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Baby & Bathwater: Standing in Election Cases After 2020

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Baby & Bathwater: Standing in Election Cases After 2020

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ABSTRACT

The current consensus among commentators is that the flood of cases challenging the 2020 presidential election results was almost completely meritless. This consensus is correct as to the ultimate result, but not as to the courts' treatment of standing. In their (understandable) zeal to reject sometimes frivolous attempts to overturn a legitimate election and undermine public confidence in our electoral system, many courts were too quick to rule that plaintiffs lacked standing. These rulings resulted in unjustified sweeping rulings that voters were not injured even if their legal votes were diluted by states accepting illegal votes; that campaigns did not share interests with the voters who supported them; and that only state legislatures, and not Electoral College nominees, had standing to sue under the Electors Clause (a relatively untested area). Moreover, many courts confused standing doctrine with the merits. All this threatens to create

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dangerous precedent which would improperly prevent full consideration of the merits of future meritorious voting rights and election suits.

Getting standing right is particularly important in election cases. Election challenges like these will recur regularly. Because elections ensure democratic health, and because the political process is often not incentivized to fix electoral problems, judicial intervention is particularly necessary. In addition, election cases raise unique standing challenges, because the asserted harms are often diffused. And they present timing problems: sue too far in advance, and courts will reject the alleged harms as speculative; sue later, and courts may decline relief under the Supreme Court's "Purcell doctrine" cautioning against disrupting electoral rules on the eve of an election. This Article synthesizes the lessons to be derived from the 2020 election cases regarding election case standing, critiques where the courts' analysis seems incorrect, and proposes general standing rules for voters, candidates, campaigns, Electors, and elected officials.

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INTRODUCTION

The virtually universal consensus among scholars,[1] media,[2] and other commentators is that the spate of presidential election lawsuits on behalf of President Trump and Republicans challenging the 2020 presidential election results were almost completely meritless and that the roughly 60 different court decisions[3] dismissing the suits were correctly decided.

1. *See, e.g.*, Richard Pildes, *As Biden Administration Ramps Up, Trump Legal Effort Drags On*, ELECTION L. BLOG (Nov. 26, 2020, 1:10 PM), https://bit.ly/3y6OU0X [https://perma.cc/X2WZ-PJVC] (describing the election challenges as increasingly "outlandish"); Ilya Somin, *Group Statement on the 2020 Election*, VOLOKH CONSPIRACY (Nov. 23, 2020, 3:48 PM), https://bit.ly/3j2CXmX [https://perma.cc/QN9J-VMQD] (calling on then-President Trump to "recognize that he lost the 2020 election and to stop promoting unsubstantiated conspiracy theories about alleged voter fraud"); Richard L. Hasen, *What's Trump's Endgame if the Race Is Called for Biden?*, SLATE (Nov. 5, 2020, 1:18 PM), https://bit.ly/3eVc4zV [https://perma.cc/3GH4-EGBS] (characterizing the lawsuits brought by Trump and affiliates, immediately after the 2020 election, as baseless).

2. *See, e.g.*, Rebecca Davis O'Brien, *Trump Lawyers Face Rebukes Over Election-Fraud Claims*, WALL ST. J. (Jan. 12, 2021, 8:31 AM), https://on.wsj.com/3BB6j4h [https://perma.cc/Y83M-8X95] (reporting on the media criticisms leveled at President Trump's attorneys for filing frivolous lawsuits); Alana Abramson, *Congressional Republicans Won't Overturn Biden's Win. But Their Objection Are Still Dangerous*, TIME (Jan. 5, 2021, 10:54 AM), https://bit.ly/2VdrB7i [https://perma.cc/YU7K-LDAB] (remarking that the legal campaign challenging the election results has had little effect in courtrooms but could have negative ramifications more broadly); William Cummins et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY, https://bit.ly/371L7Gw [https://perma.cc/89TH-CNFU] (Jan. 6, 2021, 10:50 AM) (breaking down the lawsuits resulting from Trump's "relentless campaign" to reverse President Biden's Electoral College win).

3. *See Voting Rights Litigation Tracker 2020*, BRENNAN CTR. FOR JUST., https://bit.ly/3j35ZTt [https://perma.cc/BUM9-3NJP] (last visited Feb. 2, 2021) (compiling, and organizing by state, a list of the litigation related to the 2020 election). This article does not focus on the cases brought during the spring and summer of 2020 seeking to expand access to mail voting because of the pandemic. Because those cases involved voters challenging rules directly affecting their right to cast a ballot and/or the manner in which they could do so, standing was less of

That consensus is largely correct. There is no probative evidence of widespread fraud or election irregularities on any significant scale, let alone enough to change the outcome in any one swing state (not to mention the three or more swing states necessary to change the ultimate outcome). Some of the legal theories pursued were downright frivolous,[4] and the relief sought was often breathtakingly overambitious.[5] Ultimately, we can have high confidence that the 2020 presidential election result did not in fact deserve to be judicially overturned.

But not all of the arguments advanced in these suits were frivolous. Indeed, one of the main legal theories advanced commanded four votes on the U.S. Supreme Court: i.e., the theory that when state actors other than the state legislature change presidential election voting rules to deviate from statutorily prescribed norms, they unconstitutionally usurp the exclusive and plenary authority of state legislatures over presidential elections in violation of the Electors Clause[6] of the U.S. Constitution. Another theory, that deviations among counties within a state regarding the 'curing' of defective mail ballots violated the Equal Protection Clause, is arguably a fair extrapolation of the main opinion in *Bush v. Gore*.[7] These merits theories have gained some attention, and undoubtedly will gain more.

But one area receiving comparably little attention is that of standing to bring election suits. While some of these cases involved proper and uncontroversial applications of standing doctrine,[8] in

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an issue. *See infra* Section III.A. Instead, this article focuses on the various suits brought by Republicans during the summer and fall of 2020 challenging such pandemic-inspired expansions of mail voting or challenging the election results themselves.

4. *See, e.g.*, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (denying Texas' motion for leave to file an original jurisdiction bill of complaint in the U.S. Supreme Court, challenging the manner in which a different state, Pennsylvania, conducted its elections).

5. *See, e.g.*, Donald J. Trump for President, Inc. v. Sec'y Pa., 830 F. App'x 377, 382 (3d Cir. 2020) (remarking that plaintiffs sought to cancel millions of votes and noting that that was an inappropriate remedy).

6. U.S. CONST. art. II, § 1, cl. 2.

7. Bush v. Gore, 531 U.S. 98, 103, 109–10 (2000) (per curiam) (holding that the state court-ordered statewide recount violated Equal Protection because of, *inter alia*, a lack of uniformity across counties in vote-counting standards).

8. Perhaps the clearest example was *Texas v. Pennsylvania*, where the Texas Attorney General sued on behalf of his state, claiming that non-legislative, pandemic-inspired voting rule changes in Pennsylvania, Georgia, Michigan, and Wisconsin violated the Electors Clause (discussed *infra* Section II.B.3). Texas took the extraordinary step of seeking to file a bill of complaint of original jurisdiction in the U.S. Supreme Court. *Texas v. Pennsylvania*, 141 S. Ct. at 1230. Almost as extraordinary was the attempt to challenge election procedures in other states, with-

many, courts took an unjustifiably strict view of standing as applied to both voters[9] and candidates.[10] These cases also explored the relatively undeveloped question of the standing of presidential Electors (i.e. potential members of the Electoral College)[11] and of campaign organizations.[12] And they further exemplified the unique overlap between standing analysis and the merits of election cases, while in some cases also exemplifying the dangers involved in confusing the two.

On the whole, the courts in these cases seemed eager to decisively repudiate these election challenges which not only lacked merit or even advanced frivolous claims, but which also had the effect (if not the intent) of disrupting the orderly completion of the electoral process, undermining public confidence in the electoral system, and stoking baseless conspiracy theories among an already alarmingly aroused segment of the population. While this impulse was understandable, it may have resulted in courts too cavalierly dismissing legitimate claims of standing, confusing standing questions with merits questions, or both. These judicial misfires risk setting bad precedent for future cases.

Getting the standing analysis right still matters, even where the results are ultimately correct and the merits discussion sound, as they were in these cases. Wrongly dismissing the next case on standing grounds may pretermit a full consideration of the merits or a proper opportunity to develop the factual record, leading to incorrect results in future cases.

And getting standing right is particularly important in the election law arena, for several reasons. First, election cases like these will undoubtedly recur after every election. Since the election law revolution spawned by *Bush v. Gore*,[13] election litigation has spiraled ever-upward.[14] We can expect the trend to not only continue but accelerate after the "*Bush v. Gore* on steroids" of 2020.

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out joining as plaintiff any voter, candidate, Elector, or organization from any of those states. The Court denied the request for lack of standing, because Texas had not "demonstrated a judicially cognizable interest in the manner in which another State conducts its elections." *Id*.

9. *See infra* Section III.B.

10. *See infra* Section II.B.

11. *See infra* Section V.

12. *See infra* Section IV.B.

13. Bush v. Gore, 531 U.S. 98 (2000).

14. *See generally* Richard L. Hasen, *The 2016 U.S. Voting Wars: from Bad to Worse*, 26 WM. & MARY BILL RTS. J. 629 (2018) (documenting the rise in litigation and its effect on public confidences in the election process). *See also* Joshua A. Douglas, *Discouraging Election Contests*, 47 UNIV. RICH. L. REV. 1015 (2013)

Second, election cases are uniquely important to the health of our democracy. While private law cases and non-election law constitutional cases undoubtedly raise important questions affecting our everyday lives, election and voting rights cases by their very nature determine our ability to influence policymaking in all other areas of the law. As the Supreme Court has observed, the right to vote is "preservative of all rights."[15] So even election-reform advocates who disagreed strongly with the merits claims and ultimate aims of the Trump-affiliated plaintiffs in the 2020 election cases should be concerned about precedent restricting access to the courts.[16]

Third, election law cases, like environmental law and certain types of constitutional law cases, present unique challenges to standing analysis. With the exception of candidate plaintiffs (who may not always have an incentive to litigate electoral violations), it is harder in election cases to identify parties that are uniquely and concretely harmed by violations of fair election principles than it is in the normal way we think of standing harms. Electoral violations by their nature cause widespread harm, making them paradoxically more important to litigate but simultaneously harder to clear the standing doctrine hurdle of avoiding "generalized grievances." A too-strict application of standing rules could bar access to the courts to anyone other than incumbent officeholders and governmental bodies, who are predisposed to favor the status quo and thus be less vigilant in furthering electoral reform.[17]

(proposing a range of solutions to stem the tide of election litigation in the wake of *Bush v. Gore*).

15. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

16. *Cf.* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 92 (8th ed. 2010) (recounting how the ACLU and the Mexican-American Legal Defense & Education Fund filed *amicus curiae* briefs supporting standing for affirmative action opponents, despite disagreeing with such opponents on the merits of their claims).

17. The author has personal experience with this phenomenon, as a participant in a case seeking to clear the way for implementation of a voter-passed move to Ranked Choice Voting for a municipality's election. The Secretary of State opposed the reform and blocked its implementation, citing purported state law conflicts. When candidates sued for a declaratory judgment that the reform was legal under state law, the State argued (ultimately unsuccessfully) that the candidates lacked standing. *See* Sugarmon v. Tenn. Election Comm'n, No. 20-0328-I (Tenn. Ch. 20th Jud. Dist. Mar. 1, 2021). According to the State's asserted theory of standing, only the election officials themselves, or the municipality's City Council, would have standing to test the reform's legality. But since Ranked Choice Voting tends to make elections more competitive, incumbents tend to oppose it; existing officials would have little incentive to sue to vindicate its implementation. In this case, the City Council not only opposed it but made two unsuccessful attempts to

A final reason applies specifically to the historically significant round of 2020 presidential election challenges. Although there is a relatively comprehensive consensus among courts, scholars, election officials, journalists, and other experts that Democrat Joe Biden won the election "fair and square" without significant election irregularities,[18] there is still widespread skepticism about this among millions of Americans, right-wing media outlets, and certain corners of the Internet.[19] Many political commentators are understandably concerned about what this means for the perceived legitimacy of the federal government and democratic stability in the United States.[20] Feeding into the election-skepticism paranoia is the widespread perception that the judges deciding these cases dismissed the cases merely on "technicalities," without examining the supposedly plentiful evidence of fraud and election irregularities.[21]

Against that backdrop, it would be helpful to clarify that some of the court decisions couched as the "technicality" of standing were actually decisions on the merits. And being honest about when the Trump-adverse procedural decisions were wrongly decided may help assuage fears that "elites" colluded to deny Trump

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repeal it via referendum. *See* STEVEN MULROY, RETHINKING U.S. ELECTION LAW: UNSKEWING THE SYSTEM 125–26 (2018) (describing this controversy).

18. *See* Nick Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES, Nov. 19, 2020, at A1; ANDREW C. EGGERS ET AL., NO EVIDENCE FOR VOTER FRAUD: A GUIDE TO STATISTICAL CLAIMS ABOUT THE 2020 ELECTION 42 (2021) (compiling various election fraud claims and the corresponding sources refuting them).

19. Amy B. Wang, *Republicans Call for Unity but Won't Acknowledge Biden Won Fairly*, WASH. POST (Jan. 17, 2021), https://wapo.st/372MJ2w [https://perma.cc/5ML4-T24C]; Jill Colvin & Jonathan Cooper, *'With Reservations': Trump Voters Grapple with Biden's Win*, AP NEWS (Dec. 16, 2020), https://bit.ly/3fjSY6L; Chris Kahn, *Half of Republicans Say Biden Won Because of a 'Rigged' Election: Reuters/Ipsos Poll*, REUTERS (Nov. 18, 2020), https://reut.rs/3zEQXdd [https://perma.cc/YC3A-J6RG].

20. Jonathan Manes, *The System is Not Working: The Lopsided Election Result, Not the Courts, Saved Our Democracy*, JUST SECURITY (Dec. 21, 2020), https://bit.ly/3kUCHZz [https://perma.cc/WN8B-2F8F]; Steve Coll, *The Outdated Law That Republicans Could Use to Upend the Electoral College Vote Next Time*, NEW YORKER (Dec. 18, 2020), https://bit.ly/3BQi9HQ [https://perma.cc/HW6C-PM9K].

21. *See, e.g.*, *This Week*, ABC NEWS (Jan. 24, 2021), https://abcn.ws/3y6P3BI [https://perma.cc/ENQ7-YPX7] (statement of Sen. Rand Paul (R-KY)) ("[W]e never had any presentation in court where we actually looked at the evidence. Most of the cases were thrown out for lack of standing which is a procedural way of not actually hearing the question."); Retired Judge Kevin S. Burke, *Understanding the Supreme Court's Decision in Texas' Election Suit*, MINNPOST (Dec. 16, 2020), https://bit.ly/3y5qYeD [https://perma.cc/M9PU-FEGB]; Mark Moore, *Trump 'Disappointed' in SCOTUS, Says Election Challenge 'Not Over*,' N.Y. POST (Dec. 13, 2020, 10:45 AM), https://bit.ly/3eYk8zM [https://perma.cc/5DRG-84EE].

meaningful judicial review. In this climate, clarity and intellectual honesty are their own compelling ends.

Given all this, a thorough understanding of who can sue for election reform is essential for the health of our democracy. It is thus important to ensure we draw the correct lessons from this recent, historic string of election law cases. As those cases made clear, the standing of candidates, voters, campaigns, Electors, and affiliated organizations can vary depending on the type of claim and the type of relief sought.

Section I briefly introduces the law of standing. Succeeding Sections of this Article background the preexisting law on standing for a particular class of plaintiff, then analyze how the 2020 round of election cases developed this preexisting law (and in some cases went astray). Section II discusses candidates. Section III discusses voters. Section IV discusses parties and campaign organizations. Section V discusses Electors, and Section VI elected officials. Lastly, the conclusion offers concluding thoughts and suggests how courts should treat standing in election cases going forward.

I. PRE-2020 STANDING LAW, IN GENERAL

Article III of the U.S. Constitution limits federal court jurisdiction to "Cases or Controversies."[22] This limitation serves a number of important interests, chief among them is serving as a check on judicial overreach.[23] Given the ability of unelected judges to dictate policy through judicial review, such a limit is obviously useful in preserving democratic governance.[24] From this limit we get the standing doctrine. While all of the other "justiciability" doctrines—ripeness and mootness, as well as the related prudential doctrines of "political questions" and abstention—can serve this function, the Supreme Court has said that standing is "perhaps the most important."[25]

22. U.S. CONST. art. III, § 2.

23. *See* WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 39:30 (3d ed. 2011) (discussing Article III standing, generally, and the different rationales for limiting the jurisdiction of federal courts); *see also* Trump v. New York, 141 S. Ct. 530, 534–35 (2020) (citing Already, LLC v. Nike, Inc., 568 U.S. 85, 90–91 (2013)) (applying the Article III jurisdictional limitation in a case about the 2020 census and exclusion of illegal aliens).

24. Spokeo, Inc. v Robins, 136 S. Ct. 1540, 1547 (2016); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013).

25. Allen v. Wright, 468 U.S. 737, 750 (1984).

Secondarily, standing and related doctrines address the concern that "unnecessary decisions may be wrong decisions."[26] Thus, standing helps confine litigation to those sufficiently invested in the dispute to properly develop the factual and legal record, leading to more correct judicial outcomes. Concrete harms further help to solidify the abstract issues and establish the limits of decisions in future cases, leading to better caselaw development.[27] It is also a matter of judicial economy. Standing doctrine helps to conserve scarce judicial resources.

The standing limitation obligates a plaintiff to demonstrate the following three elements before a federal court will consider the merits of the case: (1) injury in fact; (2) causation; and (3) redressability.[28] The first of these three prongs is the most important. Under (1) injury in fact, the injury claimed by the plaintiff must be "concrete," as opposed to "abstract"; "particularized," as opposed to "generalized";[29] and "actual or imminent," as opposed to "remote or conjectural."[30] A "generalized grievance" is one that is shared in common by all members of the public.[31] Thus, a plaintiff cannot merely assert an interest in having the government follow the Constitution.[32] The (2) causation prong requires that the plaintiff have sued the right defendant: i.e., the defendant(s) that caused the alleged harm.[33] And the (3) redressability prong requires that the relief sought by the plaintiff can actually remedy the claimed injury.[34]

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26. CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.3 (2021).

