No. 24-1260

In the Supreme Court of the United States

MICHAEL WATSON, MISSISSIPPI SECRETARY OF STATE,
Petitioner,

v.

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT LIBERTARIAN PARTY OF MISSISSIPPI IN OPPOSITION

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August 11, 2025

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QUESTION PRESENTED

Federal law sets Election Day as the first Tuesday after the first Monday in November. 2 U.S.C. §§ 1 and 7; and 3 U.S.C. § 1. By state law, Mississippi allows ballots to be received up to five business days after Election Day.

The question presented here is whether Mississippi's practice of allowing ballots to be received after Election Day is preempted by the federal Election Day statutes.

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BRIEF IN OPPOSITION

Respondent Libertarian Party of Mississippi respectfully submits this opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Petitioner Mississippi Secretary of State Michael Watson urges this Court to grant certiorari, claiming the Fifth Circuit's decision is "deeply wrong and raises an issue of exceptional importance." Pet. 1. He alleges a conflict with this Court's precedents in *Foster v. Love*, 522 U.S. 67 (1997), *Newberry v. United States*, 256 U.S. 232 (1921), and *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam) and warns of "sweeping ramifications" for "30 States and the District of Columbia" that accept some ballots after Election Day. Pet. 2-3. These arguments are unpersuasive.

The Fifth Circuit correctly applied this Court's precedent. In *Foster*, this Court held that the term "election" in 2 U.S.C. §§ 1 and 7 ("Election Day statutes"), "plainly refer[s] to the combined actions of voters and officials meant to make a final selection of an officeholder." 522 U.S. at 71. The Fifth Circuit concluded that these actions include ballot receipt, as receipt by election officials is the final act conveying a voter's choice of an officeholder. Pet. App. 10a-11a. Once received, the voter cannot rescind or alter their ballot, and the result is "fixed" as "the proverbial ballot box is closed." *Id.* at 10a. All circuit courts applying *Foster* have similarly held that ballot receipt by government election officials is part of the election's "consummation." *Id.* at 12a-13a (citing *Voting Integrity Proj., Inc. v. Keisling*, 259 F.3d 1169,

1175 (9th Cir. 2001), *Voting Integrity Proj., Inc. v. Bomer*, 199 F.3d 773, 774 (5th Cir. 2000), and *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001)). Because Mississippi's statute, Miss. Code Ann. § 23-15-637(1)(a) (the "Receipt Deadline"), permits ballot receipt up to five business days after Election Day, the election remains ongoing and has "not been consummated." Pet. App. 13a.

Petitioner's primary claim that the Fifth Circuit disregarded binding precedent is baseless. Neither *Foster* nor *Newberry* addressed post-Election Day ballot receipt, and *Republican Nat'l Comm.*, 589 U.S. at 424, concerned a state's *primary* election deadline, to which federal Election Day statutes do not apply. *Id.* States may (and often do) set varied primary election deadlines without violating federal law. Any state extension or modification of those deadlines does not violate the Election Day statutes. Contrary to Petitioner's argument, no Supreme Court case directly addresses post-Election Day activities for *general* elections. The Fifth Circuit faithfully applied this Court's precedent in *Foster* to find the Receipt Deadline to be preempted by the federal Election Day statutes.

Petitioner's arguments that the decision's "sweeping ramifications" necessitate review are equally unconvincing. While the case raises important issues, immediate resolution is unnecessary. The Fifth Circuit's mandate is stayed in the lower court pending resolution of this appeal, ensuring no disruption to election procedures before the next general election. *See Republican Nat'l*

Comm. v. Wetzel, No. 24-cv-25 (S.D. Miss. 2024) (Doc. 116)

For these reasons, the petition for certiorari should be denied.

