

No. 24-1260

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**In the Supreme Court of the United States**

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MICHAEL WATSON, MISSISSIPPI SECRETARY OF STATE,  
*Petitioner,*

v.

REPUBLICAN NATIONAL COMMITTEE, ET AL.,  
*Respondents.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE  
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**BRIEF FOR CENTER FOR ELECTION  
CONFIDENCE, INC., RESTORING INTEGRITY  
AND TRUST IN ELECTIONS, INC., AND  
HONEST ELECTIONS PROJECT  
AS *AMICI CURIAE* IN SUPPORT  
OF GRANTING CERTIORARI**

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## TABLE OF CONTENTS

|                                                                                          | Page |
|------------------------------------------------------------------------------------------|------|
| Table of Authorities .....                                                               | ii   |
| Interest of <i>Amici Curiae</i> .....                                                    | 1    |
| Summary of the Argument .....                                                            | 3    |
| Reasons for Granting the Writ.....                                                       | 5    |
| I. This important question requires this Court’s<br>prompt resolution.....               | 5    |
| A. Mail-in voting is a recent innovation with<br>inherent risks.....                     | 6    |
| B. Receiving votes after Election Day is a<br>newer development with greater risks. .... | 9    |
| C. Courts disagree on the legality of late mail-<br>in ballot receipt rules.....         | 13   |
| II. The decision below is correct. ....                                                  | 16   |
| A. The default federal rule is that ballots must<br>be received by Election Day.....     | 17   |
| B. Mississippi’s theory would enable the<br>mischief Congress sought to avoid.....       | 19   |
| Conclusion.....                                                                          | 21   |

## TABLE OF AUTHORITIES

|                                                                                                                                                                                                                                                                          | Page(s)      |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| <b>CASES</b>                                                                                                                                                                                                                                                             |              |
| <i>Arizona v. Inter Tribal Council of Arizona, Inc.</i> ,<br>570 U.S. 1 (2013).....                                                                                                                                                                                      | 11, 17       |
| <i>Bost v. Ill. State Bd. of Elections</i> ,<br>684 F. Supp. 3d 720 (N.D. Ill. 2023), <i>aff'd on other grounds</i> ,<br>114 F.4th 634 (CA7 2024), <i>cert. granted sub nom. Bost v. Ill. Bd. of Elections</i> , No. 24-568,<br>2025 WL 1549779 (U.S. June 2, 2025)..... | 14           |
| <i>Burson v. Freeman</i> ,<br>504 U.S. 191 (1992).....                                                                                                                                                                                                                   | 8            |
| <i>California v. Trump</i> ,<br>2025 WL 1667949 (D. Mass. June 13, 2025).....                                                                                                                                                                                            | 14           |
| <i>City of Newport v. Fact Concerts, Inc.</i> ,<br>453 U.S. 247 (1981).....                                                                                                                                                                                              | 15           |
| <i>Crawford v. Marion County Election Bd.</i> ,<br>553 U.S. 181 (2008).....                                                                                                                                                                                              | 9            |
| <i>Democratic Nat’l Comm. v. Trump</i> ,<br>No. 1:25-cv-00952 (D.D.C. 2025) .....                                                                                                                                                                                        | 15           |
| <i>Democratic Nat’l Comm. v. Wis. State Legislature</i> ,<br>141 S. Ct. 28 (2020).....                                                                                                                                                                                   | 10, 12       |
| <i>Does 1-3 v. Mills</i> ,<br>142 S. Ct. 17 (2021).....                                                                                                                                                                                                                  | 16           |
| <i>Donald J. Trump for President, Inc. v. Way</i> ,<br>492 F. Supp. 3d 354 (D.N.J. 2020) .....                                                                                                                                                                           | 14           |
| <i>Foster v. Love</i> ,<br>522 U.S. 67 (1997).....                                                                                                                                                                                                                       | 3, 5, 17, 18 |

|                                                                                                                                      |        |
|--------------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>Gallagher v. N.Y. State Bd. of Elections</i> ,<br>477 F. Supp. 3d 19 (S.D.N.Y. 2020).....                                         | 12, 13 |
| <i>Griffin v. Roupas</i> ,<br>385 F.3d 1128 (CA7 2004) .....                                                                         | 7      |
| <i>Issa v. Weber</i> ,<br>No. 25-cv-598 (S.D. Cal. 2025).....                                                                        | 15     |
| <i>Labrador v. Poe</i> ,<br>144 S. Ct. 921 (2024).....                                                                               | 15     |
| <i>League of United Latin Am. Citizens v.</i><br><i>Exec. Off. of the President</i> , 2025 WL 1187730<br>(D.D.C. Apr. 24, 2025)..... | 14     |
| <i>Massachusetts v. United States</i> ,<br>435 U.S. 444 (1978).....                                                                  | 15     |
| <i>Merrill v. Milligan</i> ,<br>142 S. Ct. 879 (2022).....                                                                           | 16     |
| <i>Nat’l Ass’n of Mfrs. v. Dep’t of Def.</i> ,<br>583 U.S. 109 (2018).....                                                           | 15     |
| <i>Pa. Democratic Party v. Boockvar</i> ,<br>238 A.3d 345 (Pa. 2020) .....                                                           | 13     |
| <i>Purcell v. Gonzalez</i> ,<br>549 U.S. 1 (2006).....                                                                               | 8, 15  |
| <i>Trump v. CASA, Inc.</i> , No. 24A884,<br>2025 WL 1773631 (U.S. June 27, 2025) .....                                               | 6      |
| <i>United States v. Constantine</i> ,<br>296 U.S. 287 (1935).....                                                                    | 15     |
| <i>Voting Integrity Project, Inc. v. Keisling</i> ,<br>259 F.3d 1169 (CA9 2001) .....                                                | 18     |
| <i>Washington v. Trump</i> ,<br>No. 2:25-cv-00602 (W.D. Wash. 2025).....                                                             | 14     |