27. *Id.*

28. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992*); see also* California v. Texas, 141 S. Ct. 2104, 2113 (2021).

29. Daimler-Chrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006).

30. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548–50 (2016); *see also* Clapper v. Amnesty Int'l, 586 U.S. 398, 409 (2013).

31. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 219–20 (1974) (holding that reservists lacked standing to complain that members of Congress were unlawfully members of the Reserves in violation of Article I's bar on members of Congress simultaneously serving in "any Office under the United States").

32. *Lujan*, 504 U.S. at 573–74.

33. Sprint Commc'ns Co., v. APCC Servs., Inc., 554 U.S. 269, 273 (2008).

34. One court recently explained standing quite clearly:

> Article III standing doctrine speaks in jargon, but the gist of its meaning is plain enough. To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests. If you are complaining about something that does not harm you—and does not harm you in a way that is concrete—then you lack standing. And if the injury that you claim is an injury that does no specific harm to you, or if it depends on a harm that may never hap-

Further, the plaintiff must demonstrate standing for each of the claims brought and for each type of relief sought.[35] Conversely, when a court considers a proposed remedy, it must be sure to tailor the remedy to the plaintiffs' particular injury.[36]

In most election cases, these distinctions will not matter. For example, if a voter claims minority vote dilution under Section 2 of the Voting Rights Act, stemming from a racially gerrymandered districting plan, the standing analysis is the same as to whether the remedy sought is a declaratory judgment, an injunction against implementation of the challenged plan, a court-ordered remedial district plan, a court-ordered change in voting rules, attorneys' fees, or a combination of all of these. But in unusual cases, the relief sought may make a difference. So it was with some of the 2020 election cases. For example, a suit brought by poll observers might warrant a court order allowing closer observation by the poll observers but not the invalidation of an election result.

Despite this natural connection between standing and the particular legal theory asserted, the standing inquiry and the merits inquiry are separate.[37] Courts should avoid confusing the two. Thus, it is entirely possible for a court to accept a particular theory for standing purposes, assuming the claim to be true on the threshold question of jurisdiction, only to then reject it on the merits.[38]

The Supreme Court's standing doctrine has received much scholarly criticism for being overly restrictive[39] and for providing insufficient guidance to the lower courts, "who have increasingly found refuge in an empty formalism."[40] Commentators have de-

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pen, then you lack an injury for which you may seek relief from a federal court.

Bognet v. Sec'y Pa., 980 F.3d 336, 348 (3d Cir. 2020).

35. *Cuno*, 547 U.S. at 352; California v. Texas, 141 S. Ct. 2104, 2119–20 (2021).

36. Gill v. Whitford, 138 S. Ct.1916, 1934 (2018) (citing *Cuno*, 547 U.S. 353); *accord* Lewis v. Casey, 518 U.S. 343, 357 (1996).

37. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 83–86 (1998).

38. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 87 (8th ed. 2010). *See, e.g.*, Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011) ("[T]he threshold question of whether plaintiff has standing . . . is distinct from the merits of is claim.").

39. *See* Heather Elliott, *Does the Supreme Court Ignore Standing Problems to Reach the Merits? Evidence (or Lack Thereof) from the Roberts Court*, 23 WM. & MARY BILL RTS. J. 189, 207 (2014) (studying treatment of standing by Roberts court and leaving open the question of whether standing was used to "duck the merits of a case"); Richard Murphy, *Abandoning Standing*, 60 ADMIN. L. REV. 943, 969 (2008) (criticizing federal standing doctrine as it relates to the injury requirement, particularly).

40. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 464 (2008).

scribed the doctrine as "incoherent," permeated with "doctrinal confusion," lacking a historical basis, and acting as a "pointless restraint on courts."[41] Courts reach inconsistent results on similar fact patterns, and justify similar results with inconsistent reasoning.[42] Perhaps most important for this Article's purposes, commentators have long criticized the tendency of courts to confuse the threshold question of standing with issues relating to the merits, or to confuse the standing question with normative preferences for a more limited judicial role.[43]

These problems are magnified in election and voting rights cases. Election law is a rather odd peg to fit into standing doctrine's square hole.[44] As noted above, the harms involved are often widespread, affecting all voters in an election and indeed the structure of democratic governance itself. The more that is true, the more courts may be tempted to defer to the political branches to resolve the dispute.[45] Moreover, election rules often involve inherently political questions and the balancing of various interests, which inherently are more suited to the give-and-take of the political branches than the rule-based adjudication of courts. In Justice Frankfurter's famous phrase from *Colegrove v. Green*, regulating electoral processes was "a political thicket" which courts "ought not to enter."[46]

But it is precisely in voting and election cases where the political process is least helpful and judicial intervention is most needed. When the very rules regarding the franchise and elections are what is broken, it is that broken system that incumbent officials have to thank for their incumbency. Such officials will not be motivated to reform the system that put them in power; instead, they will tend to sincerely believe that the system is just fine.[47] To the extent the allegedly invalid voting or election rules disadvantage the political in-

41. *See id.* at 466–67 (collecting scholarly articles).

42. *See* Richard J. Pierce, Jr., *Is Standing Law or Politics*?, 77 N.C. L. REV. 1741, 1786–87 (1999) (conducting a 66-month study of standing decisions in environmental lawsuits).

43. *See, e.g.*, Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977).

44. Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179, 180 (2011) (making a similar observation).

45. *See, e.g.*, FEC v. Akins, 524 U.S. 11, 23 (1998) ("[W]here large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy . . . .").

46. Colegrove v. Green, 328 U.S. 549, 556 (1946) (declining to rule on a district malapportionment claim).

47. *See* STEVEN MULROY, RETHINKING THE ELECTION SYSTEM: UNSKEWING THE SYSTEM 124–26 (2018) (noting a "natural unconscious bias toward thinking that a system that elected you must be a very wise system indeed," and citing mul-

fluence of reformers, the political process will be unable to self-correct.[48] It is perhaps in part for these reasons that despite the complexities of the "political thicket," the Court eventually overruled Justice Frankfurter's holding in *Colegrove v. Green* and decided to police malapportionment cases.[49]

Further, the timing of election lawsuits can often put litigants in an awkward position. Because courts are reluctant to overturn election results after the fact, there is a general consensus that litigants should seek curative injunctive relief before the election and not afterward.[50] On the other hand, courts are reluctant to change voting or election rules close in time to the election, under the so-called "Purcell principle" derived from the Supreme Court's opinion in *Purcell v. Gonzalez*.[51] This pushes the timing of the lawsuit well backward, increasing the chance that a court may reject standing because the feared harm, so far in the future, is too "remote or speculative."

This is in fact what a number of courts did in the 2020 round of election cases. All cited the above well-settled general principles of standing and denied the main relief sought.[52] But they frequently applied standing doctrine in an overly restrictive way.

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tiple examples of sustained incumbent resistance to ranked choice voting election reforms).

48. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (noting that "more exacting judicial scrutiny" is warranted for "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation").

49. *See* Baker v. Carr, 369 U.S. 186, 208–09 (1962) (overruling *Colegrove* and holding that malapportionment cases were justiciable).

50. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204–08 (2008) (Scalia, J., concurring in the judgment) (observing that judges should ensure that election rules are "known in advance of the election"); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 957–58 (2005); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1243–44 (2006).

51. *See generally* Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam) (holding that federal courts generally should refrain from changing election rules close to an election for fear of causing voter confusion and election administration disruption).

52. By "main relief sought," I exclude various interim orders segregating ballots for the pendency of the litigation. *See, e.g.*, Carson v. Simon, 978 F.3d 1051, 1051 (8th Cir. 2020) (reversing the district court's denial of preliminary injunction regarding segregation of absentee ballots received after a certain date). The sole exception was *In Re Canvassing Observation*, in which the court ordered that GOP poll-watchers be allowed to observe the counting of mail ballots more closely. No. 1094, 2020 WL 6551316, at *4 (Pa. Commw. Ct. Nov. 5, 2020). But even that order was reversed on appeal. *See In re* Canvassing Observation, 241 A.3d 339, 351 (Pa. 2020), *cert. denied sub nom*. Donald J. Trump for President, Inc. v. Degraffenreid, 141 S. Ct. 1451 (2021).

II. CANDIDATE STANDING

A. Preexisting Law

1. Generally

The type of plaintiff with the clearest claim to standing in election challenges is a candidate in the election. Obviously, in a regular election contest, asserting that fraud or election irregularities caused the wrong candidate to be declared the winner or rendered the election result incurably uncertain, a losing candidate has standing to bring the claim.[53] Depending on the circumstances, proper relief might include declaring the contestant the true winner or ordering a new election.[54] In such a case, the losing candidate has a "concrete and particularized interest" in challenging the electoral result. More than a "generalized grievance" common to all citizens, the candidate has an interest that is "actual" rather than "conjectural."

For the same reason, candidate standing extends beyond a standard post-election contest to a range of pre-election challenges to electoral rules. So, candidates have been found to have standing to challenge decisions allowing rival candidates to appear on the ballot;[55] ballot-access laws;[56] campaign finance rules;[57] and districting plans.[58]

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53. *See, e.g.*, Marre v. Reed, 775 S.W.2d 951, 952 (Mo. 1989) (holding that a losing candidate may bring an election contest if he contends that "as a result of election irregularities the wrong candidate is declared the winner"); Emery v. Robertson Cnty. Election Comm'n, 586 S.W.2d 103, 109 (Tenn. 1979) (holding that a losing candidate can invalidate election with proof that "fraud or illegality so permeated the conduct of the election as to render it incurably uncertain, even though it cannot be shown to a mathematical certainty that the result might have been different").

54. *See id.*

55. *See, e.g.*, McFarland v. Pemberton, 530 S.W.3d 76, 105–08 (Tenn. 2017) (holding that a candidate could challenge election board's determination of opponent as having proper residency).

56. *See, e.g.*, Lawrence v. Blackwell, 430 F.3d 368, 371 (6th Cir. 2005) (holding that a candidate could challenge election rule requiring a 'statement of candidacy').

57. *See, e.g.*, Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 36–37 (1st Cir. 1993) (holding that a candidate had standing to challenge campaign finance disclosure requirements and requirements of free TV advertising time).

58. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 475 (Stevens, J., concurring in part, dissenting in part) (opining that a candidate would have standing to challenge gerrymander if she resided in a district affected by the redistricting plan).

2. "Competitive Standing"

A particularly relevant theory of candidate standing here is "competitive standing." Under this theory of standing, if the allegedly illegal voting or electoral rules make the competitive environment worse for the candidate, then that is a sufficiently concrete, non-generalized harm to confer standing. The requisite injury arises from the candidate being "forced to compete in an illegally structured campaign environment."[59] So, a candidate with relatively fewer financial resources could challenge a candidate's filing fee as excessive if it allegedly would have "a significant impact . . . on the candidate's campaign strategy and allocation of resources."[60] For this reason, candidate standing often goes unchallenged in cases where the candidate challenges filing fees[61] or other rules[62] barring access to placement on the ballot.

This 'competitive standing' theory is broad. Courts do not require substantial proof of the supposed competitive disadvantage: a well-pled allegation is enough.[63] Courts will not "second-guess" plausible assertions by a candidate that the challenged electoral practice will affect their campaign strategy, allocation of resources, or perceived likelihood of campaign success.[64]

Nor is this theory limited to challenging a direct bar to a candidate's placement on the ballot. Courts have allowed a candidate to challenge the practice of allowing corporate sponsorship of presidential debates,[65] or the forced choice to accept federal campaign

59. Herron for Congress v. FEC, 903 F. Supp. 2d 9, 16 (D.D.C. 2012) (internal quotation marks omitted).

60. Belitskus v. Pizzingrilli, 343 F.3d 632, 640 (3d Cir. 2003); *see also* Green v. Mortham, 155 F.3d 1332, 1334 n.8 (11th Cir. 1998) (holding by magistrate judge that candidate had standing in a filing fee challenge, which was not questioned); Harper v. Vance, 342 F. Supp. 136, 139–40 (N.D. Ala. 1972) (three-judge panel) (holding that an impoverished candidate could challenge filing fee).

61. *See, e.g.*, Lubin v. Panish, 415 U.S. 709, 719 (1974) (invalidating candidate filing fee where there was no alternative means of ballot access provided for indigent candidates).

62. *See, e.g.*, Green Party of Ark. v. Martin, 649 F.3d 675, 687 (8th Cir. 2011) (upholding petition signature requirement for third-party placement on ballot).

63. Becker v. FEC, 230 F.3d 381, 384 (1st Cir. 2000). Of course, after the Supreme Court's decisions in *Iqbal* and *Twombly*, these allegations must be made with sufficient specificity to be "plausible." *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

64. *Becker*, 230 F.2d at 387 (holding that when a candidate claims a rule will cause competitive harm, it is "not . . . proper [for a court] to second-guess a candidate's reasonable assessment of his own campaign . . . . To probe any further into these situations would require the clairvoyance of campaign consultants or political pundits—guises that members of the apolitical branch should be especially hesitant to assume").

65. *See id.* at 386–87.

matching funds,[66] because it was alleged to affect the use of his campaign funds and overall strategy. So too with an allegedly illegal failure to implement a voter-passed electoral system, which can create a "competitive injury in the electoral arena" sufficient to confer Article III standing,[67] or a challenge to a voter registration statute,[68] or a claim that one candidate was getting a preferential mailing rate.[69] Indeed, any credible claim that a challenged electoral practice will make it harder for the plaintiff to win the election will suffice.[70]

3. "Organizational Standing"

A related means of satisfying standing is an allegation that the challenged change in electoral or voting rules would require the plaintiff to raise and spend more resources to adapt to the change during the campaign.[71] Indeed, such "economic injury" is "a quintessential injury upon which to base standing."[72] Some courts refer to this as a separate theory of "organizational standing."[73]

To be a 'candidate' for standing purposes, the plaintiff need not have formally qualified as a candidate. A declared intent to run as a candidate or a public announcement of same have been held to suf-

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66. *See* Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 37 (1st Cir. 1993).

67. LaRoque v. Holder, 650 F.3d 777, 785–91 (D.C. Cir. 2011); *see also* Sugarmon v. Tenn. Election Comm'n, No. 20-0328-I (Tenn. Ch. 20th Jud. Dist. Mar. 1, 2020) (holding that candidates had standing to challenge state's refusal to implement Ranked Choice Voting reform passed by local referendum). The author serves as counsel for the plaintiffs in the *Sugarmon* case.

68. Schulz v. Williams, 44 F.3d 48, 52–53 (2d Cir. 1994).

69. Owen v. Mulligan, 640 F.2d 1130, 1132–33 (9th Cir. 1981).

70. Tex. Democratic Party v. Benkiser, 459 F.3d 582, 586–87 (5th Cir. 2006) (finding that plaintiff established standing where plaintiff credibly claimed that opposing party's allegedly illegal candidate substitution would reduce chances of victory); Smith v. Boyle, 144 F.3d 1060, 1061–63 (7th Cir. 1998) (finding that a political party had standing to challenge state voting rules that allegedly disadvantaged Republican candidates); *Schulz*, 44 F.3d at 53 (concluding that the Conservative Party had standing to challenge opposing candidate's position on the ballot where the opponent "could siphon votes" from the Conservative Party candidate); Bay Cnty. Democratic Party v. Land, 347 F. Supp. 2d 404, 423 (E.D. Mich. 2004) (finding that a party had standing to challenge voting rules "that could diminish its power").

71. *See, e.g.*, *Benkiser*, 459 F.3d at 586–87 (finding that plaintiff had standing to challenge other party's substitution of candidates because it "would need to raise and expend addition funds and resources to prepare a new and different campaign in a short time frame").

72. *Id.*

73. *See, e.g.*, Donald J. Trump for President, Inc. v. Cegavske, 488 F. Supp. 3d 993, 1001–02 (D. Nev. 2020).

fice.[74] Indeed, the plaintiff need not even actually be a candidate at all. A political party can also advance this competitive standing theory.[75] However, an individual voter likely does not have standing under this theory.[76]

B. The 2020 Election Cases

Surprisingly, few of the 2020 election cases involved candidate plaintiffs. Where candidates did appear as plaintiffs, courts generally followed the preexisting law, but, in a number of cases, they applied too narrow of an approach to standing.

1. Appropriate Acknowledgments of Standing

A few cases acknowledged that candidates as a rule should have standing in election cases. In one of the few 2020 cases where candidate Donald Trump personally sued as a plaintiff in his personal capacity, the district court easily found that he had standing.[77]

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74. Moore v. Thurston, 928 F.3d 753, 757–58 (8th Cir. 2019) (holding the case was not mooted when alleged candidate failed to pull paperwork for that year's election); LaRoque v. Holder, 650 F.3d 777, 788 (D.C. Cir. 2011) (finding that a public announcement of candidacy was sufficient); Green Party of Ark. v. Daniels, No. 4:09-cv-00695, 2010 WL 11646587, at *4 n.3 (E.D. Ark. Apr. 15, 2010) (noting a person's declared intent to seek political office in complaint "directly bears" on whether that person may suffer an injury-in-fact).

75. *Benkiser*, 459 F.3d at 585–88 (finding that a party could challenge other party's decision to replace candidate on ballot with a new candidate); Smith v. Boyle, 144 F.3d 1060, 1061–63 (7th Cir. 1998) (concluding that a political party had standing to challenge state voting rules that allegedly disadvantaged Republican candidates); *Schulz*, 44 F.3d at 53 (finding that the Conservative Party had standing to challenge opposing candidate's position on the ballot); *Land*, 347 F. Supp. 2d at 423 (finding that a party had standing to challenge voting rules "that could diminish its power"); *see also* Herron for Congress v. FEC, 903 F. Supp. 2d 9, 11 n.1, 16–17 (D.D.C. 2012) (treating candidate's "political committee" the same as the candidate himself for purposes of analyzing standing).