STATEMENT

1. The Elections Clause, U.S. Const. art. I, § 4, cl. 1, empowers Congress to set the time for congressional elections, overriding state regulations when Congress acts. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932). The Electors Clause similarly authorizes Congress to establish a uniform date for choosing presidential and vice-presidential electors. U.S. Const. art. II, § 1, cl. 4. These clauses grant "Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." *Foster*, 522 U.S. at 69 (citing *U.S. Term Limits v. Thornton*, 514 U.S. 779, 832-833 (1995)). Federal election laws "are paramount to [election laws] made by the State legislature; and if they conflict therewith, the latter so far as the conflict extends, ceases to be operative." *Ex parte Siebold*, 100 U.S. 371, 384 (1879); *see also Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 7-18 (2013).

Congress exercised this authority in 1845 when it enacted the first of a trio of statutes that established a uniform national Election Day. *See* 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. In 2022, Congress supplemented these with the Electoral Count Reform Act, 3 U.S.C. § 21, permitting states to extend Election Day for *force majeure* events. *Id.* § 21(1). Mississippi's 2020 amendment to its Receipt Deadline, allowing absentee ballots to be counted if received up to five

business days after Election Day, conflicts with this uniform Election Day—the day which all ballots must be cast and received by election officials—and is preempted by it. *See* Miss. Code Ann. § 23-15-637(1)(a).

2. Respondents, including the Republican National Committee, the Mississippi Republican Party, two Republican Mississippi voters, and the Libertarian Party of Mississippi, filed suits against Petitioner and several county officials charged with election administration. Pet. App. 5a. They alleged Mississippi's Receipt Deadline is preempted by the Election Day statutes and violates their right to stand for public office and the right to vote under the First and Fourteenth Amendments. *Id*.

After the district court consolidated the cases and allowed intervention by two non-profit organizations as defendants, the parties agreed on an expedited schedule for cross-motions for summary judgment. The district court granted Defendants' and Intervenor-Defendants' motions for summary judgment. With respect to Article III standing, the court found that Respondents' uncontested evidence showed that the Receipt Deadline "harmed its mission to secure votes for its candidates," both by inflicting upon it a direct economic injury, and by causing it to divert its resources from other activities in order "to monitor the counting of absentee ballots." Pet. App. 71a. On the merits, the district court held that the Receipt Deadline did not conflict with the Election Day statutes. Since "[a]ll that occurs after election day is the delivery and counting of ballots cast on or before election day," there is "no 'final

selection' … made *after* the federal election day." Pet. App. 79a.

The Fifth Circuit unanimously reversed. Regarding Article III standing, which was not appealed by Petitioner, the panel found Respondents had standing since their injuries "fit[] comfortably within" Fifth Circuit precedent. Pet. App. 6a n.3.

In reversing the district court on the merits, the panel faithfully followed this Court's precedent in *Foster*. There, this Court found that the Election Day statutes preempted a Louisiana law that allowed congressional candidates to be elected in October. 522 U.S. at 74. In interpreting the meaning of "day of the election" within the Election Day statutes, this Court found that "[w]hen the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder." *Id.* at 71. Accordingly, the "day of the election" "may not be consummated prior to federal election day." *Id.* at 72 n.4.

In interpreting this Court's precedent, the panel found that *Foster* required "official action"; "finality"; and "consummation" by Election Day. The Receipt Deadline failed each element. First, the panel found that "official action" required more than "giving a voter the means to make a final selection—such as by offering a ballot and a method to cast it." Pet. App. 9a. If a ballot is "cast" before it is received by state officials, then a voter could mark the ballot and place it in a drawer, post it on social media, or countless other "hypotheticals" which are obviously "absurd." Pet. App. 10a. It is "equally obvious" that the "official

action" under *Foster* occurs when the "state takes custody" of the ballot. *Id.*