|                                                                         |    |
|-------------------------------------------------------------------------|----|
| <i>Whole Woman’s Health v. Jackson</i> ,<br>141 S. Ct. 2494 (2021)..... | 16 |
|-------------------------------------------------------------------------|----|

## CONSTITUTIONAL PROVISIONS

|                                      |       |
|--------------------------------------|-------|
| U.S. Const. art. I, § 4, cl. 1 ..... | 3, 17 |
| U.S. Const. art. II, § 1, cl. 4..... | 3     |

## STATUTES

|                                         |           |
|-----------------------------------------|-----------|
| 10 Ill. Comp. Stat. Ann. 5/19-8.....    | 13, 21    |
| 2 U.S.C. § 1 .....                      | 3, 17     |
| 2 U.S.C. § 7 .....                      | 3, 17, 18 |
| 3 U.S.C. § 1 .....                      | 3, 17     |
| Cal. Elec. Code § 3020 .....            | 11        |
| Miss. Code Ann. § 23-15-637 .....       | 20        |
| Nev. Rev. Stat. Ann. § 293.269921 ..... | 10        |

## OTHER AUTHORITIES

|                                                                                                                                                                                                                         |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| A. Zavala, <i>Why Does California’s Vote Count Take So Long? Secretary of State Explains Delay</i> , KCRA (Nov. 14, 2024), <a href="https://perma.cc/488R-R7YW">https://perma.cc/488R-R7YW</a> .....                    | 11 |
| B. Bowman & S. Wong, <i>Democrats Flip Final House Seat of the 2024 Elections, Narrowing Republicans’ Majority</i> , NBC News (Dec. 4, 2024), <a href="https://perma.cc/MCE4-22FK">https://perma.cc/MCE4-22FK</a> ..... | 11 |
| B. Christie, <i>Former San Luis Mayor Pleads Guilty to Illegally Collecting Early Ballots in 2020 Primary</i> , AZCentral (June 2, 2022), <a href="https://perma.cc/ML8R-P6EW">https://perma.cc/ML8R-P6EW</a> .....     | 8  |
| Brief of <i>Amici Curiae</i> Restoring Integrity and Trust in Elections & Honest Elections Project in Support                                                                                                           |    |

|                                                                                                                                                                                                                                               |      |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| of Petitioners, <i>Bost v. Ill. State Bd. Of Elections</i> ,<br>No. 24-568, 2024 WL 5245866 (Dec. 23, 2024) .....                                                                                                                             | 16   |
| Cong. Globe, 28th Cong., 2d Sess. (1844) .....                                                                                                                                                                                                | 19   |
| Cong. Globe, 42nd Cong., 2d Sess. (1872).....                                                                                                                                                                                                 | 18   |
| D. Palmer, <i>Absentee and Mail Ballots in America:<br/>Improving the Integrity of the Absentee and Mail<br/>Balloting</i> , Lawyers Democracy Fund (Jan. 2019),<br><a href="https://perma.cc/VSC4-TF8E">https://perma.cc/VSC4-TF8E</a> ..... | 6    |
| <i>Delays in Nevada Vote Counting Frustrates Both<br/>Parties</i> , KSNV (Nov. 7, 2024),<br><a href="https://tinyurl.com/36kkdsdn">https://tinyurl.com/36kkdsdn</a> .....                                                                     | 10   |
| <i>Election Mail Readiness for the 2024 General<br/>Election</i> , Report Number 24-016-R24, Office of<br>Inspector General (July 30, 2024),<br><a href="https://perma.cc/RL3L-7T87">https://perma.cc/RL3L-7T87</a> .....                     | 12   |
| Exec. Order No. 14248,<br>90 Fed. Reg. 14005 (Mar. 25, 2025).....                                                                                                                                                                             | 3, 4 |
| G. Fuentes, <i>Voter Fraud Report</i> , The Heritage<br>Foundation, <a href="https://perma.cc/3DLB-HMS4">https://perma.cc/3DLB-HMS4</a> .....                                                                                                 | 8    |
| <i>Mail Ballot Deadlines, 2012–2022</i> , U.S. Election<br>Assistance Commission,<br><a href="https://perma.cc/P6KQ-RG5L">https://perma.cc/P6KQ-RG5L</a> .....                                                                                | 9    |
| <i>Mail Ballot Receipt Deadlines</i> , Movement<br>Advancement Project (July 1, 2025),<br><a href="https://perma.cc/Q6QF-A39P">https://perma.cc/Q6QF-A39P</a> .....                                                                           | 9    |
| N. Korecki, <i>Nevada Results to be Delayed by Clark<br/>County Ballot Processing</i> , NBC News (Nov. 8,<br>2022), <a href="https://perma.cc/U6PX-CXHS">https://perma.cc/U6PX-CXHS</a> .....                                                 | 11   |