76. *See* Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1246 (11th Cir. 2020) (finding that a voter lacked standing to complain that a law ordering candidates on the ballot reduced the chance that her preferred candidates would win) ("Voters have no judicially enforceable interest in the *outcome* of an election") (citing Raines v. Byrd, 521 U.S. 811, 819, 824, 830 (1997)) (emphasis added); Berg v. Obama, 586 F.3d 234, 240 (3d Cir. 2009) (finding that a voter lacked standing to challenge a party nominee's eligibility to run for office on the theory that the ineligibility reduced his general election chances); Becker v. FEC, 230 F.3d 381, 390 (1st Cir. 2000) (finding that a candidate's decreased chance of winning election was not a legally cognizable injury for a voter).

77. Trump v. Wis. Elections Comm'n, 506 F. Supp. 3d 620, 631–33 (E.D. Wis.), *aff'd*, 983 F.3d 919 (7th Cir. 2020). Candidate Trump sought invalidation of the Wisconsin election results under the Electors Clause, and remand to the Wisconsin Legislature for legislative allocation of the state's Electors, based on allegedly invalid pandemic-inspired relaxation of rules regarding witness certification on mail ballots, mail ballot drop boxes, and absentee voting by the incarcerated. *Id.* at 624. The court rejected the claims on the merits, reasoning that the Wisconsin Legisla-

This includes standing to bring an Electors Clause claim, which other courts have held belongs only to the state legislature.[78]

Courts reaffirmed this principle when rejecting standing of other types of plaintiffs. In rejecting the standing claim of a voter, the 11th Circuit contrasted the voter's situation with that of a candidate, who, unlike the voter, would have standing to challenge the Georgia recount.[79] Conversely, the Eighth Circuit ruled that presidential Electors had standing to challenge the operation of the presidential election in Minnesota precisely because Minnesota law treated them as "candidates."[80]

An Arizona district court decision distinguished that Eighth Circuit decision on the ground that Arizona law did *not* recognize Electors as "candidates," but rather as officials fulfilling a purely ministerial function.[81] Like many states, Arizona statutorily requires presidential Electors to cast their Electoral College vote for the candidate who won the in-state election.[82] Rejecting standing, that court pointedly noted that the actual Republican candidate (Donald Trump) was not a plaintiff.[83] When a voter initiated an election contest of the presidential election result in Georgia pursuant to the Georgia election contest statute, a state court concluded the voter lacked standing because he was not himself a candidate.[84] These decisions clearly state or imply that candidate status is sufficient for standing.

2. Bognet *(Third Circuit).*

Among the 2020 election challenges, *Bognet v. Secretary, Commonwealth of Pennsylvania* has the most extensive discussion of this standing issue. As such, it deserves special consideration.

In *Bognet*, the Pennsylvania Supreme Court had found that pandemic-related mail delivery delays created a situation where voters applying for and sending out mail ballots just before the statutorily provided deadline risked having their vote arrive after Election Day and thus not be counted pursuant to then-existing state

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ture had statutorily authorized the Wisconsin Election Commission to make the challenged administrative decisions. *Id.* at 636–38.

78. *Id.*; *see also* discussion *infra* Section II.B.3.

79. Wood v. Raffensperger, 981 F.3d 1307, 1314 (11th Cir. 2020).

80. Carson v. Simon, 978 F.3d 1051, 1057 (8th Cir. 2020).

81. Bowyer v Ducey, 506 F. Supp. 3d 699, 710 (D. Ariz. 2020).

82. *See* ARIZ. REV. STAT. ANN. § 16-212(C) (2021).

83. *Bowyer*, 506 F. Supp. 3d at 710 ("Notably, the Republican candidate whose name was on the ballot is not a plaintiff in this case.").

84. Boland v. Raffensperger, No. 2020-cv-343018, 2020 Ga. Super. LEXIS 1897, at *3 (Fulton Cnty. Super. Ct. Dec. 8, 2020).

statutes.[85] The state court had held that disenfranchising otherwise qualified voters through no fault of their own under these circumstances would violate the Pennsylvania Constitution.[86] The state court thus had granted a three-day extension past Election Day for receipt of said ballots ("the Extension").[87] Any mail ballot postmarked on or before Election Day would be counted if received by that extension date. In addition, if the ballot did not contain a postmark, or did not contain a legible postmark, but was nonetheless received by the Extension date, it would be presumed to have been validly cast on or before Election Day ("the Presumption of Timeliness"), absent credible evidence to the contrary.[88]

A congressional candidate and a group of Pennsylvania voters raised a federal challenge to this remedial order.[89] The candidate brought a claim under the U.S. Constitution's Article I Elections Clause, which provides that the "Times, Places, and Manner of holding" congressional elections "shall be prescribed in each State by the Legislature thereof,"[90] as well as the related Article II Electors Clause, which provides that "Each State shall appoint" the presidential Electors "in such Manner as the Legislature thereof shall direct."[91] This "Elections/Electors Clause" theory, brought in many of the 2020 election cases, asserted that court-ordered or ex-

85. Bognet v. Sec'y Pa., 980 F.3d 336, 344–45 (3d Cir. 2020).

86. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 378 (2020).

87. *Id.* The Pennsylvania Secretary of State had initially opposed the extension but changed her position after receiving a letter from the USPS stating that it could not deliver mail fast enough to conform to state deadlines: to ensure Election Day receipt, a voter would need to mail a ballot by October 27, which was also the deadline to *apply* for a mail ballot. *Id.* at 364–65.

88. The Republican Party of Pennsylvania sought to challenge this state supreme court ruling through an emergency application to the U.S. Supreme Court for a stay of the ruling. In a one-line, per curiam opinion, the U.S. Supreme Court denied the stay in a 4-4 decision (because then-recently nominated Justice Amy Barrett had not yet been confirmed and sworn in). Republican Party of Pa. v. Boockvar, 141 S. Ct. 643, 643 (2020). Standing was not addressed. *Id.*

89. Bognet v. Sec'y Pa., 980 F.3d 336, 343–47 (3d Cir. 2020).

90. U.S. CONST. art. I, § 4, cl. 1.

91. U.S. CONST. art. II, § 1, cl. 2. It is common for these two Clauses to be brought together in one cause of action. The Supreme Court has repeatedly recognized that the Article I Elections Clause and the Article II Electors Clause provide for parallel allocations of authority to the "Legislature" and should be construed together. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 804–05 (1995) (noting that a state's "duty" under the Elections Clause "parallels the duty" described in the Electors Clause); Foster v. Love, 522 U.S. 67, 69 (1997) (stating the Electors Clause is the Election Clause's "counterpart for the Executive Branch"); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting) (stating that the Elections Clause and Electors Clause vest analogous power to provide for congressional and presidential election rules, respectively, in "the Legislature" of each State).

ecutive-branch-ordered deviations from the letter of state election law statutes unconstitutionally usurped the Article II authority of state legislatures to prescribe federal election rules.[92] The congressional candidate sought both declaratory and injunctive relief preventing the counting of ballots received after Election Day.[93]

The district court's approach to standing was puzzling, in that it granted standing to the voter plaintiffs but not to the candidate plaintiff. Bognet, the candidate, claimed that the Extension and Presumption of Timeliness allowed election officials to accept unlawful votes, and thus "undermine[d] his right to run in an election where Congress has paramount authority to set the 'times, places, and manner' of Election Day."[94] The district court found this claim to be "too speculative and not redressable."[95] However, the district court found standing for the voter plaintiffs on a separate Equal Protection theory that the Extension and Presumption of Timeliness were arbitrary and capricious.[96] Despite this plaintiff-favorable ruling on standing, the lower court declined to provide equitable relief, however, given the close proximity to the election.[97]

3. Undue Limits on Elections/Electors Clause Standing

In a decision rendered after the November 3, 2020, election, the Third Circuit rejected standing for all plaintiffs on all theories. As to both candidates and voters, it held that "private plaintiffs" lack standing to sue on an Elections/Electors Clause theory.[98] Because those clauses are designed to protect state legislative prerogatives, the court reasoned, only a state legislature may bring such a claim.[99] Other courts adjudicating 2020 election disputes have agreed.[100]

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92. The Supreme Court has held that this state legislative power is "plenary" in the area of allocating Electors in presidential elections. McPherson v. Blacker, 146 U.S. 1, 25 (1892); *see also* Bush v. Gore, 531 U.S. 98, 104 (2000) (reaffirming this principle and citing *McPherson*).

93. *Bognet*, 980 F.3d at 347.

94. *Id.* at 345.

95. *Id.* at 346.

96. *Id.*

97. *Id.* (citing Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam) (holding that federal courts generally should refrain from changing election rules close to an election for fear of causing voter confusion and election administration disruption)).

98. *Id.* at 349.

99. *Id*. at 350 (citing Corman v. Torres, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018)).

100. *See* King v. Whitmer, 505 F. Supp. 3d 720, 736 (E.D. Mich. 2020); Wood v. Raffensperger, 981 F.3d 1307, 1313 (11th Cir. 2020).

This bright-line conclusion is dubious, for a number of reasons. First, it runs against the general thread of case law discussed above stating that where alleged illegalities create a more challenging competitive environment for a candidate, that candidate has standing. In 2020, it was common knowledge that Democratic voters were much more likely than Republican voters to use mail balloting.[101] Any Republican candidate (including Bognet) had a plausible claim that the more lenient mail balloting rules created a more challenging competitive environment for him. Further, candidates would quite plausibly see a need to expend campaign resources to educate likely supporters of the new voting rules, causing another cognizable harm.[102]

Second, this conclusion seems to run against the trend in U.S. Supreme Court precedent, in both of the most recent presidential election controversies. In the modern era, the Court first raised this Elections/Electors Clause theory in the *Bush v. Gore* litigation. In a *per curiam* opinion which was an immediate precursor to the famed *Bush v. Gore* decision, the Court raised the concern that the initial Florida Supreme Court decision extending state statutory deadlines for certifying the presidential election result might indeed usurp the Florida Legislature's authority under the Electors Clause.[103] Shortly thereafter, in a concurring opinion on behalf of three Justices in *Bush v. Gore* itself, Chief Justice Rehnquist found exactly such an Electors Clause violation.[104] Of course, in *Bush*, the plain-

101. Lockhart et al., *There's a Growing Gap in How Democrats and Republicans Plan to Vote*, WASH. POST (Oct. 8, 2020, 7:00 AM), https://wapo.st/2UDOjoH [https://perma.cc/F7FK-CHH2]. The "gap" in vote-by-mail rates between the parties may even be widening in light of the parties' differing responses to information regarding the COVID-19 pandemic. *Id.*

102. Candidate Bognet apparently failed to expressly allege that the relaxed mail balloting rules disproportionately favored his opponents. *Bognet*, 980 F.3d at 351; *Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121, at *3 (W.D. Pa. Oct. 28, 2020). While he did claim that he expended resources to educate voters about the changes in voting rules, he asserted only that he had made expenditures in the past, as opposed to expressly alleging that he would have to continue to make such expenditures in the future. *Id.* at *5. For that reason, the District Court rejected standing on the "redressability" prong, since the requested relief (not counting the post-Election Day ballots) would not redress this claimed injury. *Id.* While this may ultimately justify the result in *Bognet* on standing, it does not support the Third Circuit's blanket holding, as a matter of law, that only the state legislature may assert an Elections/Electors Clause claim. Ultimately, this seems to be a matter of fatally inartful pleading.

103. Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76–78 (2000).

104. Bush v. Gore, 531 U.S. 98, 112–15 (Rehnquist, C.J., concurring).

tiff was a candidate, not a state legislature; the candidate's standing to raise this Electors Clause claim went unquestioned.[105]

In 2020, several Justices authored opinions criticizing pandemic-related changes to mail voting rules under this precise Electors Clause theory, indicating that there were at least four Justices—Gorsuch, Kavanaugh, Alito, and Thomas—sympathetic to this theory.[106] In two of these cases, there was no state legislature plaintiff raising this theory. Given the ideological affinity between new Justice Barrett and these four Justices, it is not at all a stretch to imagine that there is currently a Supreme Court majority prepared to entertain an Electors Clause theory with or without a state legislature as the party raising the claim. The Eighth Circuit reached a similar conclusion in 2020, ruling that potential Electors had standing to bring an Electors Clause claim "as candidates."[107]

There are contrary indications from the Supreme Court's 2020 election decisions. Faced with a series of lower court rulings enjoining the enforcement of certain mail ballot witness and identification requirements due to pandemic concerns, the Court granted a stay pending appeal in one case arising from Alabama and denied it in another arising from Rhode Island.[108] In the latter case denying the stay, the Court explained that it considered a stay of the earlier Alabama injunction appropriate when the State itself opposed the injunction and was a party before the Court but unwarranted in the instant case when the State of Rhode Island had agreed to an injunction and was not a party before the Court. In the Rhode Island case, the only party seeking a stay was the Republican National Committee("RNC") and other non-state applicants. Under these

105. *See* Zipkin, *supra* note 44, at 199–200 (arguing that, even though the Supreme Court did not directly address the question of candidate Bush's standing to raise the Electors Clause claim, it was "a straightforward case for standing," and that Bush "was the obvious person to raise this claim.").

106. *See* DNC. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (Gorsuch, J., concurring); *id.* at 30 (Kavanaugh, J., concurring) (finding that a stay of a Wisconsin mail vote expansion ruling was warranted in part because of an Electors Clause violation); Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (Alito, J. concurring, on behalf of Justices Thomas and Gorsuch) (holding similarly regarding a Pennsylvania mail vote expansion ruling); *see also* Scarnati v. Boockvar, 141 S. Ct. 644, 644 (2020) (per curiam) (indicating that the same four Justices would grant a stay in a case parallel to *Republican Party v. Boockvar*). *See generally* Moore v. Circosta, 141 S. Ct. 46 (2020) (Gorsuch, J., dissenting on behalf of himself and Justice Alito).

107. Carson v. Simon, 978 F.3d 1051, 1057 (8th Cir. 2020).

108. *See* Republican Nat'l Comm. v. Common Cause R.I., 141 S. Ct. 206, 206 (2020) (per curiam) (denying stay); Merrill v. People First of Ala., 141 S. Ct. 190, 190 (2020) (granting stay).

circumstances, the Court held, "the applicants lack a cognizable interest in the State's ability to 'enforce its duly enacted' laws."[109]

This result may be seen as an application of the general rule that plaintiffs lack standing to ensure the proper enforcement of state law. Characterized that way, it may be distinct from cases like *Bognet* where legal requirements (such as deadlines) are affirmatively altered or violated as opposed to simply not being enforced. But given the disproportionate use of mail balloting by Democratic voters in 2020, the RNC arguably did have a competitive interest in opposing Rhode Island's affirmative agreement not to enforce ordinary mail voting requirements. At any rate, the determination involved comes from a one-paragraph unsigned opinion issued on an emergency basis without any detailed discussion. It carries less precedential weight than the Supreme Court opinions discussed in the two paragraphs immediately above.[110]

Third and finally, as a pragmatic and normative matter, a rule limiting Electors Clause standing to state legislatures specifically, or official bodies more generally, is a dangerous precedent in election cases. Very often, election officials and elected officials may orchestrate, or acquiesce to, voting and election rule changes that benefit the status quo.[111] Examples abound from the areas of redistricting, method of election, campaign finance, and ballot access, to name just a few. These officials may frequently lack an institutional incentive to challenge improper voting rule changes. In the specific case of Elections/Electors Clause challenges, it is easy to visualize instances in which even the most blatantly improper changes to election rules by an activist state court or state executive branch might go unchallenged if it benefits the political party which happens then to be in control of the state legislature. Proper judicial review of such violations should not depend on the happenstance of party-divided state government.

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109. *Common Cause R.I.*, 141 S. Ct. at 206. For this proposition, the Court cites only *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). However, the cited text in *Perez* stands only for the proposition that a State does indeed have a cognizable interest in the enforcement of its own laws, not that other parties lack such an interest.

110. More substantial Supreme Court authority arguably supporting limiting Electors Clause standing to state actors, an opinion relied on in *Bognet*, is discussed below regarding voter standing. *See generally* Lance v. Coffman, 549 U.S. 437 (2007), discussed *supra* in Section III.A.

111. Indeed, the RNC alleged such collusive litigation in the Rhode Island case. Common Cause R.I. v. Gorbea, 970 F.3d 11, 17 (1st Cir. 2020). The First Circuit rejected this claim, finding no evidence to support and the circumstances surrounding the consent decree in that case to rebut it. *Id.*

4. Confusing Standing with the Merits & Mootness

The Third Circuit in *Bognet* also noted that for the candidate to have standing to enjoin the counting of late-arriving ballots, "such votes would have to be sufficient in number to change the outcome of the election to *Bognet's* detriment."[112] While superficially reasonable, this statement has several doctrinal difficulties.

First, standing is to be decided as of the time of filing the complaint.[113] Courts should not take into account factual developments which occur after filing when deciding standing.[114] Such developments may be relevant to mootness, but not standing.[115] While Bognet ended up losing the November 3, 2020 general election by over 12,000 votes,[116] he filed his complaint prior to the election, seeking pre-election relief.[117] When denied a Temporary Restraining Order at the district court level, he unsuccessfully sought an expedited pre-election appeal from the Third Circuit, which decided to schedule briefing for a post-election ruling.[118] Thus, it would be improper to hold him to showing that a certain number of mail ballots would be affected sufficient to exceed a margin of victory, because, at the time of the complaint filing, the election had not yet occurred.[119]

Second, whether the challenged practice can affect enough votes to exceed the margin of victory, while certainly relevant, is a question for the merits. For purposes of determining standing, it must be sufficient merely to plausibly allege that the number of votes affected might be outcome-determinative. Courts have warned against confusing the standing inquiry with the merits inquiry.[120]

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112. 980 F.3d at 351–52.

113. Davis v. FEC, 554 U.S. 724, 732–33 (2008); Brown v. Buhman, 822 F.3d 1151, 1164 (10th Cir. 2016).

114. Rothe Dev. Corp. v. DOD, 413 F.3d 1327, 1334–35 (Fed. Cir. 2005).

115. *Brown*, 822 F.3d at 1164–65. This is true as a matter of state law as well. *See, e.g.*, Whalum v. Shelby Cnty. Election Comm'n, No. W2013-02076-COA-R3-CV, 2014 WL 4919601, at *7 (Tenn. Ct. App. Sept. 30, 2014).

116. *2020 Election Returns*, PA. STATE DEP'T., https://bit.ly/3xE3Sdk [https://perma.cc/6SG8-U7R6] (last visited Feb. 1, 2021).