The panel distinguished *Newberry*, involving the voter's selection of a candidate rather than a public election of an officeholder. In the latter case, "the electorate as a whole has made an election and finally chosen the winner" when "all voters' selections are received." Pet. App. 10a. At that point, the "proverbial ballot box is closed." All ballots are in and the "selection is done and final." *Id.* By contrast, when "election officials are still receiving ballots, the election is ongoing" and the "result is not yet fixed." *Id.* The panel credited Mississippi's own regulations that define "an absentee ballot" as a "final vote of a voter when, during absentee ballot processing by the Resolution Board, the ballot is marked accepted." *Id.* at 11a (citing 1 Miss. Code. R. 17-2.1). And the fact that the postal service allows domestic ballot "senders to recall mail" further "undermines the State's claim that ballots are 'final' when mailed." *Id.* at 12a (citing Domestic Mail Manual, §§ 507.5, 703.8; 39 C.F.R. § 111.1 and 39 C.F.R. § 211.2).

The panel noted that in the cases that followed *Foster* in various circuit courts of appeals, receipt was a critical factor in determining whether an election was ongoing and had not been consummated. Pet. App. 12a-13a. While it may take additional time after Election Day to tabulate and canvass results, the "election is nonetheless 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." *Id.* at 13a. "Receipt,"

therefore, "constitutes consummation of the election," and it must occur on or before Election Day. *Id.*

Finally, the panel noted that the historical practice around the time Congress enacted the Election Day statutes confirms its understanding that ballot receipt is necessary to consummate an election. Pet. App. 14a-18a. The panel rejected Petitioner's argument that other federal statutes such as the Uniform and Overseas Citizens Absentee Voting Act ("UOCAVA") and the 1970 Amendments to the Voting Rights Act "reinforce[] that the federal election-day statutes do not require ballot receipt by election day." Pet. App. 19a. The panel noted that these "cited statutes are *silent* on the deadline for ballot receipt—and congressional silence does not 'reinforce[]' anything." *Id.*

Given that Congress knows how to authorize post-Election Day receipt in limited circumstances such as for provisional ballots under the Help America Vote Act of 2002 ("HAVA"), the congressional silence under UOCAVA and the Voting Rights Act is "particularly unhelpful." *Id.* at 20a. HAVA shows that "Congress knew how to authorize post-Election Day voting when it wanted to do so." *Id.* Likewise, Congress permitted states to hold special elections for vacancies under 2 U.S.C. § 8, and allowed states to "modif[y] the period of voting" in presidential elections for "force majeure events" in 3 U.S.C. § 21(1). *Id.* at 22a-23a. Both statutes show "[w]here Congress wants to make exceptions to the federal Election Day statutes, it has done so." *Id.* at 23a.

The panel rejected Petitioner's invitation to read a "mailbox rule" into the Election Day statutes, where

a vote is effective once deposited in the mail. But again, where Congress wants to impose such a rule in federal statutes, it has done so, as in federal tax law that "adopts such a mailbox rule." Pet. App. 23a (citing 26 U.S.C. § 7502(a)). Congress did not do so in the Election Day statutes. The panel declined to read this Court's opinion in *Republican Nat'l Comm.*, 589 U.S. at 423-424, as requiring a mailbox rule for elections. Pet. App. 23a-24a.

The panel did not order a remedy. Instead, it remanded to the district court for "further proceedings to fashion appropriate relief, giving due consideration to 'the value of preserving the status quo in a voting case on the eve of an election.'" Pet. App. 24a-25a (citing *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 567 (5th Cir. 2020) and *Purcell v. Gonzalez*, 549 U.S. 1 (2006)).

The Fifth Circuit denied rehearing en banc by a vote of 10-5, with two dissenting and two concurring opinions. Pet. App. 29a. After en banc review was denied, the district court entered an agreed order staying all proceedings in the case "pending the filing and disposition of a petition for a writ of certiorari in the United States Supreme Court and the conclusion of any Supreme Court proceedings on the merits." *Republican Nat'l Committee, et al. v. Wetzel, et al.*, No. 24-cv-25 (S.D. Miss. 2024) (Doc. 116).