|                                                                                                                                                                                                                           |        |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| P. Steinbicker, <i>Absentee Voting in the United States</i> ,<br>32 Am. Pol. Sci. Rev. 898 (1938).....                                                                                                                    | 6      |
| R. Berg-Andersson, <i>Dates of Biennial Federal<br/>Elections for Congress: From 1872 On</i> , Green<br>Papers (June 3, 2009),<br><a href="https://perma.cc/8W2Y-GEEA">https://perma.cc/8W2Y-GEEA</a> .....               | 20     |
| R. Gonzales, <i>North Carolina GOP Operative Faces<br/>New Felony Charges That Allege Ballot Fraud</i> ,<br>NPR (July 30, 2019),<br><a href="https://perma.cc/VU86-6G8J">https://perma.cc/VU86-6G8J</a> .....             | 8      |
| R. Pildes, <i>How to Accommodate a Massive Surge in<br/>Absentee Voting</i> , U. Chi. L. Rev. Online (June 26,<br>2020) .....                                                                                             | 10, 13 |
| <i>Receipt and Postmark Deadlines for Absentee/Mail<br/>Ballots</i> , tbl. 11, National Conference of State<br>Legislatures (June 16, 2025),<br><a href="https://perma.cc/9VVZ-GYSA">https://perma.cc/9VVZ-GYSA</a> ..... | 9      |
| <i>The Evolution of Absentee/Mail Voting Laws, 2020–<br/>22</i> , tbl. 6, National Conference of State<br>Legislatures (Oct. 26, 2023),<br><a href="https://perma.cc/JW72-PBP6">https://perma.cc/JW72-PBP6</a> .....      | 9      |
| UPS Delivery Intercept Options,<br><a href="https://tinyurl.com/mpem98kh">https://tinyurl.com/mpem98kh</a> .....                                                                                                          | 21     |
| <i>Voting by Mail and Absentee Voting</i> , MIT Election<br>Data & Science Lab (Feb. 28, 2024),<br><a href="https://perma.cc/4R83-NMDQ">https://perma.cc/4R83-NMDQ</a> .....                                              | 6, 7   |

## INTEREST OF *AMICI CURIAE*

Center for Election Confidence, Inc., is a non-profit organization that promotes ethics, integrity, and professionalism in the electoral process. CEC works to ensure that all eligible citizens can vote freely within an election system of reasonable procedures that promote election integrity, prevent vote dilution and disenfranchisement, and instill public confidence in election systems and outcomes. To accomplish these objectives, CEC conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. CEC is a resource for lawyers, journalists, policymakers, courts, and others interested in the electoral process. CEC also periodically engages in public-interest litigation to uphold the rule of law and election integrity and files *amicus* briefs in cases where its background, expertise, and national perspective may illuminate the issues under consideration.\*

Restoring Integrity and Trust in Elections, Inc. is a non-profit organization with the mission of protecting the rule of law in the qualifications for, process and administration of, and tabulation of voting throughout the United States. RITE supports laws and policies that promote secure elections and enhance voter confidence in the electoral process. Its expertise and national perspective on voting rights,

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\* Under Rule 37.2, *amici* provided timely notice of their intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.



election law, and election administration will assist the Court in reaching a decision consistent with the Constitution and the rule of law.

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain.

Because laws like Mississippi's that enable return of ballots after Election Day threaten election integrity and accuracy, *amici* have a significant interest in this case.

## SUMMARY OF THE ARGUMENT

The strength of any democratic system depends on voters trusting electoral outcomes. Voter confidence in election integrity is essential to effective democracies, whose legitimacy and ability to govern necessarily depend on voter trust. Thus, as a recent Executive Order put it, “[f]ree, fair, and honest elections unmarred by fraud, errors, or suspicion are fundamental to maintaining our constitutional Republic.” Exec. Order No. 14248, 90 Fed. Reg. 14005 (Mar. 25, 2025).

Recognizing these realities, Congress for nearly two centuries has sought to promote voter trust and consistency by setting a single nationwide Election Day. In Federalist No. 61, Hamilton noted that “uniformity in the time of elections” “may be found by experience to be of great importance to the public welfare.” Acting under Article I, § 4, cl. 1 and Article II, § 1, cl. 4, Congress set a single day for federal elections: The “day for the election” for selecting members of the House of Representatives and Senate is the “Tuesday next after the 1st Monday in November” (“Election Day”). 2 U.S.C. § 7; see *id.* § 1. Likewise, electors of the President and Vice President are to “be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.” 3 U.S.C. § 1.