117. Bognet v. Sec'y Pa., 980 F.3d 336, 346 (3d Cir. 2020).

118. *Id.* at 345.

119. *Id.* at 346.

120. *See* Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011) ("[T]he threshold question of whether plaintiff has standing . . . is distinct from the merits of his claim.").

5. Unwarranted Limits on "Competitive Standing"

The 2020 round of election cases also cast unjustified doubt on the breadth of the "competitive standing" theory. In *Donald J. Trump for President, Inc. v. Boockvar*,[121] the Trump Campaign challenged Pennsylvania's practice of allowing counties to choose disparate stances on whether, and to what extent, to assist voters in "curing" their absentee ballots after those ballots were rejected for technical defects.[122] It asserted a competitive standing theory, noting the disparate actions of the various counties leading to "the potential loss of an election."[123] The district court rejected this theory.

Troublingly, the court held that the competitive standing theory was limited to the inclusion of an allegedly ineligible rival candidate on the ballot.[124] For this conclusion, it relied on the 2013 Ninth Circuit decision in *Townley v. Miller*.[125] *Townley* did indeed describe competitive standing as "the notion that a candidate or his political party has standing to challenge the inclusion of an allegedly ineligible rival on the ballot."[126] But *Townley* did not have occasion to consider any other type of assertion of competitive standing. The *Townley* court noted that the competitive standing cases cited to it by the plaintiffs in that case (which included the Nevada Republican Party) all involved such situations.[127] This is

121. *See generally* Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899 (M.D. Pa. 2020).

122. *Id.* at 912.

123. *Id.* at 915.

124. *Id.*

125. *Id.* (citing Townley v. Miller, 722 F3d 1128, 1135 (9th Cir. 2013)). It also noted another district court decision earlier that year citing *Townley* and reaching the same conclusion. *See* Mecinas v. Hobbs, 468 F. Supp. 3d 1186, 1206–07 (D. Ariz. 2020). Even as it did so, it acknowledged other cases expanding competitive standing beyond the cause of challenging rivals' placement on the ballot, but still noted that those cases were all "still relating to ballot provisions." *See Donald J. Trump for President*, 502 F. Supp. 3d at 916 n.73 (citing Green Party of Tenn. v. Hargett, 767 F.3d 533, 542–43 (6th Cir. 2014) (finding that a political party had standing to challenge ballot-access laws)); Pavek v. Donald J. Trump for President, Inc., 967 F.3d 905, 907 (8th Cir. 2020) (finding that campaign had standing to challenge ballot-ordering provision)). As discussed below, competitive standing extends beyond claims "relating to ballots."

126. *Townley*, 722 F.3d at 1135 (quoting Drake v. Obama, 664 F.3d 774, 782 (9th Cir. 2011) (quoting Hollander v. McCain, 566 F. Supp. 2d 63, 68 (D.N.H. 2008))) (cleaned up).

127. *Id.* (citing Fulani v. Hogsett, 917 F.2d 1028, 1029 (7th Cir. 1990) (challenging Indiana electoral officials' decision to allow presidential candidates on the ballot even though those candidates were not certified by the Indiana Secretary of State by the statutory deadline); Schulz v. Williams, 44 F.3d 48, 52–53 (2d Cir. 1994) (concluding that an intervenor had standing to appeal an injunction by the district court that required the inclusion of Libertarian candidates on the ballot even though the state Board of Elections had concluded that the petition to in-

unsurprising because the claim in that case challenged a state law providing for a "None Of These Candidates" ("NOTC") option for voters on the ballot. Cases involving the alleged improper inclusion of rival lines on the ballot were naturally the most analogous ones for plaintiffs to cite. But, as noted above, there are any number of cases applying a wider scope to the competitive standing theory.[128]

Moreover, *Townley* did not even reject standing in that case for that reason, but rather for a distinct reason. The Ninth Circuit's problem with competitive standing in that case was not that a potential negative effect on the candidate or party's electoral chances failed to constitute an "injury in fact"; it assumed without deciding that it did.[129] Instead, the Ninth Circuit noted that plaintiffs did not challenge the inclusion of the "None Of These Candidates" option *per se*, but rather just that provision of the law which said that all votes for that option would not legally count.[130] Because the "siphoning away of votes" the plaintiffs complained of occurred once the NOTC line is placed on the ballot, it is irrelevant whether those votes are later given legal effect. The court reasoned that "Plaintiffs having conceded the legality of the NOTC option being on the ballot . . . the state's failure to give legal effect to the ballots cast for NOTC is immaterial to the plaintiffs' alleged *competitive* injury."[131] Thus, while there may be "injury in fact," that injury was not "fairly traceable to the conduct being challenged."[132] Once again, the issue seems to be a fatal pleading error and not an inherent limitation on the theory of competitive standing.

There was no such pleading error in *Donald J. Trump for President, Inc. v. Boockvar*. The challenged governmental practice in that case—differential treatment across counties in curing absentee ballots—was in fact the very practice that could have cost Trump

clude those candidates was invalid); Tex. Democratic Party v Benkiser, 459 F.3d 582, 586 (5th Cir. 2006) (challenging an official's decision to declare one candidate ineligible and replace him with a viable candidate).

128. *See, e.g.*, LaRoque v. Holder, 650 F.3d 777, 786 (D.C. Cir. 2011) (finding that the allegedly illegal failure to implement a voter-passed electoral system could create "competitive injur[y] in the electoral arena" sufficient to confer Article III standing); *Schulz*, 44 F.3d at 52–54 (challenging a voter registration statute); Owen v. Mulligan, 640 F.2d 1130, 1132–33 (9th Cir. 1981) (claiming that one candidate was getting a preferential mailing rate); *Benkiser*, 459 F.3d at 586–87 (establishing standing where plaintiff credibly alleged that opponent's allegedly illegal candidate substitution would reduce chances of victory); Smith v. Boyle, 144 F.3d 1060, 1061–63 (7th Cir. 1998) (finding that a political party had standing to challenge state voting rules that allegedly disadvantaged Republican candidates).

129. *Townley*, 722 F.3d at 1135.

130. *Id.* at 1135–36.

131. *Id.* at 1136 (emphasis in original).

132. *Id.*

the election.[133] It was far from "immaterial." The same was true for most of the 2020 election cases asserting a competitive standing theory.

Nor is such a cramped view of the Ninth Circuit decision in *Townley* sound even as a matter of Ninth Circuit precedent. In an earlier Ninth Circuit case, a competitive standing theory which did not suffer from the "materiality" problem identified in *Townley* did indeed succeed. The court there held that a candidate did have standing to challenge preferential mail rates given to another candidate because he had "a personal stake in the outcome of the upcoming election" and could thus legitimately complain of an "unfair advantage."[134]

As a general matter, there is no principled reason to limit competitive standing to the cause of keeping ineligible rivals off the ballot, or to the slightly wider universe of complaints having to do with ballot access or ballot format. Methods of election, campaign fi-

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133. In fact, it almost certainly did not. Candidate Biden's margin of victory in Pennsylvania was over 80,000 votes. *2020 Presidential Election*, PA. STATE DEP'T, https://bit.ly/3A5YwcV [https://perma.cc/MX7A-Y558] (last visited Aug. 3, 2021). There was no credible evidence that county disparities in curing rules so heavily tilted towards Democrats, and affected so many votes, that it would have overcome a deficit that large. Nor was the legal theory in *Donald J. Trump for President* necessarily meritorious. While county disparities in the rules for counting actual ballots during a presidential election recount can constitute an Equal Protection violation, *see* Bush v. Gore, 531 U.S. 98, 108–09 (2000), that does not translate to a requirement of absolute uniformity among counties in the granular level in the hands-on way they interact with voters. *See id.* at 109 ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."). Indeed, the district court in *Donald J. Trump for President* quite reasonably distinguished *Bush v. Gore* from the case before it, showing an understandable reluctance to rule that all counties—rural, urban, large, small—would have to interact with their voters in the same way. It further stated:

> Arguable differences in how elections boards apply uniform statewide standards to the innumerable permutations of ballot irregularities, although perhaps unfortunate, are to be expected . . . . Requiring that every single county administer elections in exactly the same way would impose untenable burdens on counties, whether because of population, resources, or a myriad of other reasonable considerations.

Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 922 (M.D. Pa. 2020). But these are all matters for the merits, and not for the threshold question of standing.

134. Owen v. Mulligan, 640 F.2d 1130, 1132–34 (9th Cir. 1981). The district court in the 2020 election case *Mecinas v. Hobbs* purported to distinguish *Owen* by noting that the plaintiffs intended to enforce and reinstate a previous, dissolved injunction. 468 F. Supp. 3d 1186, 1206–07 (D. Ariz. 2020). But the *Owen* opinion itself did not expressly suggest any such limit. Nor would such a limit make sense: the prior injunction was for precisely the same kind of injury (preferential mail rates given to a rival candidate) based on precisely the same theory of standing. *See Owen*, 640 F.2d at 1131–32.

nance rules, voter access laws, and preferential mail rates are all examples of things which can create an unfair competitive environment for a candidate or party, just as much as, or more, than what is contained within the four corners of the ballot. If a low-funded candidate planning to run in a single-member district was suddenly and illegally forced to run a more expensive campaign in an at-large system, she would have an undeniable (1) injury in fact that was (2) fairly traceable to the illegal method of election change and (3) redressable by a court order reinstating the proper method of election. A rule to the contrary requiring some nexus to the language of the ballot is simply beside the point and arbitrary.

For all these reasons, this part of the court's decision may be best considered as *dicta*. The court noted that the Trump Campaign plaintiff also failed standing on the "directly traceable to defendant" prong, just as it had ruled regarding the voter plaintiffs in that case.[135] Plaintiffs sued the Secretary of State, whereas it was individual county election officials who actually accepted or rejected the mail ballots in question.[136] This is a far more narrow, fact-limited resolution of the dispute than the broad limit on competitive standing, and thus should be given more weight as precedent.

III. VOTER STANDING

A. Pre-2020 Law

Another common type of standing in election cases is voter standing. Usually, voters have standing when they are denied the right to cast a ballot, or when their vote is mathematically diluted by the method of election. In *Harper v. Virginia Board of Elections*, for example, a classic "vote denial" case, Virginia voters successfully sued to invalidate a poll tax.[137]

A classic original "vote dilution" case is *Baker v. Carr*, in which voters challenged Tennessee's use of state legislative districts that varied widely in district population. The plaintiffs in *Baker* were

135. *Donald J. Trump for President*, 502 F. Supp. 3d at 913, 916 n.75.

136. *Id.* at 913. The court also ruled that the Trump Campaign failed the "redressability" prong for the same reason as the voter plaintiffs. *Id*. The court had reasoned that invalidating the votes of millions of other Pennsylvania voters would not address the individual voters' complaint that their mail ballots had been rejected. *Id.* at 914. However, that conclusion does not actually follow with respect to the Trump Campaign's competitive standing argument. The campaign was not complaining of improperly rejected ballots, but rather an allegedly undeserved electoral loss stemming from the alleged unconstitutional county-based disparate treatment. Invalidating the results of the 2020 presidential election in Pennsylvania would indeed address that alleged harm.

137. Harper v. Va. Bd. of Elections, 383 U.S. 663, 668–70 (1966).

voters who alleged that population deviations among state legislative districts in Tennessee were arbitrary and capricious, making their votes in overpopulated districts mathematically count for less than votes in other, underpopulated districts.[138] The U.S. Supreme Court held that these voters did indeed have standing. They asserted an "adequate interest in maintaining the effectiveness of their votes,"[139] and not merely a "right possessed by every citizen to require that the government be administered according to law."[140] Crucially, the Court found dispositive the allegation that the districting plan "disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties."[141]

This vote dilution theory of voter standing extends beyond "one person, one vote" cases to claims of racial gerrymandering under the Equal Protection Clause,[142] including cases challenging an at-large or multimember district method of election as causing minority vote dilution.[143] And it obviously extends to minority vote dilution claims under the Voting Rights Act, which statutorily authorizes suit by voters.[144] In gerrymander cases, for a voter to have standing, she would have to prove that she resides in a district that was actually affected by the alleged violative districting.[145] A claim of statewide or jurisdiction-wide vote dilution will not suffice for the "injury" prong.[146] However, for "one person, one vote" malapportionment cases, a voter living in any overpopulated district

138. Baker v. Carr, 369 U.S. 186, 207–08 (1962).

139. *Id.* at 208 (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939)).

140. *Id.* (quoting Fairchild v. Hughes, 258 U.S. 126, 129 (1922).

141. *Id.* at 207–08.

142. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 67–68 (1980) (explaining that voters can bring Equal Protection racial gerrymandering claim where they can show intentional discrimination).

143. *See, e.g.*, Gaffney v. Cummings, 412 U.S 735, 751 (1973) (allowing such a voter-brought claim).

144. 52 U.S.C. § 10301 (2021); Thornburg v. Gingles, 478 U.S. 30, 55 (1986).

145. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 475 (2006) (stating that to have standing to challenge a gerrymander, a voter must show she resides in a district affected by the redistricting plan) (Stevens, J., dissenting) (citing United States v. Hays, 515 U.S. 737 (1995)).

146. *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1931–33 (2018) (finding that voters lacked standing where they claimed partisan gerrymander redistricting plan diluted Democratic votes statewide and failed to provide concrete proof that they resided in individual districts that had been gerrymandered). *Gill* concerned the special case of partisan gerrymandering, which the Court has indicated, both before and since, that it considers such gerrymandering to be a nonjusticiable Political Question. *See* Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality opinion); *id*. at 306–08 (Kennedy, J., concurring) (suggesting that the rule in *Vieth* could change in the future if proper "judicially manageable standards" for political gerrymandering cases could be found); Rucho v. Common Cause, 139 S. Ct. 2484,

would have standing.[147] But because even a slight overpopulation is enough to constitute standing-worthy underrepresentation,[148] this casts a wide net indeed.

Contrast the above cases with the recent U.S. Supreme Court decision in *Lance v. Coffman*.[149] In *Lance*, the Colorado Supreme Court had drawn a congressional redistricting map when the state legislature failed to do so after the 2000 Census.[150] When the legislature later passed its own plan, the state's Attorney General successfully sued in state court to block its implementation, based on a state constitution limit of one redistricting plan per decade.[151] Four Colorado voters sued in federal court, arguing that the state court's blocking of the state legislature's plan violated the U.S. Constitution's Elections Clause, which provides that "the Manner of holding Elections" for Congress "shall be prescribed in each state by the *Legislature thereof*."[152]

The Supreme Court held that the voters lacked standing. The Court held that the "only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed."[153] According to the Court, this injury "is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."[154] The Court distinguished voter standing in *Baker v. Carr*, the original 'one-person-one-vote' case, where the plaintiffs alleged that their individual votes in overpopulated districts carried less mathematical weight than that of other voters.[155]

The distinction between the standing theory advanced by plaintiffs in *Lance* and that in the traditional vote dilution cases is crucial. Where plaintiffs merely assert an interest in seeing that the law is correctly followed, they will lack standing. But where plain-

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2498–500, 2506–07 (2019) (concluding that partisan gerrymandering claims are nonjusticiable).

147. Wright v. Dougherty Cnty., 358 F.3d 1352, 1355–56 (11th Cir. 2004); Fairley v. Patterson, 493 F.2d 598, 603–04 (5th Cir. 1974).

148. *See* Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1719 (1999) (describing how even minor deviations from ideal district population will afford a district resident standing).

149. Lance v. Coffman, 549 U.S. 437 (2007).

150. *Id*. at 437–38 (citing Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002)).

151. *Id*. (citing People ex rel. Salazar v. Davidson, 79 P.3d 1221, 1231 (Colo. 2003), *cert. denied*, 541 U.S. 1093 (2004)).

152. U.S. CONST. art. I, § 4, cl. 1.

153. *Lance*, 549 U.S. at 442.

154. *Id*.

155. *See generally* Baker v. Carr, 369 U.S. 186 (1962).

tiffs can assert that the alleged illegality will actually dilute the weight carried by their votes, they will have standing.

B. 2020 Election Cases

In some cases, state law terrain proved favorable to the notion of voter standing during the 2020 round of election cases.[156] But courts were far more skeptical of voter standing than candidate standing. Treatment of voter standing varied depending on the type of substantive claim asserted.

1. Fraud Theories

Courts in the 2020 election cases uniformly rejected the allegations of fraud. But many did so as a threshold matter of standing as opposed to a merits consideration.

For example, in the late December 2020 decision in *Wood v. Raffensperger*,[157] the district court noted that the plaintiff merely asserted that alleged election administration malfeasance in Georgia would occur in the January 5, 2021, U.S. Senate runoff elections, in the form of the manipulation of signature-match procedures, abuse of ballot drop boxes, intentional mishandling of mail ballots, and computer mischief with Dominion voting machines. The court held that, "*even taking his statements as true*," the allegations "show only the 'possibility of future injury based on a series of events, which falls short of . . . a concrete injury.'"[158]

This is odd indeed. If the court really were accepting as true that mail ballots, drop boxes, and voting machines were going to be intentionally manipulated, surely that would constitute the kind of concrete imminent injury which would confer standing on a voter.[159] The court quite likely was highly skeptical that such malfeasance would in fact occur. But that is not "taking the statements as true."

The court went further, noting that the plaintiff attempted to show "fraud is certain to occur during the runoff" by arguing that

156. *See, e.g.*, Ariz. Pub. Integrity All. v. Fontes, 475 P.3d 303, 307 (Ariz. 2020) (holding that voters had standing to seek a *mandamus* order directing a county elections official to cease issuing unauthorized mail ballot instructions to voters; state law provided "a more relaxed standard for standing in mandamus actions").

157. Wood v. Raffensperger, No. 1:20-cv-5155, 2020 WL 7706833 (N.D. Ga. Dec. 28, 2020).

158. *Id*. at *5 (cleaned up) (emphasis added).