REASONS FOR DENYING THE PETITION

Petitioner seeks review, claiming the Fifth Circuit's decision is legally erroneous law because it conflicts with this Court's precedent and raises issues of exceptional importance. Pet. 1. While the issues are significant, immediate review is unwarranted. The decision, the only non-vacated circuit opinion to address this issue, correctly applied precedent. Other cases in various circuits are working their way through the courts now, including one presently before this Court on the issue of Article III standing. *Bost v. Ill. St. Bd. of El.*, No. 24-568. The decision below properly applied this Court's precedent and was correct on the law. The petition should be denied.

I. The Fifth Circuit Decision Was Correct and Did Not Conflict with This Court's Precedent.

Petitioner's primary argument for review is that the decision below is "deeply wrong" on the merits. Petitioner faults the Fifth Circuit for three reasons. First, he claims it ignored the text of the Election Day statutes and failed to give weight to any dictionary definition of "election." Pet. 22-23. Second, he claims the panel's decision was contrary to this Court's precedent in *Foster* and *Republican Nat'l Comm*. Finally, he contends the panel wrongly construed the historical practices and overlooked federal statutes governing mail-in balloting, such as UOCAVA. Pet. 21-28. Each argument fails.

1. The panel correctly interpreted the Election Day statutes' text and original public meaning. Statutory interpretation begins with the text's plain

meaning. *Hughey v. United States*, 495 U.S. 411, 415 (1990). "[T]he court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988) (citations omitted). A fundamental canon of statutory construction is that, unless otherwise defined, words take their ordinary, common public meaning at the time of enactment. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 654-655 (2020). "Preemption thus turns on the meaning of election within 'the day for the election.'" Pet. App. 8a (citing 2 U.S.C. § 7; 3 U.S.C. §§ 1, 21).

In *Foster*, this Court defined "the day of the election" in the Election Day statutes. Pet. App. 9a. "When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder." *Foster*, 522 U.S. at 71. "[I]f an election does take place, it may not be consummated prior to federal election day." *Id.* at 72 n.4. From this, the Fifth Circuit identified three definitional elements to "the day of the election": "(1) official action, (2) finality, and (3) consummation." Pet. App. 9a.

Petitioner contends it was an "error" by the panel to fail to use a dictionary definition. But this Court already cautioned against "paring the term 'election' in § 7 down to the definitional bone." Pet. App. 9a. *See Foster*, 522 U.S. at 72. And any attempt to fault the court of appeals for following the *Foster* majority's definition of "day of the election" in the Election Day statutes is merely an implicit attack on *Foster* itself. *Foster* acknowledged there was "room for argument

about just what may constitute the final act of selection within the meaning of the law," but did not find it necessary to resolve that argument for all future cases. It was not in error for the panel to follow *Foster*'s definition of the Election Day statutes as the combined actions of voters and officials meant to select a final officeholder.

Regardless of what supplemental glosses dictionary definitions may add to *Foster*, the Election Day statutes will always require ballot receipt. Indeed, dictionaries published before and after 1845 define "election" as "[t]he day of a public choice of officers," emphasizing the temporal nature of this regulation. Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, 288, (Joseph E. Worcester, et al. eds. 1st ed. 1830); and Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, 383, (Joseph E. Worcester, et al. eds. 2nd ed. 1860). These contemporaneous dictionary definitions from around 1845 speak to the ordinary public meaning of the term "election."

Historical voting practices confirm that the "election" included ballot receipt by Election Day. "During the colonial period, many government officials were elected by the *viva voce* method or by the showing of hands, as was the custom in most parts of Europe." *Burson v. Freeman*, 504 U.S. 191, 200 (1992); *see also Doe v. Reed*, 561 U.S. 186, 224-27 (2010) (Scalia, J., concurring in judgment) (describing historic voting practices). Ballot receipt after Election Day—whether conducted *viva voce* or by electors dropping balls or beans in a bowl—was simply not

possible. Moreover, subsequent voting innovations do not change this original public meaning.