This Court, in turn, has made clear what Congress’s single-election-day mandate means. By the close of Election Day, all the “combined actions of voters and officials meant to make a final selection of an officeholder” must occur. *Foster v. Love*, 522 U.S. 67, 71 (1997). Under *Foster*, receipt of mail-in ballots

is one of the required “final act[s] of selection” to cast a ballot by Election Day. Receipt is the *sine qua non* of a mail-in vote. A vote is not valid until it is received by election officials. A fully completed mail-in ballot sitting on a kitchen table is not a vote because it has not been received.

But Mississippi and some 13 other States—together containing almost 50% of the national population—are not content to abide by Congress’s mandate that all requisite actions needed to make a “final act of selection” occur by Election Day. *Id.* at 72. These States count mail-in ballots received after Election Day—sometimes *weeks* after. The lags occasioned by these drawn-out deadlines contribute to the protracted delays in counting ballots that persist in many States, delays that are essentially unknown in any other developed country. Loose ballot return rules engender all sorts of mischief and problems, not the least of which is sowing mistrust in our election system at a time when citizens already lack confidence in election integrity.

The Fifth Circuit below invalidated Mississippi’s law permitting late ballot returns as preempted by federal law. That decision was correct, which ordinarily might counsel against this Court’s review. But similar challenges are percolating in many courts, and several have disagreed with the Fifth Circuit. And the President—after years of executive under-enforcement of federal election law—has ordered that the government enforce federal law “against States that” count “absentee or mail-in ballots received after Election Day.” Exec. Order No. 14248, § 7(a). Already,

a district court in Massachusetts has enjoined this order, and other challenges are pending.

All this confirms the need for this Court's prompt resolution of the question presented by the petition—before the question inevitably arrives in an emergency posture. The 2026 federal elections are approaching, and letting a patchwork of unconstitutional state policies and meritless district court injunctions against federal enforcement fester through those elections will exacerbate inconsistencies and mistrust in elections. The Court should grant certiorari and affirm *Foster's* holding that when a ballot is received after Election Day, the vote was not cast by Election Day and thus may not be counted absent a permissible federal exception.

## **REASONS FOR GRANTING THE WRIT**

### **I. This important question requires this Court's prompt resolution.**

The question presented cuts to the heart of the trust that Americans have in our electoral process. This preemption question calls out for the Court's final resolution on a nationwide basis before emergencies develop. Widespread mail-in voting is a recent phenomenon, and extended ballot receipt deadlines are an even newer innovation. These extended deadlines threaten election mechanics and integrity. But several courts have upheld these extended deadlines, and in light of the President's directive to enforce the uniform federal deadline, continuing challenges are certain. Delaying review threatens to disrupt consistent, accurate election administration in the 2026 election. "One of this Court's roles, in

justiciable cases, is to resolve major legal questions of national importance and ensure uniformity of federal law.” *Trump v. CASA, Inc.*, No. 24A884, 2025 WL 1773631, at \*22 (U.S. June 27, 2025) (Kavanaugh, J., concurring). This case presents such a question.

**A. Mail-in voting is a recent innovation with inherent risks.**

The widespread mail-in voting that has characterized recent elections is historically unique. As Mississippi correctly notes, “[f]or 120 years after the Founding,” “States largely required voting to occur in person.” Pet. 26. “[B]efore 1913, only two States had general civilian absentee-voting laws.” *Ibid.* (citing P. Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898, 898 (1938)). In the 1936 election, “only about 2% of 45 million votes were being cast by absentee ballot,” and “[b]y 1960, it was estimated that less than 5% of voters had cast absentee ballots in any election.”<sup>1</sup> “In the 1980s, California became the first state to allow eligible voters to request absentee ballots for any reason at all, including their convenience.”<sup>2</sup> By 2020, 32% of Americans cast a mail-in ballot.<sup>3</sup> And in 2022, over 85% of

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<sup>1</sup> D. Palmer, *Absentee and Mail Ballots in America: Improving the Integrity of the Absentee and Mail Balloting*, at 6, Lawyers Democracy Fund (Jan. 2019), <https://perma.cc/VSC4-TF8E>. Lawyers Democracy Fund is now *amicus* Center for Election Confidence.

<sup>2</sup> *Voting by Mail and Absentee Voting*, MIT Election Data & Science Lab (Feb. 28, 2024), <https://perma.cc/4R83-NMDQ>.

<sup>3</sup> *Ibid.*

voters in Washington, Oregon, Colorado, Hawaii, and Utah voted by mail.”<sup>4</sup>

Mail-in voting carries significantly higher potential for fraud and inaccuracy. As Judge Posner explained, historically “[v]oting fraud [has been] a serious problem in U.S. elections generally,” sometimes “facilitated” mail-in voting. *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (CA7 2004). “[E]ven many scholars who argue that [election] fraud is generally rare agree that fraud with [vote-by-mail] voting seems to be more frequent than with in-person voting.”<sup>5</sup> Plus, mail-in voters “are more prone to cast invalid ballots than voters who, being present at the polling place, may be able to get assistance from the election judges if they have a problem with the ballot.” *Griffin*, 385 F.3d at 1131.