159. There was no indication in the opinion that the perceived problem was that it was a *voter*, as opposed to a candidate or party, suing. Instead, the focus was on the nature of the harm alleged.

the then-recent November 2020 election "was rife with fraud."[160] The court stated that "even if that were the case," "the alleged presence of harm during the general election does not increase the likelihood of harm during the runoff."[161]

Again, odd. If Georgia officials or Democratic Party actors indeed committed fraud in an election three weeks prior, that would seem to be relevant and probative evidence that the fraud might recur in an election conducted one week hence by the same state officials and party actors.[162]

This situation is another instance of courts confusing standing with the merits. It does seem that plaintiffs in these cases failed to present to the courts the kind of extensive, credible evidence necessary to justify the broad-ranging relief sought of cancelling the votes of millions of voters and allowing a partisan state legislature to substitute its judgment for that of the electorate in choosing the next President. But that was a failure on the merits. A plausible allegation[163] of an increased risk of fraud should, by itself, be sufficient for the threshold question of standing, at least in suits initiated before the election. In the next meritorious case, plaintiffs with legitimate claims will have to contend with the stray language in this decision.

Pre-election lawsuits challenging error-prone voting machines, provisional ballot rules, voter registration procedures, and other election protocols in advance of the election have proceeded to the merits, despite the fact that in such cases, plaintiffs have not identified specific named voters who have been or will be disenfranchised. For example, in a challenge to an Ohio provisional ballot law, the Sixth Circuit ruled that a county Democratic Party had standing. Even though they had not "identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers," this was "understandable," because, "by their

160. *Wood*, 2020 WL 7706833, at *5.

161. *Id*.

162. Contrast plaintiff Wood's separate allegation that the Dominion voting machines in Georgia's January 2021 election were likely compromised because machines from the same company had allegedly been used by deceased Venezuelan dictator Hugo Chavez to steal elections in years past. *Id*. That certainly is the kind of far-afield assertion that, even if true, would not create a plausible risk of harm to 2021 Georgia voters.

163. Perhaps the court did not find the fraud allegations "plausible" under the general civil procedure rule established in the Iqbal and Twombly cases. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). If so, the court should have said so directly. As the opinion stands, it is an overbroad rejection of standing.

nature, mistakes cannot be specifically identified in advance."[164] Because mistakes like inadvertently dropping a voter's name from the rolls, listing them in the wrong precinct, etc., are "inevitable," the issues raised in the suit were "real and imminent" rather than "speculative and remote."[165] This rationale has been called "probabilistic standing."[166] Other courts have used a similar approach in cases involving challenges to provisional balloting rules[167]and allegedly error-prone voting machines.[168]

Thus, an allegation that fraud was "certain to occur" should ordinarily be the kind of assertion that would give rise to standing.

This is not to say that the 2020 election fraud claims should not have been dismissed. Depending on the procedural posture of the various cases, courts could have decided on the record that plaintiffs had failed to establish a "genuine issue of fact" on these questions sufficient to withstand summary judgment or had failed to carry their burden of showing a likelihood of success on the merits for purposes of a Temporary Restraining Order or Preliminary Injunction; or, simply on a motion to dismiss, courts could have decided that the allegations did not meet the "plausibility" threshold of *Iqbal* and *Twombly*. But, to dismiss as a matter of standing introduces unnecessary doctrinal confusion and makes it harder for truly meritorious election claims to receive serious judicial consideration.

2. "Illegal Votes Cast Vote Dilution" Theory

A common theory of injury asserted by voter plaintiffs in the 2020 election cases is one which could be termed "illegal votes cast vote dilution." Claiming an equal protection violation, plaintiffs allege that unauthorized changes to election procedures will allow a number of illegal votes to be cast, which will dilute the weight given to their own, legally cast votes. For example, the Pennsylvania voters in *Bognet* alleged that the Pennsylvania Supreme Court's decision would allow ballots cast or received after Election Day to be

164. Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565, 574 (6th Cir. 2004).

165. *Id.*

166. Zipkin, *supra* note 44, at 204.

167. *See* Bay Cnty. Democratic Party v. Land, 347 F. Supp. 2d 404, 422 (E.D. Mich. 2004) (reasoning similarly); Fla. Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004) (reasoning similarly).

168. Stewart v. Blackwell, 444 F.3d 843, 855 (6th Cir. 2006), *vacated and remanded as moot*, 473 F.3d 692 (6th Cir. 2007) (en banc). The case was mooted after Ohio adopted new voting machines. The *en banc* opinion vacating and remanding did not address the Sixth Circuit panel's discussion of standing.

counted, thus diluting their own votes in violation of the Equal Protection Clause.[169] Other 2020 election cases involved similar claims.[170]

This theory has surface appeal, in that it is superficially similar to traditional vote dilution theories. Indeed, *Reynolds v. Sims*, one of the original vote dilution cases establishing the "one person, one vote principle," stated that "the right to vote can neither be denied outright . . . nor *diluted by ballot box stuffing*."[171] The harm with "ballot box stuffing" is that illegal votes are being counted, thus diluting the weight of legal votes. *Bush v. Gore* extended this "equal weight for equal votes" principle from apportionment and redistricting to the granular rules for counting votes. In that case, candidate Bush complained that, *inter alia*, some Florida counties used too lenient a "chad-counting standard," resulting in improper votes being counted.[172] And some courts have treated voter plaintiffs similarly to candidate plaintiffs as being able to vindicate this right to proper vote weight and accurate election results.[173] Just this year, in a Voting Rights Act case involving a challenge to a rule barring the counting of ballots cast in the incorrect precinct (even in statewide races, where being in the correct precinct is arguably irrelevant), a lawyer for the Republican Party asserted during Su-

169. Bognet v. Sec'y Pa., 980 F.3d 336, 346 (3d Cir. 2020). The voter plaintiffs advanced a related Equal Protection claim that the resulting differing treatment between mail voters and in-person voters was arbitrary and capricious. *Id.* at 352.

170. *See generally* Carson v. Simon, 494 F. Supp. 3d 589 (D. Minn.), *rev'd and remanded*, 978 F.3d 1051 (8th Cir. 2020) (claiming that ballots received after statutorily-mandated absentee ballot-receipt deadline resulted in vote dilution and harmed Minnesota voters, generally); Moore v. Circosta, 494 F. Supp. 3d 289, 311 (M.D.N.C.), *application for injunctive relief denied*, 141 S. Ct. 46 (2020) (arguing, unsuccessfully, that individual voters have standing to bring a vote dilution claim whenever there is "ballot box stuffing"); Paher v. Cegavske, 457 F. Supp. 3d 919, 926–27 (D. Nev. 2020) (claiming that an increase in illegal votes incident to expanded mail-ballot rules will dilute the votes of rightful voters); Martel v. Condos, 487 F. Supp. 3d 247, 250–51, (D. Vt. 2020) (arguing that automatic distribution of mail-in ballots, even to voters who did not request one, would lead to voter fraud and, thus, dilution of legal votes).

171. Reynolds v. Sims, 377 U.S. 555, 555 (1964) (emphasis added).

172. Bush v. Gore, 531 U.S. 98, 105–07 (2000).

173. *See, e.g.*, Marre v. Reed, 775 S.W.2d 951, 952 (Mo. 1989) (stating that if the wrong candidate is declared the winner, "more is at stake than the losing candidate's disappointment; the people have lost the ability to impose their will through the electoral process" and "[i]n bringing an election contest, the contestant speaks for the entire electorate, seeking to assure all that the democratic process has functioned properly and that the voters' will is done"); Hawkins v. Wayne Twp. Bd. of Marion Cnty., 183 F. Supp. 2d 1099, 1103 (S.D. Ind. 2002) (finding that both the voter and unsuccessful candidate had standing to pursue a 'wrongful votes cast' vote dilution theory when suit alleged four precincts were improperly excluded from the district election).

preme Court oral argument that the Party had standing to defend the ballot invalidation rule because allowing such votes would disproportionately benefit Democratic voters.[174]

However, the courts handling the 2020 round of election cases overwhelmingly rejected this theory of standing, at least as it applied to voters.[175] The 11th Circuit rejected it, along with a related equal protection argument of "arbitrary and disparate treatment" between mail voters and in-person voters, for a basic pleading deficiency. The plaintiff did not allege that the allegedly illegal votes tilted the election in a direction unfavorable to him.[176] The district court below in that case remarked that plaintiff LinWood conceded during oral argument that under this theory, "any one of Georgia's more than seven million registered voters would have standing to assert these claims."[177] But, even if not pled or articulated very clearly, plaintiff Wood's theory was that fraud would occur to assist *Democrats*.[178] Thus, it would be only *Republican* voters—or, more strongly, Republican candidates or party organizations—who would have standing. These cases are thus yet more examples of potentially valid standing arguments undercut by inartful pleading.

Both the 11th Circuit and the 3rd Circuit took the view that:

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174. *Brnovich v. Democratic National Committee Oral Argument*, OYEZ, at 32:07 (Mar. 2, 2021), https://bit.ly/3A8xou4 [https://perma.cc/QKW2-PD2L].

175. Courts have consistently found that a plaintiff lacks standing where he claims that his vote will be diluted by unlawful or invalid ballots. *See Moore*, 494 F. Supp. 3d at 312 ("[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, 1000 (D. Nev. 2020) ("[P]laintiffs' claims of a substantial risk of vote dilution 'amount to general grievances that cannot support a finding of particularized injury . . . .'"); *Martel*, 487 F. Supp. 3d at, 253–54 (rejecting vote-dilution theory as conferring standing because it constituted a generalized grievance); *Paher*, 457 F. Supp. 3d at 926 (pointing out that because "ostensible election fraud may conceivably be raised by any Nevada voter," the plaintiffs' "purported injury of having their votes diluted" does not "state a concrete and particularized injury"). However, the result can change where the plaintiff is a candidate. *See* Wood v. Raffensperger, 981 F.3d 1307, 1314 (11th Cir. 2020) (stating that if plaintiff were a candidate, he could establish standing under this theory, "because he could assert a personal, distinct injury").

176. *Id.* at 1314–15.

177. Nor is it clear that a harm affecting all *voters* (as opposed to, say, all residents) is always and necessarily insufficient to confer standing. *See Martel*, 487 F. Supp. 3d at 252 ("It would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because it affects all voters.").

178. Lee Drutman, *There Is No Evidence That Voting by Mail Gives One Party an Advantage*, FIVETHIRTYEIGHT (May 12, 2020, 6:00 AM), https://53eig.ht/3ftgiil [https://perma.cc/JC64-LQ4K] (finding that Democratic counties greater utilize voting by mail as opposed to Republican counties).

> [A] vote cast by fraud or . . . mistake . . . has a mathematical impact on the final tally and . . . every vote, but no single voter is specifically disadvantaged. Such an alleged dilution is suffered equally by all voters and is not particularized.[179]

Again, this is true in the abstract. But given a well-pled, plausible claim that fraud or mistake disproportionately helped Democrats, Republican voters should be considered as alleging a cognizable harm.

But just as in the 11th Circuit case, voter plaintiffs in the 3rd Circuit case did not expressly allege that the challenged relaxation of mail ballot rules (accepting ballots arriving three days after Election Day, presuming that any such ballots without a legible postmark had been timely cast) would be disproportionately votes against their preferred candidates.[180] In this way, the claim was more like that in *Vance* of a simple desire to have officials follow the law, as opposed to a specific allegation that plaintiffs' votes were being given less weight or effectiveness, as in the "one person, one vote" cases of *Baker v. Carr* and *Reynolds v. Sims*,[181] or the racial gerrymandering cases. Both *Bognet* and many other 2020 election cases made this distinction as they held voter plaintiffs lacked standing on this theory.[182]

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179. Bognet v. Sec'y Pa., 980 F.3d 336, 356 (3d Cir. 2020) (quotation marks omitted). *See also Moore*, 494 F. Supp. 3d at 312.

180. *See Bognet*, 980 F.3d at 356 ("Any alleged harm of vote dilution that turns not on the proportional influence of votes, but solely on the federal illegality of the Deadline Extension, strikes us as . . . divorced from any concrete harm.") (cleaned up); *see also id*. at 358 n.13 ("Voter Plaintiffs have not alleged that their votes are less influential than any other vote."). The voter plaintiffs did allege that they resided in a county where voting by mail occurred at below-average rates, such that their votes would be diluted to a greater degree than other voters. *Id.* at 365 n.12. This claim of disproportionate harm is close but no cigar. Averaging mail balloting rates on a per-county basis lacks force as a conceptual matter as well as support in the case law. The Third Circuit, for its part, dismissed this allegation as "conjectural" and "hypothetical," since it could discern no indication that counties with greater mail balloting rates would necessarily generate more ballots received post-Election Day. *Id.*

181. *See generally* Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).

182. *See Bognet*, 980 F.3d at 352; Carson v. Simon, 494 F. Supp. 3d 589, 602 (D. Minn. 2020) ("The prospect of hypothetical unlawful votes . . . is not a harm unique to Electors."); Wise v. Circosta, 978 F.3d 93, 104 (4th Cir. 2020) (Motz, J., concurring) ("[P]laintiffs' votes would not count for less *relative to other North Carolina voters*"); *Moore*,, 494 F. Supp. at 289, 323, *application for injunctive relief denied* 141 S. Ct. 46 (2020) (finding that an individual voter does not have standing when solely alleging that the Elections Clause "has not been followed"); Paher v. Cegavske, 457 F. Supp. 3d 919, 926–27 (D. Nev. 2020) ("Plaintiffs' purported injury [of vote dilution due to fraud] may be conceivably raised by any [ ] voter."); Martel v. Condos, 487 F. Supp. 3d 247, 253 (D. Vt. 2020) ("If every voter suffers the same

However, even when the plaintiff did properly plead this kind of one-sided advantage stemming from the expansion of mail voting, the court evaluating the claim still decided the voter plaintiffs lacked standing. In *Feehan v. Wisconsin Elections Commission*, the voter plaintiff did indeed allege that Wisconsin's liberalization of mail voting "had a negative impact on those who voted for Republican candidates and a positive impact on those who voted for Democratic candidates."[183] He also alleged that he had voted for candidate Trump.[184] The court nonetheless found "no more than a generalized grievance common to any voter."[185] It explained that "the voters who voted for Joseph R. Biden . . . could make the same complaints the plaintiff makes here."[186]

This reasoning is hard to understand, as the plaintiff specifically alleged that the mail expansion disproportionately harmed *Trump* voters. But again, pleading deficiencies provide an alternate ground for the decision on standing. Plaintiff's requested relief was not only to decertify the results of the Wisconsin presidential election, which had already been certified by the Secretary of State (and which therefore created issues of mootness), but also to order the governor to certify Trump as the state's winner.[187] The court was skeptical it had such authority and did not think doing so would actually remedy the complained-of dilution of plaintiffs' vote, because it would also cancel the plaintiffs' vote and replace the election with "judicial fiat."[188] For this reason, the court ruled that standing failed under the "redressability" prong.[189] Precedentially, this case would be best understood as standing only for this latter "redressability prong" rationale, as it is both narrower and less incoherent.

But again, as with the candidate claims for standing, given proper pleading, the allegation that unauthorized relaxation of mail ballot rules adversely affected Republican plaintiffs would not have been outlandish. It was well-recognized that 2020 Democratic voters were using mail balloting at a greater rate than the Republican

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incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury.").

183. Feehan v. Wis. Elections Comm'n, 506 F. Supp. 3d 596, 609 (E.D. Wis. 2020).

184. *Id.* at 607.

185. *Id*. at 609.

186. *Id.*

187. *Id.* at 600.

188. *Id.* at 610.

189. *Id*. (dismissing the claim as moot).

voter plaintiffs.[190] A "let everyone in" lawlessness regarding mail voting would clearly disadvantage Republican candidates and voters.

The more serious problem with this otherwise coherent theory of standing is an overall "floodgates" concern. Typically, if there is an allegation that fraud or other election irregularity let in illegal votes, such that the election result should be overturned, that allegation is handled as an old-fashioned state law election contest. Such cases are legion. But if each such instance also constituted "vote dilution" in violation of the Equal Protection Clause, then every garden-variety election contest would become a dispute of constitutional dimension warranting resolution by the federal courts.[191] The *Bognet* court, like several other courts around the same time,[192] understandably declined to embark on such a project of federalization/constitutionalization of virtually all election contests.

As for the reference to "ballot-box stuffing" in *Reynolds v. Sims*, the Third Circuit distinguished this language. Good faith voting per the (possibly procedurally improper) instructions of state officials is not akin to old-fashioned fraud, the court reasoned.[193] More important, the cases cited by *Reynolds* on box-stuffing arose from criminal fraud prosecutions under a statute making it a federal offense to deprive someone of their constitutional rights (including the right to vote). Standing in those cases was not at issue because the challenger was a criminal defendant.[194]

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190. *See* Drutman, *supra* note 178.

191. Bognet v. Sec'y Pa., 980 F.3d 336, 354–55 (3d Cir. 2020).

192. *See, e.g.*, King v. Whitmer, 505 F. Supp. 3d 720, 739 n.11 (E.D. Mich. 2020) (reaching the same conclusion).

193. *Bognet*, 980 F.3d at 357 (quoting Gray v. Sanders, 372 U.S 368, 386 (1963) (Harlan, J., dissenting) ("[I]t is hard to take seriously the argument that 'dilution' of a vote in consequence of a legislatively sanctioned electoral system can, without more, be analogized to an impairment of the political franchise by ballot box stuffing or other criminal activity.")). Of course, by this logic, then straight-up allegations of fraud—of which there were many in 2020 election litigation—ought to confer standing, which would again constitutionalize every garden variety election dispute. And, with or without the *mens rea* of fraud, the acceptance of invalid ballots still has the identical mathematical effect of diluting valid votes.

194. *Id*. Although *Bognet* did not distinguish *Bush v. Gore* in any meaningful way, a post-*Bognet* district court decision within the Third Circuit did. Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 922 (M.D. Pa. 2020). Noting that the statewide recount criticized by the *Bush* majority had been overseen by a single Florida court, the district court reasoned that the Equal Protection problem in *Bush* essentially "concerned a 'situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards'" and a lack of uniformity. *Id*. (quoting Bush v. Gore, 531 U.S. 98,

This "floodgates" concern is a reasonable one. But it seems more like a merits concern than one of standing. Federal courts could plausibly invoke an abstention doctrine to avoid intervening in what should more properly be a state court election contest. And both federal and state courts could plausibly decline, on the merits, to expand the equal protection theory of *Reynolds v. Sims* and *Bush v. Gore* to garden-variety election contests. But regardless of whether federal courts are the proper forum, or equal protection the proper legal claims, and regardless of whether the pandemic-inspired expansion of mail ballot rules is unconstitutional, plaintiffs clearly had a plausible claim that the expansion frustrated their electoral interests. They would thus have standing and be entitled to a full hearing on the merits (absent some other procedural problem) rather than a cursory dismissal.