In the 18th and early part of the 19th century, some states began adopting paper ballots, which quickly became the majority practice. E. Evans, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES, 11 (1917) (Evans); *Burson*, 504 U.S. at 200. This practice generally involved voters handwriting their votes on personal paper, which they delivered to polling places on Election Day. *Id.* at 200. These "ballots" were only cast once marked and deposited in the ballot box or otherwise delivered to election officials on Election Day. *Id.*

Viva voce and handwritten ballots remained the majority practices until the advent of preprinted "ticket" ballots in 1829. Evans at 11-12. As ticket ballots became more popular, States eventually abandoned the *viva voce* voting practice throughout the 19th century, with Kentucky being the last state to abandon it in 1890. *See* Donald A. Debats, HOW AMERICA VOTED: BY VOICE, 5, Univ. of Virg. Inst. for Advanced Tech. in Humanities, (2016).

Congress passed the Election Day statutes during a period of time when all ballots were received by election officials on Election Day, with the exception of one state. In 1845, Congress passed the "Presidential Election Day Act," which is now codified as 3 U.S.C. § 1. In 1872, Congress passed what is now 2 U.S.C § 7, establishing the same day for congressional elections. During this time, only Pennsylvania had an absentee voting law that did not mandate receipt by Election Day. Josiah Henry Benton, VOTING IN THE FIELD, 17, and 189-203 (1915).

That statute was later struck down, in part because ballots were not being received by deputized state officials at poll sites. *Id.* at 17 (discussing *Chase v. Miller*, 41 Pa. 403 (1862)). This decision is what led to the practice of deputizing servicemen as state officials. *Id.*

During the Civil War, several states adopted one of two absentee voting methods to allow "voting in the field," both of which were designed to facilitate ballots being received by state election officials on Election Day. Benton at 4, 15. Some states enacted proxy voting whereby a soldier would mail his marked ballot to someone back home to deliver at his home precinct on Election Day. *Id.* at 15, 265. Under the second method, states created physical poll sites near the battlefield, providing ballot boxes and deputizing servicemen as state election officials (e.g., bailiffs) to receive ballots on Election Day. *Id.* at 15-17; *see also id.* at 43 (describing Missouri's field voting practices). After they were cast, the ballots would be counted in the field or sent back to the servicemen's home states. Even if the absentee ballots took additional time to arrive at the servicemen's home state, the ballot still was *received* by deputized election officials in the field on Election Day.

Petitioner completely ignores the absentee voting practices during the Civil War and casts the rest of the early history aside since "voting … occur[ed] in person," and any ballot cast would also be "immediately received." Pet. 26. But that is exactly the point. Congressional legislation should be understood by relying on the original public meaning of its text at the time it was adopted. The "day of the

election" at the time Congress passed the Election Day statutes was understood to include ballot receipt. As the court of appeals correctly concluded, Civil War and "[e]arly postwar iterations of absentee voting universally required receipt by Election Day." Pet. App. 15a-16a.

Presumably recognizing this point, Petitioner pivots to arguing that the change in post-Election Day receipt by states in the 20th century was a "policy choice[]" by the states due to voters needing to vote away from their residences. Pet. 25-26 (citing *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring)). But the "policy choice" arising 100 years after Congress passed the Election Day statutes says "nothing about the original public meaning of the Election-Day statutes" as Congress understood them in the 19th Century. Pet. App. 18a (citing *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 70 (2022); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 250–51 (2022)). The panel correctly rejected Petitioner's argument.

2. The court of appeals correctly applied *Foster*. Though the issue of post-Election Day receipt was not at issue in *Foster*, this Court did define the meaning of "day of the election" in the Election Day statutes for congressional elections. Contrary to Petitioner's assertion, the court of appeals application of *Foster* did not conflict with existing Court precedent in *Newberry*, 256 U.S. at 250, *United States v. Classic*, 313 U.S. 299, 318 (1941), and more recently in *Republican Nat'l Comm.*, 589 U.S. at 424.