Mail-in voting creates more links in the chain between a ballot being created and a ballot being cast. This creates more opportunities for honest mistakes *and* political chicanery, and partisan actors of all political stripes have used this increased opportunity to engage in fraud and intimidation to gain an electoral advantage.

For example, in the 2018 race for the North Carolina’s Ninth Congressional District, the State Board of Elections refused to certify the election and ordered a new election “after an investigation into an absentee ballot operation on [the Republican candidate’s] behalf suggested that” ballots had been

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

“improperly collected and possibly tampered with” by a political operative.<sup>6</sup>

In an Arizona example, the former Democrat Mayor of San Luis, Guillermina Fuentes, pleaded guilty in 2022 to ballot harvesting charges.<sup>7</sup> Fuentes was a political figure in her community and worked as a political consultant.<sup>8</sup> Using that influence, Fuentes persuaded voters to allow her to collect their ballots and, in some instances, fill out ballots on behalf of the voters.<sup>9</sup>

In short, mail-in voting lacks a historical pedigree and carries unique risks to the election process. Guardrails around mail-in voting are especially important to minimize these risks. As this Court has recognized, there is “a compelling interest in preserving the integrity of [the] election process,” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), so that “an individual’s right to vote is not undermined by fraud in the election process.” *Burson v. Freeman*, 504 U.S. 191, 199 (1992). Protecting the integrity of the election also instills public confidence in the electoral process, which “encourages citizen

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<sup>6</sup> R. Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR (July 30, 2019), <https://perma.cc/VU86-6G8J>.

<sup>7</sup> B. Christie, *Former San Luis Mayor Pleads Guilty to Illegally Collecting Early Ballots in 2020 Primary*, AZCentral (June 2, 2022), <https://perma.cc/ML8R-P6EW>.

<sup>8</sup> G. Fuentes, *Voter Fraud Report*, The Heritage Foundation, <https://perma.cc/3DLB-HMS4>.

<sup>9</sup> *Ibid.*

participation in the democratic process.” *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008).

**B. Receiving votes after Election Day is a newer development with greater risks.**

Allowing mail-in votes to be received after Election Day was largely unknown until recent decades, and these newfound state policies are especially hazardous to fair elections. Late ballot receipt poses many problems for election administration—problems that implicate election integrity and thus citizen confidence in elections.

“During the [COVID] pandemic, with the significant increase in absentee/mail voting, seven states plus D.C. chose to give more time for ballots to be received.”<sup>10</sup> Now, about 14 States plus D.C. broadly count mail-in ballots that are received after Election Day—anywhere from 5:00 p.m. the next day to 2 weeks later.<sup>11</sup> About 47% of the voting-age population lives in these places.<sup>12</sup>

Protracted delays and other election administration problems associated with late receipt of mail-in ballots contribute to diminished confidence in

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<sup>10</sup> *The Evolution of Absentee/Mail Voting Laws, 2020–22*, tbl. 6, National Conference of State Legislatures (Oct. 26, 2023), <https://perma.cc/JW72-PBP6>; see also *Mail Ballot Deadlines, 2012–2022*, U.S. Election Assistance Commission, <https://perma.cc/P6KQ-RG5L>.

<sup>11</sup> *Receipt and Postmark Deadlines for Absentee/Mail Ballots*, tbl. 11, National Conference of State Legislatures (June 16, 2025), <https://perma.cc/9VVZ-GYSA>.

<sup>12</sup> *Mail Ballot Receipt Deadlines*, Movement Advancement Project (July 1, 2025), <https://perma.cc/Q6QF-A39P>.



elections. First and most obviously, late receipt of mail-in ballots necessarily means that ballot counting and resolution of any disputes will be delayed. A uniform Election Day receipt deadline “avoid[s] the chaos and suspicions of impropriety that can ensue if thousands of [mail-in] ballots flow in after election day and potentially flip the results of an election.” *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). As Professor Pildes explained, “[l]ate-arriving ballots open up one of the greatest risks of what might, in our era of hyperpolarized political parties and existential politics, destabilize the election result. If the apparent winner the morning after the election ends up losing due to late-arriving ballots, charges of a rigged election could explode.” *Ibid.* (quoting R. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. Chi. L. Rev. Online (June 26, 2020)). “[D]efinitively announc[ing] the results of the election on election night, or as soon as possible thereafter” avoids these risks, and promotes prompt, trustworthy outcomes. *Ibid.*

These administrative dangers are not hypothetical. Nevada accepts mail-in ballots received until the fourth day after Election Day. Nev. Rev. Stat. Ann. § 293.269921(1)(b)(2). As a result, the close 2024 Senate election was plagued by delays, and the Secretary of State laid blame on the “influx” of late-arriving mail-in ballots.<sup>13</sup> A similar situation played

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<sup>13</sup> *Delays in Nevada Vote Counting Frustrates Both Parties*, KSNV (Nov. 7, 2024), <https://tinyurl.com/36kkdsdn>.

out in the prior election.<sup>14</sup> The glut of ballots received after Election Day caused bipartisan and needless frustration that could have been prevented through simple compliance with federal law.