Courts in future election cases should take from these cases the cue that plaintiffs are pleading a cognizable injury entitling them to substantive consideration. And contemporary observers should realize that many of these so-called "procedural" decisions actually incorporated a thoughtful look at the merits.

3. Cases of "Public Importance"

For some state courts, ruling with an eye toward future cases, it was precisely the importance of the issues involved that militated *in favor* of standing. In *The Election Integrity Project of Nevada v. Nevada*, a state court held that an election integrity organization had standing to challenge under state law the Nevada Legislature's pandemic-inspired move to an automatic vote-by-mail regime (in which all voters are automatically mailed absentee ballots regardless of whether they request them), using an "illegal votes cast vote dilution" theory.[195] The plaintiff argued that the mail vote expansion would lead to fraud, thus diluting their legitimate, non-fraudulent votes. The state court relied on Nevada's "public importance exception" to standing, wherein a Nevada court may grant Nevada citizens standing even absent specialized harm, if the case involves "an issue of significant public importance" and challenges a "legislative expenditure or appropriation" under the Nevada Constitution.[196] The court then rejected the claim on the merits, finding that plain-

109 (2000)). In essence, "the lack of guidance from a court constituted an equal protection violation." *Id*. This situation clearly did not exist in *Bognet* or any of the other 2020 election cases.

195. Election Integrity Project of Nev. v. Nevada, No. A-20-820510-C, 2020 WL 6498940, at *6 (Nev. Dist. Ct., Clark Cnty. Sept. 29, 2020).

196. *Id.* at *9–10.

tiffs' "unfounded speculations regarding voter fraud fall far short of the 'substantial evidence' required to obtain injunctive relief" under Nevada law.[197]

This result seems appropriate. An organization dedicated to election integrity clearly has an interest in combating election procedures which would lead to fraud. But once it gets to the merits, it cannot rely on speculation or conclusory assertions to obtain preliminary relief, or to withstand proper dispositive motions.

More important, the court recognized that election cases generally were "issues of significant public importance" which should not be cursorily dismissed in the ordinary course. As it happens, most state courts have "public interest" exceptions to their standing doctrines, as well as for ripeness and mootness doctrines.[198] They should readily be applied to election and voting rights cases, to ensure adequate judicial review of alleged infringement on the right to vote and other fundamental structures of democracy.

Federal courts do not recognize such an exception, given the unique restraints placed on them by Article III's "Case or Controversy" requirement.[199] Indeed, federal courts may be inclined to shun such cases, given their deference to the political process, which motivates much of the federal justiciability doctrine.[200] But the public importance of the question can be considered in applying the "capable of repetition, yet evading review" exception to mootness, which has been held to apply to election cases.[201]

4. Availability of Post-Election Remedies; Revotes

Again, some of the 2020 decisions rejecting this "illegal votes cast vote dilution" theory did so in alarmingly overbroad terms. A district court in Michigan rejected this theory because plaintiffs

197. *Id*. at *10. The court also found that speculative nature of the harm rendered this pre-election challenge not ripe. *Id*.

198. Fialka-Feldman v. Oakland Univ. Bd. of Trustees, 639 F.3d 711, 716 (6th Cir. 2011) (listing examples of state cases); Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1141 (9th Cir. 2005) (en banc) (Fletcher, J., dissenting) ("[A]lmost every state in the union" has such an exception) (cleaned up).

199. *Fialka-Feldman*, 639 F.3d at 716; WRIGHT & MILLER, *supra* note 26, at § 3533.9; *see also* DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (recognizing that applicable state law would allow consideration of the case under its "public importance" exception, but clarifying that the Court would have to consider justiciability under distinct federal rules); Richardson v. Ramirez, 418 U.S. 24, 36 (1974) (recognizing the same). The doctrinal difference reflects the fundamental difference between federal and state courts, with the former courts of limited jurisdiction and the latter ones of general jurisdiction. *Fialka-Feldman*, 639 F.3d at 716.

200. *See id.* at 715.

201. *Id.*

sought decertification of the election results, which would cancel the votes of millions of people. Rather than simply stating that the evidence did not support such a sweeping remedy, the court dismissed the case as a matter of standing because "the alleged injury of vote-dilution" could not be redressed by "denying millions of others of *their* right to vote."[202] But where the alleged harm is "dilution" of one's counted voters, rather than having one's vote improperly rejected, cancellation of the election results would indeed remedy the alleged harm. In fact, once the election has occurred, that is the *only* remedy which adequately addresses the harm.

The courts' squeamishness at cancelling millions of already cast votes is understandable. But it is a matter of the merits, or perhaps a matter of equitable remedial discretion, not a question of whether the plaintiff has met the three prongs of standing. It applies only to those cases decided after the election, of course.

But even as to those cases, it is by no means clear that a post-election remedy is unavailable. Because this reluctance to cancel the election underscored the courts' thinking in these cases, causing so much standing doctrine mischief, this point is worth addressing in some detail.

Courts can, and do, cancel election results after the fact when given sufficient evidence of electoral improprieties. Where there is sufficient evidence to show that a different candidate than the declared winner actually won, the remedy can be an injunction requiring a different candidate elected.[203] Where it is clear there were sufficient irregularities to cast doubt on the election outcome, but not enough evidence to state with confidence which candidate won, a court can order a "revote"—i.e., a special election held under proper election rules.[204] As one federal court has stated, explaining why federal courts "have often ordered special elections" to rem-

202. King v. Whitmer, 505 F. Supp. 3d 720, 735 (E.D. Mich. 2020).

203. *See* Adkins v. Huckabay, 755 So. 2d 206, 218–19 (La. 2000) ("[C]ourts are not powerless to overturn elections where irregularities are present."); Broadhurst v. City of Myrtle Beach Election Comm'n, 537 S.E.2d 543, 547 (S.C. 2000) (stating that a remedy is not available "in the absence of fraud, a constitutional violation, or a statute so providing.").

204. *See, e.g.*, Hadnott v. Amos, 394 U.S. 358, 367 (1969) (ordering new county elections because of constitutional violations); Connor v. Coleman, 440 U.S. 612, 618 (1979) (ordering statewide special elections for state legislature because of constitutional and statutory violations); Armstrong v. Adams, 869 F.2d 410, 413 n.3 (8th Cir. 1989) (ordering special elections to remedy voting rights violations); Cousins v. City Council of Chicago, 503 F.2d 912, 924 (7th Cir. 1974) (ordering special elections to remedy voting rights violations), *cert. denied*, 320 U.S. 992 (1975); Tucker v. Burford, 603 F. Supp. 276, 279 (N.D. Miss. 1985) (ordering the same); Pestrak v. Ohio Elections Comm'n, 670 F. Supp. 1368, 1378 (S.D. Ohio 1987).

edy voting rights violations: "Prospective relief alone is of little consequence to the many voters who sought to vote . . . and could not do it effectively."[205]

A legitimate question arises as to whether courts could order a "revote" in a federal election, let alone a presidential election. The Electors Clause provides that Congress "may determine the Time of choosing the Electors, and the Day on which they shall give their vote; which Day shall be the same throughout the United States."[206] Pursuant to that authority, Congress has statutorily authorized a single uniform date for the presidential election.[207] Congress also designated a single uniform date for congressional elections as well.[208] Every four years, the congressionally-mandated uniform date for congressional and presidential elections coincides.

Some have argued that this precludes any court-ordered special election remedy in a presidential election or a congressional election. Indeed, the 2000 Gore campaign originally considered challenging the Palm Beach County, Florida "butterfly ballot," given plentiful evidence of a ballot defect causing massive voter confusion, depriving candidate Gore of thousands of votes. But it opted not to, reasoning that a court-ordered special election was not possible.[209] And a Florida trial court at the time agreed.[210] But actually, both federal courts[211] and state courts[212] have on numerous occasions ordered special congressional elections to remedy election lawsuits. The theory is that while the date for a *regular* election should be uniform pursuant to law, a *special* election, by definition, need not be. Special elections are held all the time to fill

205. Ketchum v. City Council of Chi., 630 F. Supp. 551, 565 (N.D. Ill. 1985).

206. U.S. CONST. art. II, § 1, cl. 4.

207. 3 U.S.C. § 1 (1948).

208. 2 U.S.C. § 7 (1934).

209. *See* Steven Mulroy, *Right Without a Remedy? The "Butterfly Ballot" Case and Court-Ordered Federal Election "Revotes,"* 10 GEO. MASON L. REV. 215, 216, 222–23 (2001) (collecting sources).

210. *See* Fladell v. Elections Canvassing Comm'n of Fla., No. CL-0010965, 2000 WL 35531402 (Fla. Cir. Ct. Nov. 20, 2000) (holding so in the Palm Beach County, Florida "butterfly ballot" case during the 2000 presidential election controversy).

211. *See, e.g.*, Vera v. Bush, 933 F. Supp. 1341, 1353 (S.D. Tex. 1996) (ordering new congressional elections because of constitutional violations in districting); Busbee v. Smith, 549 F. Supp. 494, 525 (D.D.C. 1982) (ordering a new congressional election because of statutory violations in districting).

212. *See, e.g.*, LaCaze v. Johnson, 310 So. 2d 86, 86 (La. 1974) (ordering a new congressional election because one voting machine malfunctioned, resulting in the loss of 144 votes in a close race); Lowenstein v. Larkin, 288 N.E.2d 133, 133 (N.Y. 1972) (setting aside a congressional election and ordering a new election because of errors by polling place official who wrongly turned away some voters and allowed others to vote).

congressional vacancies; they do not all coincide with the "first Tuesday in November" of even-numbered years set out in 2 U.S.C. § 7.[213] Otherwise, no matter how clear-cut and serious the voting rights violation—a deliberate destruction of thousands of ballots, a hurricane which prevented a quarter of the population from going to the polls, widespread voting machine breakdowns preventing thousands from casting Election Day ballots—a court's remedial hands would be tied.

Nor must the answer differ with respect to presidential elections. A federal court has actually considered this question and concluded that ordering a revote of a presidential election is within the equitable authority of federal courts, if truly necessary to vindicate substantial electoral improprieties denying the right to vote.[214] Such violations, of either the Constitution or of a specific federal statute like the Voting Rights Act,[215] could take precedence over the more general statutory mandate of 3 U.S.C. § 1 and 2 U.S.C. § 7.[216] Or, just as plausibly, those statutes could be read to apply to *regular* elections, and not *special* elections. A similar reading could be given to the Electors Clause.

Even further, the Electors Clause might not even actually require that the *regular* presidential election be held on the same day. The better interpretation of the Electors Clause is that in the Clause:

> 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.[217]

The phrase "the Day" which "shall be the same throughout the United States" is "the Day" on which the Electors shall "give their Votes"—i.e., the day on which they meet as the Electoral College—rather than "the Time of chusing the Electors." Thus, there is more temporal flexibility regarding the initial mechanism for assigning Electors (in the modern era, the general election) than for the later "Day" when they "shall meet in their respective States"[218] to cast their ballots.

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213. 2 U.S.C. 7 (2018); *see* Steven Mulroy, *Right Without a Remedy? The "Butterfly Ballot" Case and Court-Ordered Federal Election "Revotes,"* 10 GEO. MASON L. REV. 215, 223–28 (2001) (making this argument).

214. Donohue v. Bd. of Elections, 435 F. Supp. 957, 967–68 (E.D.N.Y. 1976) (explaining that on the merits, relief was not appropriate).

215. 52 U.S.C. § 10101 (2018).

216. 3 U.S.C. § 1 (2018); 2 U.S.C. § 7 (2018).

217. U.S. CONST. art. II, § 1, cl. 4.

218. U.S. CONST. art. II, § 1, cl. 3.

This interpretation is consistent with historical practice. In the early decades of the Republic, states would either hold an election, hold a series of caucuses at various locations around the state, or simply appoint a slate of Electors through a vote of the state legislature.[219] Indeed, most states chose the latter method early on in the Republic, with presidential elections not becoming universal until the 1840s.[220] During this period, there was no federal statute prescribing a uniform date for the "chusing."

5. Poll Observer Claims

One pattern in the 2020 election cases was complaints about insufficient access of Republican poll observers to the counting of ballots. Except for one early injunction temporarily giving poll observers closer access in the days immediately after the election, while absentee ballots were still being counted,[221] these claims went nowhere, and for good reasons. In some cases, plaintiffs failed to allege that election officials were discriminating against Republican poll observers.[222] In other cases, the remedy sought—invalidation of the election results well after the counting had stopped—was incommensurate with the nature of the alleged injury.[223]

6. Other Troubling Standing Doctrine Pronouncements

Even more troubling are alternative grounds given by the Third Circuit in *Bognet* for rejecting standing on the Equal Protection Clause claim. Before even getting to the "pleading deficiency" and "floodgates" concerns, the court made some dubious, overarching claims about standing.

First, it said that because the "source" of the alleged voting illegality is "necessarily a matter of state law," any alleged harm

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219. McPherson v. Blacker, 146 U.S. 1, 27 (1982)

220. Chiafalo v. Washington, 140 S. Ct. 2316, 2322 (2020).

221. *In re* Canvassing Observation, No. 1094, 2020 WL 6551316, at *4 (Pa. Commw. Ct. Nov. 5, 2020). *Id.* at *1 n.4 (explaining that the proceedings were expedited due to the time constraints posed by the matter). *But see In re* Canvassing Observation, 241 A.3d 339, 351 (Pa. 2020) (vacating that order and denying relief), *cert. denied sub nom*. Donald J. Trump for President, Inc. v. Degraffenreid, 141 S. Ct. 1451 (2021).

222. *See, e.g.*, Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1322 (N.D. Ga. 2020) (stating that the alleged injury was a generalized grievance as plaintiff did not allege that *he* attempted to participate as an election monitor, individually, nor did he allege that election monitors of his designation, acting on behalf of the GOP, were denied participation).

223. Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 906 (M.D. Pa. 2020) ("This Court has been unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election . . . .").

stemming from the mail ballot Deadline Extension was thus "abstract for purposes of the Equal Protection Clause."[224] But voter plaintiffs challenge election rules which are products of state law determinations all the time.[225] It is hard to see how that makes all such challenges "abstract," or even the instant challenge in *Bognet*, which involved very specific allegations about identified classes of votes.

The court also stated that alleged vote dilution harm was not "concrete" because it would occur even if the identical Extension had been made by the state legislature, and thus clearly not in violation of the Electors Clause.[226] It is even harder to make sense of this statement. The alleged violation is precisely that a state actor other than the state legislature made the voting change, in supposed violation of the Electors Clause.[227] One cannot logically deny standing on the ground that the burden on the plaintiff would be the same if, counterfactually, it came from a legal source as opposed to an illegal one. By that logic, if the President unilaterally and unconstitutionally imposed a tax on certain industries without seeking congressional approval, an industry paying the tax would not have standing to challenge the separation of powers violation

224. Bognet v. Sec'y Pa., 980 F.3d 336, 353 (3d Cir. 2020).

225. *See generally* League of Women Voters of Ohio v. LaRose, 489 F. Supp. 3d 719 (S.D. Ohio 2020); Nemes v. Bensinger, 467 F. Supp. 3d 509 (W.D. Ky. 2020).

226. *Bognet*, 980 F.3d at 353.

227. There are a number of good reasons to reject this Electors Clause theory on the merits. For example, one can reasonably conclude that state statutes granting emergency rulemaking authority to the state's Secretary of State, Governor, or other official, or statutes conferring on state courts jurisdiction to adjudicate alleged violations of the state constitution, are proper delegations of the state legislature's Electors Clause authority. *See* Trump v. Kemp, 511 F. Supp. 3d 1325, 1337–38 (N.D. Ga. 2021) (finding that the Governor's certification of the election, as required by state statute, did not violate Electors Clause); *cf.* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 787 (2015) (finding that a state referendum moving redistricting authority from the state legislature to an independent commission did not violate the Elections Clause). There are also sound equitable reasons for not granting relief on this theory under the facts of the 2020 elections cases—e.g., that it is unfair to disenfranchise voters who relied in good faith on mid-2020, pandemic-triggered state official pronouncements as to how to properly vote, or that it is too close to the election to judicially change election rules. Paher v. Cegavske, No. 3:20-cv-00243, 2020 WL 2748301, at *6 (D. Nev. May 27, 2020) (declining to take any action to alter Nevada officials' enacted plan to conduct an all-mail election in order to diminish the spread of COVID-19); *see* Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (noting that federal courts should generally avoid ordering election changes close to the election, to avoid voter confusion and administrative disruption). But those questions are distinct from the threshold standing inquiry.

because the amount of tax would be the same even if Congress had actually passed it.[228]

These two statements—about state law as the "source" of the alleged violation and about the burden on plaintiffs being the same regardless of whether it stemmed from a legal or illegal authority—would, if taken seriously, substantially and improperly eliminate standing for a host of otherwise proper plaintiffs.

7. Appropriate Rejections of Standing

Sometimes, voters who otherwise might have standing sued the wrong defendants or sought the wrong relief, creating problems not with the "injury" prong of standing but the "causation" and "redressability" prongs.