This Court unanimously held that "Election Day" means "the *combined* actions of voters *and* officials meant to make a *final* selection of an officeholder." *Foster*, 522 U.S. at 71-72 (emphasis added). "Election Day" can no more conclude five-business days before Election Day, as in *Foster*, than it can conclude five-business days after Election Day, as it does here in Mississippi. The Election Day statutes established the time in which "the combined actions of voters and officials meant to make a final selection of an officeholder" must occur. They necessarily displaced state authority to modify or alter (even slightly) Congress' deadline.

Here and in *Foster*, the combined actions of voters *and* officials includes ballot receipt by election officials. Notably, the Court's definition emphasized the combined, not the unilateral, actions of voters and officials. The unilateral actions of voters include registering, requesting and marking ballots, and handing a ballot to the U.S. Postal Service for delivery. The unilateral actions of officials include registering voters, distributing ballots, canvassing and counting ballots, and certifying election results. But these are not combined actions. Ballots in transit or sitting in the postal distribution center similarly have not been subject to combined actions. The only moment in an election that constitutes the "combined actions of voters and election officials" is the depositing and receipt of ballots into the custody of state election officials. When all qualified ballots are received by election officials, that is the "day of the election." That is because when the Election Day statutes were adopted in 1845 and 1872, the public understood them as fixing the deadline for giving

their ballot to election officials. That was the only way to interpret the electoral practices of the time. The public would have understood that "Election Day" was when election officials must receive all qualified votes. Congress "mandate[d] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster*, 522 U.S. at 70.

Foster's interpretation is consistent with the other holdings of this Court. In *Newberry*, 256 U.S. at 250, this Court ruled that ratification of the Seventeenth Amendment did not alter the original textual understanding of an "election" as the "final choice of an officer by the duly qualified electors." (citation omitted). Reading *Foster*, *Newberry*, and the Election Day statutes together, "the election" requires both the final "combined actions of voters and officials" and that these "actions" are "meant to make a final selection," and that all of this occurs on Election Day. As the panel correctly noted, the "voter's *selection* of a candidate differs from the public's *election* of the candidate." Pet. App. 10a.

An election involves finality under *Foster*, and a mailed ballot cannot become final unless and until received by the state official. Until then, the mail ballot can be destroyed in transit, delayed, and for domestic mailings, recalled by the voter prior to receipt. The panel correctly noted that the U.S. Postal Service allows for recall of mail before receipt (Pet. App. 12a (citing Domestic Mail Manual, §§ 507.5, 703.8; 39 C.F.R. § 111.1 and 39 C.F.R. § 211.2) and Mississippi's own state regulations require receipt of the ballot by election officials before it is considered "final." 1 Miss. Code. R. 17-2.1 ("an absentee ballot is

the final vote of a voter when, during absentee ballot processing by the Resolution Board, the ballot is marked accepted").

Petitioner's only response is to resort to the purposes of the Mississippi regulations, which are to prevent voters from mailing a ballot and then casting a second ballot in person. Pet. 23. But the purposes of this legislation cannot be used to contradict the text of the regulation itself, which clearly contemplates a ballot is final upon receipt.

Petitioner attempts a last-ditch effort to manufacture a conflict with this Court's decision in *Republican Nat'l Comm.*, 589 U.S. 423 (2020). But that case involved a judicial extension of an absentee ballot deadline for a *primary* election. The Election Day statutes do not govern *primary* elections. States can and often do hold their primary elections on different times and dates throughout the calendar year. The Election Day statutes here concern Congress' mandate that all ballots must be received by Election Day for the *general* election. Far from being an "on-point *holding of this Court*," (Pet. 25), *Republican Nat'l Comm.* did not even concern the statute at issue here. If a state wishes to extend ballot receipt for several days after the state's primary election, there is no Election Day statute that applies. Congress left those deadlines squarely within the province of the state.