California, meanwhile, featured a 2024 U.S. House race that was not called until the first week of December—a month after election day.<sup>15</sup> One key reason why: California counts mail ballots received up to one week after Election Day. Cal. Elec. Code § 3020(b).<sup>16</sup> Indeed, “in the 2022 midterm elections,” half of California’s “votes were counted after Election Day.”<sup>17</sup>

Such delays in certifying results of a federal election to the House or the Senate threaten Congress’s ability to convene a full membership and to legislate with that membership. This threat is exactly what the limited Elections Clause failsafe was designed to prevent: a State’s failure “to provide for the election of representatives to the Federal Congress.” *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013). As Hamilton put it in Federalist No. 59, “every government ought to contain in itself the means of its own preservation,” and “an

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<sup>14</sup> N. Korecki, *Nevada Results to be Delayed by Clark County Ballot Processing*, NBC News (Nov. 8, 2022), <https://perma.cc/U6PX-CXHS>.

<sup>15</sup> B. Bowman & S. Wong, *Democrats Flip Final House Seat of the 2024 Elections, Narrowing Republicans’ Majority*, NBC News (Dec. 4, 2024), <https://perma.cc/MCE4-22FK>.

<sup>16</sup> See A. Zavala, *Why Does California’s Vote Count Take So Long? Secretary of State Explains Delay*, KCRA (Nov. 14, 2024), <https://perma.cc/488R-R7YW>.

<sup>17</sup> *Ibid.*

exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.”

Late ballot receipt also risks treating voters differently and fostering confusion in the process. “Elections must end sometime, a single deadline supplies clear notice, and requiring ballots be in by election day puts all voters on the same footing.” *Democratic Nat’l Comm.*, 141 S. Ct. at 28 (Gorsuch, J., concurring in denial of application to vacate stay). As discussed more below, mail-in voters may be able to recall their ballots after Election Day, unlike other voters. See Pet. 12a.

What’s more, a postmark is not always included on returned ballot envelopes. In one New York primary, a court found “uncontroverted evidence that thousands of [mail-in] ballots . . . were not postmarked” at all. *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 30 (S.D.N.Y. 2020); see *id.* at 49 (finding “arbitrary postmarking of [mail-in] ballots”). A recent Postal Service audit report confirmed that this is a widespread problem, but USPS said that it merely “tries to ensure that every return ballot . . . receives a postmark” but would not change its postmark operations “to accommodate” state voting laws.<sup>18</sup> USPS officials have also said “that [mail-in] ballots placed in a USPS mailbox on Election Day after the last pick-up time would not be

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<sup>18</sup> *Election Mail Readiness for the 2024 General Election, Report Number 24-016-R24*, at 11–12, Office of Inspector General (July 30, 2024), <https://perma.cc/RL3L-7T87>.

postmarked” that day. *Gallagher*, 477 F. Supp. 3d at 29. States not adhering to the Election Day deadline essentially outsource to the Postal Service (or other entities) procedures for ensuring proof that voters timely mail ballots, but the Postal Service disclaims that responsibility. All this heightens the risk for disputes about whether a mail-in ballot received after Election Day was properly cast.

Similarly, eliminating the postmark requirement—as Illinois has done in some cases, 10 Ill. Comp. Stat. Ann. 5/19-8(c)—raises the risk of voting occurring after Election Day. The Pennsylvania Supreme Court infamously mandated that some ballots received after Election Day without any postmark be presumed to be timely cast unless “a preponderance of the evidence demonstrates that it was mailed after Election Day.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 371–72 n.26 (Pa. 2020). Combine that holding with Mississippi’s theory and the potential risks of election disruption are manifest.

Last, a prompt receipt of ballots enables States to give voters “an adequate opportunity to cure any inadvertent defects, such as failing to sign the ballot envelope.” Pildes, *supra*. “The earlier the ballots are [received and] processed, the more time there is for voters to do so.” *Ibid*.

Ballot receipt after Election Day is thus a serious—and new—problem facing American elections.

### **C. Courts disagree on the legality of late mail-in ballot receipt rules.**

The lawfulness of late mail-in ballot receipt rules has already divided courts. Especially because of a

recent Executive Order directing enforcement of the federal statutes against such state rules, the cases are sure to multiply. This division in the courts risks conflict and chaos in the upcoming 2026 elections. Such an important question of federal election law deserves a prompt resolution by this Court, outside the exigencies of emergency applications that would be inevitable as the next federal elections approach.

Several courts besides the Fifth Circuit have now considered the legality of late mail-in ballot rules, either in the context of challenges to state law or challenges to the recent Executive Order. Generally, those courts have disagreed with the Fifth Circuit's conclusion. See, e.g., *California v. Trump*, 2025 WL 1667949, at \*13 (D. Mass. June 13, 2025) (“[T]he text of the Election Day statutes require only that all votes are cast by Election Day, not that they are received by that date.”); *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720, 736 (N.D. Ill. 2023), *aff’d on other grounds*, 114 F.4th 634 (CA7 2024), *cert. granted sub nom. Bost v. Ill. Bd. of Elections*, No. 24-568, 2025 WL 1549779 (U.S. June 2, 2025); see also *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 372 (D.N.J. 2020).