For example, in *Donald J. Trump for President, Inc. v. Boockvar*,[229] two voters complained that Pennsylvania allowed counties to vary widely as to whether and how they allowed absentee ballot voters to "cure" their mail ballots. Plaintiffs sued the Secretary of State, who had issued guidance encouraging but not requiring counties to do so,[230] seeking to invalidate the election results.[231] The voter plaintiffs had a credible claim of injury: each of their mail ballots had been canceled by counties which failed to provide opportunities to cure.[232] The district court found that they had met the first prong of "injury in fact."[233] But they failed to meet the second and third prongs of the standing inquiry.[234] Because their county election office canceled their ballots, and not the defendant Secre-

228. *Cf.* Sierra Club v. Trump, 379 F. Supp. 3d 883, 905–08 (N.D. Cal. 2019) (finding that an environmental organization had standing to challenge a unilateral presidential allocation of funds for border wall construction without congressional approval); Trump v. Sierra Club, 963 F.3d 874, 883–86 (9th Cir. 2020) (sustaining the ruling on standing). The Third Circuit excluded the Presumption of Timeliness from this counterfactual analysis, because it was not clear that the state legislature actually could constitutionally provide for the Presumption. *Bognet*, 980 F.3d at 353 n.9. This was because the Presumption allegedly might allow at least some voters to cast a ballot after Election Day, benefiting from the USPS' failure to legibly postmark it as such. *Id.* This would arguably violate the requirement that presidential elections be held on a single uniform day throughout the United States. *See* U.S. CONST. art. II, § 1, cl. 4 (authorizing Congress to establish a uniform date); 3 U.S.C. § 1 (establishing Election Day for presidential elections); 2 U.S.C.§ 7 (establishing same Election Day for congressional elections).

229. *See generally* Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899 (M.D. Pa.), *aff'd sub nom.* Donald J. Trump for President, Inc. v. Sec'y Pa., 830 F. App'x 377 (3d Cir. 2020).

230. *Id.* at 906.

231. *Id.*

232. *Id.* at 907.

233. *Id.* at 912.

234. *Id.*

tary of State, plaintiffs' injuries were not "fairly traceable" to actions of the defendant.[235] And because their injury of vote cancellation would not be alleviated "by invalidating the votes of others," plaintiffs also lacked the third, "redressability" prong.[236] This was not the only such instances of plaintiffs suing the wrong party and losing the standing argument on the second or third prongs.[237]

In an earlier order in the same case, the court rejected other claims on standing grounds because they were too speculative. Plaintiffs had also objected to Pennsylvania's (i) use of unmanned drop boxes for absentee ballots, (ii) failure to require all counties to check mail ballot signatures for matches with signatures on file, and (iii) requirement that poll watchers be residents of the county they conducted poll-watching in.[238] The plaintiffs' theory was that these challenged practices increased the risk of election fraud and that the inclusion of fraudulent votes in the vote totals diluted their legitimate votes to their detriment.[239] For all three challenged practices, the court concluded that the supposed harm was too remote and hypothetical.[240] After reviewing all of the evidence before it on the state's motion for summary judgment, the court concluded that plaintiffs had not met their burden of establishing a genuine issue of fact on whether the type of fraud alleged was "certainly impending," as opposed to just "a possible future injury."[241]

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235. *Id.*

236. *Id*. On a related note in that same case, the district court rejected the plaintiffs' Equal Protection Claim on the merits because, *inter alia*, plaintiffs sought to enjoin certification just of the presidential election, and not of any other election race on the ballot, despite all such races being theoretically tainted to the same degree by the disparate ballot curing procedures. The court questioned whether it was "logically possible to hold Pennsylvania's electoral system both constitutional and unconstitutional at the same time." *Id.* at 920 n.118.

237. *See, e.g.*, Ga. Republican Party, Inc. v. Sec'y of State for Ga., No. 20-14741, 2020 WL 7488181, at *2 (11th Cir. Dec. 21, 2020) (noting that plaintiffs sued Georgia Secretary of State over allegedly lax mail ballot signature-matching, but it was county election officials who conducted the matching); Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1254–56 (11th Cir. 2020) (noting that plaintiffs sued Florida Secretary of State over improper placement of candidate names on ballots, a function carried out by county election officials).

238. Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 342 (W.D. Pa. 2020).

239. *Id.* at 370.

240. *Id.* at 371–79.

241. *Id.* at 377.

IV. CAMPAIGN/ORGANIZATION STANDING

A. Preexisting Law

Courts often recognize the standing of political parties to bring election challenges.[242] They consider campaign organizations and political parties similarly to candidates when it comes to standing, including using a "competitive standing" theory.[243]

The challenge to Indiana's voter identification law is a good example. In that case, the Seventh Circuit ruled that the Democratic Party had standing to challenge Indiana's requirement that voters present a photo identification in order to vote. The court recognized the reality that most voters without photo identification "are low on the economic ladder."[244] Citing polling data, the court further recognized the reality that such persons "are more likely to vote for Democratic than Republican candidates."[245] Thus, the new law injured the Democratic Party by requiring it to devote resources to turn out voters who might otherwise be discouraged to show up.[246] The court also recognized the associational standing of the Party on behalf of those of its members who lacked adequate photo identifications.[247]

Indeed, political parties may often be better situated than individual voters to sue on these claims. They represent a wide diversity of voters who may be adversely affected by electoral rules and can

242. *See* Tex. Democratic Party v. Benkiser, 459 F.3d 582, 585–86 (5th Cir. 2006) (finding that a party had standing to challenge a last-minute replacement of one rival candidate with another on the ballot); Schulz v. Williams, 44 F.3d 48, 52 (2d Cir. 1994) (finding that the Libertarian Party had standing to challenge ballot access laws); Owen v. Mulligan, 640 F.2d 1130, 1132–33 (9th Cir. 1981) (finding that a county Republican Central Committee had standing to challenge the USPS's practice of providing preferential mail rates to rival candidate); SAM Party v. Kosinski, 483 F. Supp. 3d 245, 250 n.1 (S.D.N.Y. 2020) (noting that a third party could challenge ballot access provisions regarding status as a recognized "party," but lacked standing to challenge ballot access provision for independent candidates unaffiliated with a party).

243. *See, e.g.*, Green Party of Tenn. v. Hargett, 767 F.3d 533, 542–44 (6th Cir. 2014) (concluding that the Green Party had standing to challenge ballot-access laws); Pavek v. Simon, 967 F.3d 905, 907 (8th Cir. 2020) (finding that a campaign had standing to challenge a ballot-ordering provision).

244. Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 951 (7th Cir. 2007); *aff'd*, 553 U.S. 181 (2008).

245. *Id*.

246. *Id.*

247. *Id.*

represent a broader range of interests, not limited to the individual circumstances of one or a few voters.[248]

In some cases, political parties and organizations can separately achieve "associational standing" and bring suit on behalf of their members. Associational standing is met where (1) the organization's members would have standing to sue in their own right, (2) the interests sought to be protected are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[249] Typically, the organization meets the third prong of the test if it seeks only injunctive relief and not money damages.[250] And, as noted above with respect to candidates themselves, organizations can satisfy their standing burden by showing that the challenged governmental practice has forced them to divert resources to deal with the practice.[251] To prevail under that theory, however, organizations must be specific about what activities they would divert resources *from*, and what they would divert resources *to*, as a result of the challenged voting or election rule.[252]

B. 2020 Election Cases

In some cases, party organizations were cursorily dismissed as lacking standing, sans analysis.[253] In others, courts dismissed them on standing grounds for a pleading deficiency surprisingly common in these cases. They raised a "competitive standing" theory but

248. *See* Zipkin, *supra* note 44, at 227–38 (arguing for a broader, less individualized approach to standing in such cases and thus for broader organizational standing).

249. Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977); *see also* Am. Civ. Rts. Union v. Martinez-Rivera, 166 F. Supp. 3d 779, 790–91 (W.D. Tex. 2015) (finding that a nonprofit election integrity group had organizational standing to challenge the alleged failure of a county election office to conduct list maintenance efforts and purge voter registration rolls of ineligible voters).

250. Clark v. McDonald's Corp., 213 F.R.D. 198, 207 (D.N.J. 2003).

251. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 378–79, 379 n.21 (1982) (concluding that a fair housing organization had standing to challenge discriminatory renting practices); Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1163 n.13, 1165–66 (11th Cir. 2008) (finding that the NAACP had standing to challenge a voter photo ID law based on a 'diversion of resources' theory).

252. *See* Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1250–52 (11th Cir. 2020) (concluding that the Democratic National Committee and a Democratic-supporting PAC lacked standing under this theory for failing to so allege with sufficient specificity).

253. Bowyer v. Ducey, 506 F. Supp. 3d 699, 710 (D. Ariz. 2020) (dismissing standing of Republican Party County Chair plaintiffs "outright," because plaintiffs' briefing did not contain any arguments explaining why they had standing).

failed to allege how the challenged governmental practices would disproportionately harm *their* side's voters.[254]

Still another approach was to dismiss for failure to meet the first prong of the associational standing test. The organization's individual members, voters, supposedly lacked standing to pursue a fraud or "illegal votes cast vote dilution" theory because these harms were too "speculative" or "general."[255] This analysis is subject to the same criticism above as applied to voter plaintiffs.[256]

Other courts used perhaps the most problematic approach when they rejected the standing of the Trump Campaign organization for failing to meet the second prong of the associational standing test: the interests asserted are germane to the organization's purpose. One district court in Nevada reasoned that the Trump Campaign did not represent Nevada voters, but rather only candidate Trump's "electoral and political goals."[257] While it may achieve those goals through Nevada voters, the court continued, the individual interests of Nevada voters are wholly distinct.[258]

This is dubious. Federal courts generally recognize that the second, "germaneness" prong of associational standing is "undemanding."[259] All that is required is that the lawsuit would, if successful, "reasonably tend to further general interests that individual members sought to vindicate in joining the association."[260] The interests sought in the litigation need not be the sole or primary goals of the organization.[261] The interests of the organization and its members need not be exactly coextensive.[262]

The Trump Campaign in Nevada undoubtedly had members who were Nevada voters who supported candidate Trump. They shared the Trump Campaign's interest in seeing Trump elected, and thus furthered Trump's "electoral and political goals." The cam-

254. Donald J. Trump for President, Inc. v. Cegavske, 488 F. Supp. 3d 993, 1003 (D. Nev. 2020).

255. *Id.* at 1000.

256. *See supra* Section III.

257. *Cegavske*, 488 F. Supp. 3d at 999.

258. *Id.*

259. Presidio Golf Club v. Nat'l Park Serv., 155 F.3d 1153, 1159 (9th Cir. 1998); Humane Soc'y of U.S. v. Hodel, 840 F.2d 45, 58 (D.C. Cir. 1998).

260. Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc., 448 F.3d 138, 149 (2d Cir. 2006); W. Va. Coal. Against Domestic Violence, Inc. v. Morrisey, No. 2:19-cv-00434, 2020 WL 6948093, at*7 (S.D. W. Va. Nov. 25, 2020) (quoting *Downtown Dev., Inc.*).

261. *W. Va. Coal. Against Domestic Violence, Inc.*, 2020 WL 6948093, at *7–8 (rejecting defense's argument that the domestic violence coalition had no interest in being able to ask visitors if they bore firearms, because the organization was interested in curbing domestic violence and not the free exchange of ideas).

262. *Id.* at *7.

paign did not need to represent the interests of *all* Nevada voters, or of all Nevada voters equally. It sufficed if there were at least *some* members of its organization who would have standing and who share the general purposes of the campaign.

The Nevada court had a similarly cramped view of the standing of the Republican National Committee and Nevada Republican Party, who were also plaintiffs. In addition to "associational standing," which is derivative of the standing held by an association's individual members, the RNC and Nevada GOP also asserted "direct organizational standing"—i.e., that the state's alleged violations caused a diversion of its resources and a frustration of its mission.[263] Courts commonly recognize this theory of standing for political parties and organizations.[264]

The RNC and Nevada GOP argued that the Nevada Legislature's pandemic-inspired expansion of mail balloting would confuse Nevada voters and keep them away from the polls. The organizations would thus have to divert resources to voter education and Get-Out-The-Vote efforts.[265] The court rejected this argument because voters confused by the new mail balloting rules could still vote in person; the rules for voting in person had not changed.[266]

This reasoning seems persuasive if one views the "diversion of resources" theory in isolation. Combining a "diversion of resources" with a "competitive standing" theory might be more effective: i.e., because Democrats vote by mail at greater rates, Republicans will need to take advantage of the new mail voting opportunities to stay competitive, thus requiring more resources. However, in yet another failure of pleading, the plaintiffs in *Cegavske* failed to allege this partisan imbalance.[267]

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263. Donald J. Trump for President, Inc. v. Cegavske, 488 F. Supp. 3d 993, 999 (Dist. Nev. 2020).

264. *See, e.g.*, DNC. v. Reagan, 329 F. Supp. 3d 824, 841 (D. Ariz. 2018), *rev'd on other grounds sub nom.* DNC v. Hobbs, 948 F.3d 989 (9th Cir. 2020) (en banc) (finding that a party had organizational standing to challenge a state law banning ballot collection by third parties); Ga. Coal. for People's Agenda, Inc. v. Kemp, 347 F. Supp. 3d 1251, 1258 (N.D. Ga. 2018) (finding that a public advocacy organization had organizational standing to challenge a state voter ID law); Feldman v. Ariz. Sec'y of State's Office, 208 F. Supp. 3d 1074, 1080–81 (D. Ariz. 2016) (finding that a political party had organizational standing to challenge law limiting who may collect a voter's early ballot); Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) (finding that a political party had standing to challenge voter ID law).

265. *Cegavske*, 488 F. Supp. 3d at 1001.

266. *Id.* at 1002.

267. *Id.*

V. ELECTORS

There is relatively little preexisting precedent on the standing of potential Electors to raise election-related claims. But the 2020 round of election litigation certainly provided ample opportunity for courts to blaze new trails in this area. With the notable exception of the Eighth Circuit, courts by and large rejected the contention that persons nominated by their political party to be presidential Electors had standing to sue.

The Eighth Circuit provided the broadest reading of standing, holding that persons designated by the Republican Party to be potential presidential Electors had standing to challenge, under the Electors Clause, a state court-ordered extension of Minnesota's statutorily provided deadline for the receipt of mail ballots.[268] Overruling a district court ruling to the contrary, the Eighth Circuit concluded that Minnesota election statutes treat Electors as candidates.[269] As such, they had a concrete and particularized interest in ensuring that "the final vote tally accurately reflects the legally valid votes cast," and thus had standing.[270] In doing so, the Eighth Circuit directly (and properly) rejected the notion that only the state legislature would have standing to bring an Electors Clause claim.[271]

The opinion drew a dissent, which concluded that although Minnesota law "at times refers to them as candidates," the Electors "are not candidates for public office as that term is commonly understood."[272] This is because they are not "presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals"—i.e., the actual candidates for President.[273] Even if Electors were "candidates," the dissent continued, their claimed injury of an "inaccurate vote tally" is "precisely the kind of undifferentiated, generalized grievance about the conduct of government" that the Supreme Court in *Lance* considered insufficient for stand-

268. Carson v. Simon, 978 F.3d 1051, 1057 (8th Cir. 2020). The court-ordered deadline change was the product of a consent decree agreed to by the state. *Id.*

269. *Id.* at 1058.

270. *Id.* The court reasoned that this injury was "directly traceable" to the State defendants, and that the requested injunction would address the injury. *Id.*

271. *Id.* at 1058–59 ("Although the Minnesota Legislature may have been harmed by the Secretary's usurpation of its constitutional right under the Elector Clause, the Electors have been as well.").

272. *Id.* at 1063 (Kelly, J., dissenting).

273. *Id.* (citing MINN. STAT. § 2048.03 (2020) (providing that a vote cast for the presidential candidate shall be considered a vote cast for that party's Electors)).

ing under the related Elections Clause.[274] Because they are legally required under Minnesota law to vote for the presidential candidate who won the state's popular vote, the dissent reasoned, they lack a "particularized stake" distinct from that of the general population.[275]

Most other courts addressing this issue in 2020 agreed with the dissent. A federal district court in Wisconsin, for example, ruled that potential Electors did not have standing, citing the Eighth Circuit decision and expressly stating that the dissent's reasoning was more persuasive.[276] That decision also relied on the U.S. Supreme Court's 2020 decision in *Chiafalo v. Washington*,[277] where the Court ruled that Electors had no right to be "faithless," and that states could cancel the vote of and replace any Elector who disregarded the election results in her state. Other courts reached the same result on Elector standing and distinguished the Eighth Circuit decision by noting that their state statutes did not characterize Electors as "candidates."[278]

The Eighth Circuit majority had the better view. Electors have interests distinct from that of voters. The Supreme Court decision in *Chiafalo* is not necessarily to the contrary.

At present, 32 states and the District of Columbia require Electors to pledge to cast their Electoral College vote for the candi-

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274. *Id.*

275. *Id.* (quoting Lance v. Coffman, 549 U.S. 437, 442 (2007)).

276. Feehan v. Wis. Elections Comm'n, 506 F. Supp. 3d 596, 612 (E.D. Wis. 2020). The court stated:

> Like Minnesota electors, Wisconsin electors may be referred to as 'candidates' by statute but they are not traditional political candidates presented to and chosen by the voting public. Their interest in seeing that every valid vote is correctly counted and that no vote is diluted is no different than that of an ordinary voter.

Id.

277. Chiafalo v. Washington, 140 S. Ct. 2316, 2328 (2020).

278. Bowyer v. Ducey, 506 F. Supp. 3d 699, 710 (D. Ariz. 2020) (stating that electors are not "candidates" under Arizona law); *cf.* Gohmert v. Pence, 510 F. Supp. 3d 435, 442 n.1 (E.D. Tex. 2021) (declining to decide whether Electors were "candidates" under Arizona law, because injury asserted was "fairly traceable" to the Vice President, the only named defendant).The latter case is another example of fatal pleading deficiencies: rather than seek as relief an order that they be permitted to vote in the Electoral College, plaintiffs merely sought a declaration that Vice President Pence could exercise discretion to decide that they should so serve, *or* that no one from Arizona should so serve. Rejecting standing on the "redressability" ground, the court ruled that "[i]t is well established that a plaintiff lacks standing where it is 'uncertain that granting the relief . . . would remedy its injuries.'" *Id*. at 443 (citing Inclusive Cmtys. Project, Inc. v. Dep't of Treasury, 946 F.3d 649, 657–58 (5th Cir. 2019)).

date who won the state's popular vote.[279] But not all states do so. And in many of these states, there is no penalty for violating that pledge, or the penalty is only a small fine.[280] And only 15 states go so far as to provide that faithless Electors will be removed as Electors or that their Electoral College votes will not count.[281] This number may of course increase now that the Supreme Court in *Chiafalo* clarified that states have the authority to do so.[282]

So, for many Electors, they still have the legal ability to use their independent judgment and cast a vote different from that called for by the result of the presidential election in their state. To that extent, they certainly have an interest in serving in the Electoral College distinct from that of the general populace.