As one court put it, “[b]ecause the Supreme Court has not yet had occasion to consider this issue, the lower courts remain divided.” *League of United Latin Am. Citizens v. Exec. Off. of the President*, 2025 WL 1187730, at \*50 (D.D.C. Apr. 24, 2025). And many more cases on this issue are headed for judicial resolution. See, e.g., *Washington v. Trump*, No. 2:25-cv-00602 (W.D. Wash. 2025); *Democratic Nat’l Comm.*

v. *Trump*, No. 1:25-cv-00952 (D.D.C. 2025); *Issa v. Weber*, No. 25-cv-598 (S.D. Cal. 2025).

This conflict between courts on an important question of federal law—especially one that implicates our Nation’s election process—requires this Court’s prompt attention. Because “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy,” *Purcell*, 549 U.S. at 4, resolution by this Court on a nationwide basis of the procedures States must use in federal elections is critically important. Otherwise, the 2026 elections will likely face a tangle of inconsistent state rules and judicial decisions. And as shown by the divisions already present on the issue—reflected in the en banc opinions below—the conflict between courts is unlikely to resolve itself. This conflict warrants certiorari. See *United States v. Constantine*, 296 U.S. 287, 290 (1935) (emphasizing conflicts between a Court of Appeals and district courts in granting certiorari); see also *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 583 U.S. 109, 119 (2018); *Massachusetts v. United States*, 435 U.S. 444, 453 (1978) (similar); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 n.14 (1981) (conflicts between district courts).

Another reason for prompt resolution is to avoid the exigencies of deciding this important federal law election question in an emergency posture. As members of this Court have recognized, “forc[ing] judges into making rushed, high-stakes, low-information decisions at all levels” is “not always optimal for orderly judicial decisionmaking.” *Labrador v. Poe*, 144 S. Ct. 921, 927 (2024) (Gorsuch, J., concurring) (cleaned up) (first quotation); *id.* at 930

(Kavanaugh, J., concurring) (second quotation); see also *id.* at 934–35 (Jackson, J., dissenting); *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring); *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting). Further, this Court has repeatedly said that “[w]hen an election is close at hand, the rules of the road must be clear and settled.” *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring); see *id.* at 880 (collecting cases). By granting certiorari now, the Court can give this important issue the attention it warrants and resolve an important question of federal election law well before the next elections.

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Millions of Americans lack trust in our election system. It is thus essential for both the courts and the elected branches to foster trust in what our election officials are doing. But late mail-in ballot receipt rules—and inconsistent judicial verdicts about the legality of those rules—do the opposite. This needless threat to voter confidence requires this Court’s intervention.

## **II. The decision below is correct.**

This Court should grant certiorari and affirm the Fifth Circuit’s decision. As two *amici* here recently explained,<sup>19</sup> federal law generally precludes counting mail-in ballots that arrive after Election Day. Only

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<sup>19</sup> Brief of *Amici Curiae* Restoring Integrity and Trust in Elections & Honest Elections Project in Support of Petitioners, *Bost v. Ill. State Bd. Of Elections*, No. 24-568, 2024 WL 5245866 (Dec. 23, 2024).

that understanding gives effect to Congress’s desire for a uniform Election Day that would avoid fraud and other mischiefs. Mississippi’s theory, by contrast, would allow ballots to be received at any time after Election Day without limitation. The decision below rightly rejected that extreme theory.

**A. The default federal rule is that ballots must be received by Election Day.**

The Elections Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” U.S. Const. art. I, § 4, cl. 1. This Clause operates as “a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices.” *Foster*, 522 U.S. at 69 (citation omitted).

Thus, any “assumption that Congress is reluctant to pre-empt does not hold when Congress acts under” the Elections Clause. *Inter Tribal Council*, 570 U.S. at 14. “Because the power the Elections Clause confers is none other than the power to preempt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress’s pre-emptive intent.” *Ibid*.

The statutory text sets a specific “day for the election” for federal elections. 2 U.S.C. § 7; see *id.* § 1; 3 U.S.C. § 1 (“election day”). As described by this Court, these statutes set a “uniform federal election day.” *Foster*, 522 U.S. at 72 n.3. And the Court has



held what must occur under federal law by the end of Election Day for votes to be valid: the completion of the “combined actions of voters and officials meant to make a final selection of an officeholder.” *Id.* at 71; see *id.* at 72 (Election Day is when “the final act of selection” must take place); cf. *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (CA9 2001) (noting that this Court in *Foster* held “that the word ‘election’ means a ‘consummation’ of the process of selecting an official”).

Congress considered and rejected an amendment to 2 U.S.C. § 7 that would have permitted States to continue voting after Election Day. See *id.* at 1173 & n.42 (citing Cong. Globe, 42nd Cong., 2d Sess. 676 (1872)). Other voting statutes, like the Help America Vote Act of 2002, “show that Congress knew how to authorize post-Election Day voting when it wanted to.” Pet. 20a. And statutes in other contexts “show[] that Congress knows how to embrace a mailbox rule when it wants to do so.” Pet. 23a. The default federal election rule, however, is that the consummation of votes must be finished by the end of the first Tuesday after the first Monday in November.

But States like Mississippi push the deadline to finalize the necessary steps for selecting a candidate until as late as two weeks after Election Day. That is unlawful under *Foster*. Because ballot receipt is one of the official actions required for a voter to make their selection, if it occurs after Election Day then the vote is untimely and invalid.

Receipt is not some administrative post-vote action like tabulation. Receipt is part of the vote itself. It is therefore different from tabulation and certification,

which may permissibly take place after Election Day. Those are ministerial acts of the government to ascertain the intent of the voter, not the voter's actual selection of a candidate. "The election is . . . consummated because officials know there are X ballots to count, and they know there are X ballots to count because the proverbial ballot box is closed. In short, *counting* ballots is one of the various post-election 'administrative actions' that can and do occur after Election Day." Pet. 13a.

In sum, the Election Day statutes preempt contrary state law and require consummation of the voting process before the end of Election Day. State laws like Mississippi's that seek to extend the date of consummation (*i.e.*, receipt) are unlawful. And allowing those state laws to remain in force contradicts the uniformity that the Elections Clause and these federal statutes are designed to ensure. The absence of uniformity in this area may lead to "election fraud, delay, and other problems." Pet. 3a (citing Cong. Globe, 28th Cong., 2d Sess. 14–15, 29 (1844)).

**B. Mississippi's theory would enable the mischief Congress sought to avoid.**

Mississippi's arguments against the decision below are unavailing. On Mississippi's theory, Congress wrote a law to ensure Election Day uniformity—without any care about when votes would be received, or even who would have the ballots in the meantime. That is not a plausible understanding of federal statutes that sought a streamlined Election Day.

Below, Judge Oldham—joined by Judges Smith, Ho, and Duncan—noted that on Mississippi's theory,

“States [w]ould be free to accept ballots for as long as they’d like after Election Day.” Pet. 34a (concurring in denial of rehearing en banc). Mississippi has no meaningful response. Rather, it points to dates when congressional terms start, suggesting that these “deadlines” “force action.” Pet. 29. But members of Congress have seen the start of their terms delayed because of unresolved or late elections, and Mississippi does not explain why the same consequence could not occur here.<sup>20</sup> Thus, it remains true that under Mississippi’s theory, “nothing whatsoever prevents the States from innovating with ever-later ballot receipt deadlines 2 months, or even 2 years, after Election Day.” Pet. 34a (Oldham, J., concurring in denial of rehearing en banc).

Mississippi also glosses over the fact that custody of ballots between Election Day and a later deadline will not be by the State, but by third parties—potentially private parties. Under Mississippi law, mail-in ballots can be given not only to the U.S. Postal Service but also to private carriers “such as United Parcel Service or FedEx Corporation.” Miss. Code Ann. § 23-15-637(1)(a) (effective July 1, 2024). So while Mississippi quibbles about whether the Postal Service permits mail recall, Pet. 24, other third parties could (and do) allow recall and rerouting. See, e.g., UPS Delivery Intercept Options, <https://tinyurl.com/>

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<sup>20</sup> See, e.g., R. Berg-Andersson, *Dates of Biennial Federal Elections for Congress: From 1872 On*, Green Papers (June 3, 2009), <https://perma.cc/8W2Y-GEEA> (noting historical “elections being held *after* the term to which [the] Congressmen were being elected had already, technically, begun”).

mpem98kh. And some States with laws like Mississippi's already do not require any postmark or other proof of mailing in at least some situations. See 10 Ill. Comp. Stat. Ann. 5/19-8(c).

What's more, it is not obvious why Mississippi's reading would preclude a State from letting voters hang on to their own ballots, then deliver them sometime in the future (if they still want to). Though Mississippi frames its theory of "casting" a vote as "marking *and submitting*," *e.g.*, Pet. 1 (emphasis added), it is unclear why putting the ballot in the hands of another potentially private party for provisional future delivery should matter on Mississippi's understanding. Mississippi's dictionaries (Pet. 16–17) do not appear to draw the line that Mississippi needs for its meaning of "election"—after submission but before receipt. Cf. Pet. 8a n.5.

At a minimum, Mississippi's theory means that States could authorize *anyone*—ballot harvesters, unions, political parties—to hold ballots for any period of time after Election Day without supplying proof of when they received those ballots. Mississippi's theory would also mean that voters could retract their votes anytime in that period. Those results cannot be squared with Congress's establishment of "a uniform election day." Pet. 14a. The Fifth Circuit rightly rejected Mississippi's theory, holding that ballot receipt is a necessary part of an election under the default federal rule.

## CONCLUSION

For these reasons, the Court should grant the petition and affirm.

Respectfully submitted,

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