But even in states which have removed that possibility, Electors have an interest distinct from that of the public at large, albeit perhaps not a particularly weighty one. Simply put, Electors get to do things, and achieve honor and a place in history, that distinguish them from the average voter. The Electors physically meet in a designated place in their state capital for an official Electoral College ceremony. The meeting is typically solemnized with patriotic traditions like the Pledge of Allegiance or the national anthem.[283] Each Elector then gets to sign the official Certificate of Vote.[284] All Certificates of Vote are then held in perpetuity as an official record by the National Archives.[285] The Certificate of Vote contains the names of each Elector from that state.[286]

Thus, an Elector could certainly meet the "particularized" portion of the "injury in fact" prong. Electors have an interest distinct

279. *Chiafalo*, 140 S. Ct. at 2321; *see also Summary: State Laws Regarding Presidential Electors*, NAT'L ASS'N OF SEC'YS OF STATE (Oct. 2020), https://bit.ly/3quxXuD [https://perma.cc/KYQ5-SLL7].

280. Only six states explicitly.

281. *See* ARIZ. REV. STAT. ANN. § 16-212 (2021); CAL. ELEC. CODE §§ 6906, 18002 (West 2021); COLO. REV. STAT. § 1-4-304 (2021); IND. CODE § 3-10-4-9 (2019); MICH. COMP. LAWS § 168.47 (2021); MINN. STAT. §§ 208.43, .46 (2021); MONT. CODE ANN. §§ 13-25-304, -307 (2021); NEB. REV. STAT. §§ 32-713, -714 (2021); NEV. REV. STAT. §§ 298.045, .075 (2021); N.M. STAT. ANN. § 1-15-9 (2021); N.C. GEN. STAT. ANN. § 163-212 (West 2021); OKLA. STAT. tit. 26, §§ 10-102, -109 (2021); S.C. CODE ANN. § 7-19-80 (2021); UTAH CODE § 20A-13-304 (2021); WASH. REV. CODE §§ 29A.56.084, .090 (2021).

282. *Chiafalo*, 140 S. Ct. at 2317.

283. Jordan Smith, *What Happens at the Electoral College Meeting?*, FOX 10 PHX. (Nov. 24, 2020), https://bit.ly/3hd3m08 [https://perma.cc/3BTH-ARQW].

284. *Roles and Responsibilities in the Electoral College Process*, NAT'L ARCHIVES, https://bit.ly/3qt6tW0 [https://perma.cc/FGX2-G32J] (last visited Aug. 5, 2021).

285. *See id.*

286. *See, e.g.*, *2020 Electoral College Results*, NAT'L ARCHIVES, https://bit.ly/3xZktJU [https://perma.cc/8RUG-7F9H] (last visited Aug. 5, 2021).

from the rest of the citizenry. The question is whether this interest is sufficiently non-abstract to meet the "concreteness" portion of the first prong, which the Supreme Court has said is a distinct inquiry from whether the alleged harm is "particularized."[287]

As the Supreme Court has recently made clear, a "concrete" injury can be an intangible injury.[288] Courts can, and do, recognize "dignitary harm" as sufficient for standing, including in cases involving the violation of civil rights. Indeed, the Court has stated that the "stigma" caused by discrimination "is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing."[289]

This notion extends to the context of election and voting rights cases. Under the U.S. Supreme Court cases of *Shaw v. Reno* and *Miller v. Johnson*,[290] white plaintiffs can sue under the Equal Protection Clause to challenge so-called "reverse racial gerrymanders" even where they cannot show any actual vote dilution.[291] Thus, even when a white plaintiff asserting such a claim cannot show that a challenged redistricting plan over-represents African-Americans, the mere existence of an oddly-shaped black-majority district which allegedly subordinates traditional redistricting principles to race can constitute a legally cognizable harm.[292] Indeed, such a white plaintiff could prevail on this kind of a claim even if white voters were *over-represented* under a districting plan but could still point to one oddly-shaped Black or Hispanic district.[293] According to the Supreme Court, such a district supposedly causes "stigmatic harm:" it "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls."[294] Scholars have referred to this as "expressive harm."[295]

There is much cause to be skeptical about regarding this "expressive harm" theory in the context of *Shaw/Miller* "reverse racial gerrymander" claims. Whether prodded by litigation under the Vot-

287. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548–50 (2016).

288. *Id.*; *see also* Miller v. Johnson, 515 U.S. 900, 916 (1995).

289. Allen v. Wright, 468 U.S. 737, 755 (1984).

290. *See generally* Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995).

291. *Shaw*, 509 U.S. at 647–48.

292. *Id.*

293. *See, e.g.*, *Miller*, 515 U.S. at 916; Bush v. Vera, 517 U.S 952, 979 (1996); Shaw v. Hunt, 517 U.S. 899, 900 (1996).

294. *Shaw*, 509 U.S. at 647.

295. *See generally* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

ing Rights Act, the threat of such litigation, or honest policy concerns about minority vote dilution on the part of the jurisdiction enacting the districting plan, minority-majority districts are almost always drawn in situations where competent statistical evidence demonstrates racially polarized voting patterns in the jurisdiction.[296] Thus, the tendency of minority voters to vote alike is not some bigoted or condescending supposition; it has been demonstrated. There is no "stigma" in recognizing this evident reality. Otherwise, all traditional minority vote dilution claims under the Voting Rights Act would be unconstitutional.[297] And there is no constitutional requirement that districts be compact, either. So, absent actual vote dilution, it is hard to see how an oddly-shaped minority district creates a "concrete" harm to a white voter. But we nonetheless recognize it as such. If the bar is that low in the election context, then a disappointed potential Elector ought to be recognized as having a concrete harm as well—let alone an actual candidate or political party.

Another illustrative example of how low the "concreteness" bar can be comes from "one person, one vote" cases. For congressional redistricting, the doctrine requires that districts be mathematically equal in population "as nearly as practicable."[298] Although state and local redistricting is given more leeway, allowing deviations from ideal district populations to be considered presumptively constitutional,[299] states must draw congressional districts "with populations as close to perfect equality as possible."[300] As a result, standing has gone unchallenged when voter plaintiffs pursue a one-person, one-vote theory, even when the asserted harm is so mathematically miniscule as to border on the theoretical.[301] As one commentator put it, "Any citizen who lives in a congressional district whose population deviates even a scintilla from the ideal district size has standing."[302] While robust judicial review of malap-

296. *See* STEVEN J. MULROY, RETHINKING U.S. ELECTION LAW: UNSKEWING THE SYSTEM 84–89 (2018).

297. *Id.* at 87 n.22 (making this point).

298. Wesberry v. Sanders, 376 U.S. 1, 7–8 (1973).

299. Mahan v. Howell, 410 U.S. 315, 328–29 (1973).

300. Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016) (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969)).

301. *See, e.g.*, Anne Arundel Cnty. Republican Cent. Comm. v. State Advisory Bd. of Election L., 781 F. Supp. 394, 395, 398–99 (D. Md. 1991) (three-judge district court) (reaching the merits of a malapportionment claim when the challenged districting plan deviated by an average of 10 people from the ideal district population of 597,684 people).

302. Pamela Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1719 (1999).

portionment is certainly sound as a doctrinal and normative matter, it is hard to see how this is less "abstract" and more "concrete" than the plight of a potential Elector cheated out of his chance to make history.

VI. ELECTED OFFICIALS

A unique standing issue arose in one of the last 2020 election challenges to be filed, *Gohmert v. Pence*.[303] In that case, a House of Representatives member and a group of potential Electors claimed that the rules for the Joint Session of Congress provided by the Electoral Count Act to finalize the certification of the presidential election results were invalid,[304] that those Electoral Count Act provisions were unconstitutional, and that, contrary to the Act, the Vice President had sole authority to determine which slate of Electors from a contested state should count.[305] Specifically, the complaint asserted that the Electoral Count Act provided for the House to determine disputes as to a particular state's Electoral votes by vote of the membership as a whole, as opposed to the state-by-state voting procedure set out in the 12th Amendment.[306]

The district court properly rejected the congressman's standing because his theory complained of an institutional injury to the House of Representatives as a whole. This holding is in accord with precedent that says that just a few members of a legislative house lack authority to sue on behalf of the entire house, or to vindicate that house's rights.[307]

In the alternative, Rep. Goehmert (belatedly, in his reply brief) asserted rights as a voter. But the court correctly dismissed this theory of standing as well, because his pleadings made clear that he was not complaining of a problem in the Texas presidential election in which he participated, but rather specifically his right to participate in the upcoming congressional proceedings held pursuant to the Electoral Count Act.[308]

One part of the decision does give pause. The court rejected the claimed injury as "speculative."[309] According to the court, the

303. Gohmert v. Pence, 510 F. Supp. 3d 435, 441 (E.D. Tex. 2021).

304. 3 U.S.C. §§ 5, 15 (2019) (containing the disputed provisions).

305. *Gohmert*, 510 F. Supp. 3d at 438–39.

306. *Id.* at 440.

307. *See, e.g.*, Raines v. Byrd, 521 U.S 811, 821 (1997).

308. *Gohmert*, 510 F. Supp. 3d at 441. His claimed injury was that when he participated in the Joint Session of Congress, he would "not be able to vote as a Congressional Representative in accordance with the Twelfth Amendment." *Id.* at 440.

309. *Id.* at 441.

claimed injury required "a series of hypothetical—but by no means certain—events."[310] Specifically, one Representative and one Senator would have to object to a state's vote certification; Vice President Pence would then have to decline to rule favorably on the objection, and instead send each chamber to debate separately per the Electoral Count Act, and preside in such a way that the House would vote based on total membership, rather than state-by-state.[311]

This result is problematic, and a good example of why courts should be less strict in requiring that asserted harms be "certainly impending."[312] If courts wait until the feared electoral harm is certain and imminent, it will be too late to provide relief before the election. It will also often be too late to provide relief after the election because it may be difficult to discern exactly how many votes (if any) were affected by the alleged electoral impropriety.[313] For example, in a challenge to a voter identification requirement, a court could not speculate post-election about how many voters may have been discouraged from attempting to vote, so there would be no grounds for overturning an election result.

A similar dynamic was at work in *Gohmert*. If one waited to see whether members of Congress would object to a state's presidential vote, and to see how Vice President Pence would react, it would then be too late to file suit and seek relief: Congress would have made a final determination on the presidential election. The opportunity to either have Vice President Pence make a sole determination, or for the House to vote on a state-by-state basis, would have been lost.[314]

Indeed, courts in election cases have recognized that an allegation of feared future harm will suffice as long as there is "a 'substantial risk' that the harm will occur."[315] Here, there was more

310. *Id.*

311. *Id.*

312. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).

313. The tendency of courts to apply the "capable of repetition yet evading review" exception to mootness in election cases may help somewhat in this regard. *See* Storer v. Brown, 415 U.S. 724, 737 n.8 (1974). It may allow continued judicial consideration of the claimed electoral problem for future elections. But that will be small comfort to the plaintiffs who are concerned about the actual result of the election at hand.

314. A court-ordered "do-over" of the Joint Session of Congress seems extraordinary and farfetched in this context. And, the political momentum to resist any retroactive changes once Congress completed its Joint Session would be irresistible. A post-January 6 lawsuit was not plausible as a practical reality.

315. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 414 n.5).

than a "substantial risk" that the Joint Session would play out as Rep. Gohmert predicted. Publicly available statements already demonstrated that at least one Representative and at least one Senator would object to a state's certification, forcing Vice President Pence to rule on the objection, and Vice President Pence had already announced his intention to follow the Electoral Count Act procedures rather than purport to decide the issues by himself.[316]

Much more coherent would have been a ruling which accepted standing on the basis of the claimed injury, but simply rejected the suit on the merits. There is no legitimate authority requiring that a congressional vote *to choose between two competing slates of Electors* has to use the same voting procedure as the Twelfth Amendment, which was designed for the distinct situation when *no one candidate obtained a majority of the Electoral votes*. That latter situation would normally occur because there were three or more candidates splitting the vote.[317] *Gohmert* presented the former situation, as the plaintiffs themselves alleged.[318]

CONCLUSION

On the whole, while the cases discussed herein reached the correct result on the merits, they were quite a mixed bag on the question of standing. While some cases correctly analyzed standing doctrine, a surprisingly large number did not. They often reached problematic conclusions rejecting the right of Electors to sue,[319] or of anyone other than state legislatures to sue under the Electors Clause;[320] or the right of voters to claim vote dilution from rules

316. Carl Campanile, *VP Pence Says He Can't Block Congress from Certifying Electoral College Results*, N.Y. POST (Jan. 6, 2021, 1:31 PM), https://bit.ly/2Tb2CAD [https://perma.cc/2ZCT-XHSL]; Maggie Haberman & Annie Karni, *Pence Said to Have Told Trump He Lacks Power to Change Election Result*, N.Y. TIMES (Apr. 30, 2021), https://nyti.ms/3x1b9ov [https://perma.cc/TL62-AHQ3]; Kyle Cheney & Josh Gerstein, *Pence: Gohmert's Fight to Overturn the 2020 Election Results is with Congress, Not Me*, POLITICO (Dec. 31, 2020, 6:57 PM), https://politi.co/3gV8KpY [https://perma.cc/SXZ9-489Y].

317. One possible theory here might be that if Congress rejected a state's certified Electors, but failed to rule that a competing slate of Electors was appointed, then the "plurality winner only" scenario contemplated by the Twelfth Amendment might be triggered. But that argument would also be unavailing. A mere failure of a state or states to certify *any* presidential winner would not trigger the Twelfth Amendment procedure, which kicks in only if no candidate receives a "majority of the whole number of Electors *appointed*." U.S. CONST. amend. XII (emphasis added). Thus, states racking up zero Electoral votes would reduce the denominator, and, thus, the number of Electoral votes needed to achieve a majority.

318. Gohmert v. Pence, 510 F. Supp. 3d 435, 438–39 (E.D. Tex. 2021).

319. *See supra* Section V.

320. *See supra* Section II.B.3.

allowing illegal votes to be cast.[321] They often confused standing with the merits,[322] or with mootness,[323] or with the perceived impracticality of the requested relief.[324] Almost laughably, at least one court improperly ruled that there was insufficient overlap of interests between a campaign and the voters supporting that campaign,[325] and another cavalierly dismissed as too "speculative" future events which were near-certain.[326]

The various rationales for having a standing doctrine in the first place counsel for a more relaxed approach. When voters, candidates, campaigns, or Electors sue over voting and election rules, they generally have a sufficient stake in the outcome to adequately develop the factual record and the law. If the various election cases brought during the election year of 2020 are any guide, there is no significant frequency of collusive litigation. And the disputes involved are sufficiently detailed and concrete as to avoid any undue risk of "abstract" disputes leading to wrong decisions. Finally, as discussed above,[327] the very fact that they involve claimed flaws in the electoral process means that the political process may not be adequate to address the flaws, thus justifying the need for judicial intervention and ameliorating concerns about judicial overreach.

In light of this, clarity about a few basic rules of standing in election cases is desirable.

First, voters should continue to have standing whenever they challenge a direct impediment to their ability to cast a ballot and have it counted with proper weight, from registration requirements, to voter purge practices, to early/mail/in-person voting procedures, to vote dilution stemming from methods of election and districting decisions. They should also be able to challenge "illegal votes cast voter dilution" theories wherever they can plausibly and specifically show that the threat of illegal votes would tend to skew the electoral result in a particular direction unfavorable to their own interests. They should further be able to challenge the legality of items placed on the ballot, as well as rules which affect transparency and deny voters access to material information about candidates and referenda (e.g., campaign disclosure information).

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321. *See supra* Section III.B.2.

322. *See supra* Sections II.B.4, III.B.2.

323. *See supra* Section II.B.4.

324. *See supra* Section III.B.4.

325. *See* Bowyer v. Ducey, 506 F. Supp 3d 699, 724 (D. Ariz. 2020); *supra* Section IV.B.

326. *See* Gohmert v. Pence, 510 F. Supp. 3d 435, 441 (E.D. Tex. 2021); *supra* Section V.

327. *See supra* Section I.

Candidates and parties should be able to challenge all of the above situations, plus rules which affect their own access to the ballot, and the contents of the ballot. In addition, they should be able to challenge election rules which less directly affect the competitive environment, such as methods of election, the implementation of voter-adopted election reforms, rules regarding political advertising and debates, and regulations of campaign finance. For these purposes, campaign organizations, and the Political Action Committees they control, should be treated the same as candidates and parties.

Elector nominees should have the ability to challenge decisions affecting the outcome of the presidential election.

The rules regarding all of the above should not vary depending on whether the underlying claims sound in Equal Protection, Due Process, the Electors Clause, or other constitutional theories. The standing of statutory claims, of course, would be governed by the statutory language regarding who has a cause of action (although statutory ambiguity should be resolved with respect to the above principles).[328]

Finally, even after the roiling of 2020, garden-variety election contests should still be decided under state law, with reference to state law standing principles, which tend to rely mostly on candidates and parties to bring such claims. But any such limits should be properly understood as limitations based on the merits, or on federalism/prudential principles, rather than as standing doctrine limits.

If democracy requires broad and fair access to the franchise, it also requires broad and fair access to the courthouse.

328. Until recently, it might have been assumed that if a statute clearly gave a party a private right of action to bring a particular claim, such a party had Article III standing. However, the Supreme Court just recently clarified that this is not always the case. In *TransUnion, LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Court held that even where a statute provides for a private right of action, a plaintiff must still demonstrate a sufficiently "concrete" injury under Article III. *Id.* at 2205 (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1543 (2016)). *TransUnion* involved a Fair Credit Reporting Act class action complaining of a credit reporting agency's mistaken listing of thousands of consumers as persons on a terrorist watch list and thus ineligible for credit. The Court held that only those consumers who could show that their erroneous report was actually sent to a third-party vendor had standing to sue. *Id.* at 2209–11. A risk of future harm was not enough, regardless of what the FCRA provided. *Id.* at 2211. Nonetheless, in all the examples discussed above in this Conclusion, the injuries seem at least as concrete as that recognized in *TransUnion*. Thus, as a practical matter, in most election cases, if a statute confers a private right of action on a party, that party will have Article III standing.