Moreover, Petitioner omits that this Court in *Republican Nat'l Comm.* noted the decision was only with respect to the "narrow question before the Court" of whether the district court's injunction allowing ballots to be mailed *and* received after the primary

date was lawful. 589 U.S. at 426. The panel correctly rejected Petitioner's argument that *Republican Nat'l Comm.* proves the "act of mailing ballots equates to voting," which is "neither a logical nor necessary implication of the case." Pet. App. 24a. The "conclusion that mailing ballots after Election Day allows voting after the election is equally consistent with the ballot receipt requirement." *Id.*

3. Federal election statutes passed after the Election Day statutes do not help Petitioner. Congressional inaction does not meaningfully aid the preemption analysis or alter the meaning of Election Day. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960); *United States v. Craft*, 535 U.S. 274, 287 (2002); *see also* Let Congress Do It: The Case for An Absolute Rule of Statutory Stare Decisis, 88 Mich. L. Rev. 177, 186 ("The notion of silent acquiescence has long been condemned as based on unrealistic and irrelevant assumptions about the legislative process.").

For example, Congress exercised its authority when it enacted § 302 of the Help America Vote Act ("HAVA") of 2002. Under § 302, if a voter appears at a poll site and a question arises about his or her eligibility to cast a ballot, they can cast a provisional ballot. 52 U.S.C. § 21082. Though a provisional ballot is *received* at poll sites on Election Day, jurisdictions only accept ballots *after* Election Day once any questions about the voter's eligibility are resolved. In this way, § 302 actually reinforces the necessity of Election Day receipt. The "fact that Congress authorized a narrow exception" for voters with

suspect eligibility, "does not impliedly repeal all of the other federal laws that impose a singular, uniform Election Day for every other voter in America." Pet. App. 21a. HAVA § 302 does not *allow* post-Election Day receipt. It mandates Election Day receipt.

Similarly, with UOCAVA, Congress exercised its authority to craft a limited exception to allow the Attorney General to seek remedies to enforce the Act. The fact that federal courts have granted post-Election Day receipt remedies in limited circumstances for military and overseas voters under UOCAVA does not mean states are authorized unilaterally to grant this privilege to all voters. In situations where a state fails to timely transmit ballots, the United States often obtains court-ordered relief extending receipt deadlines to ensure UOCAVA voters get the benefit of the full 45-day period to receive and return their ballots. But nothing in the text of the UOCAVA explicitly authorizes states to allow post-Election Day receipt.

UOCAVA is a statute designed for a specific set of circumstances that have no bearing here. While 52 U.S.C. § 20302(a) sets forth state UOCAVA responsibilities, 52 U.S.C. § 20304 sets forth the Secretary of Defense's responsibilities. These include "implement[ing] procedures that facilitate" the timely delivery of military ballots, such as the collection of certain military ballots seven days before Election Day for delivery "not later than the date by which an absentee ballot must be received in order to be counted in the election." 52 U.S.C. § 20304(a)-(b).

Notwithstanding Petitioner's objection, the Fifth Circuit was right to recognize that UOCAVA (and

other federal statutes) are silent regarding state absentee deadlines. Pet. 27. If Congress wanted to extend ballot receipt deadlines for UOCAVA voters, it could have done so. Cong. Globe, 42 Cong., 2d Sess. 676 (1872); and 95th Cong. pp. 13, 34, 59, 67, 84, and 94 (1977) (rejecting requests to extend ballot receipt deadlines for overseas voters). And Congress has on at least one occasion expressly authorized state modification of the Election Day deadline. 3 U.S.C. § 21(1) (States may "modif[y] the period of voting" in presidential elections for "force majeure events.").

In short, the court of appeals correctly applied existing Court precedent to find that the Receipt Deadline is inconsistent and conflicts with the Election Day statutes, and is preempted by them. Petitioner has not demonstrated any reason why the Court's intervention is needed now. Modification of the Election Day receipt deadline allows states to "engage in gamesmanship, experiment with deadlines, and renew the very ills Congress sought to eliminate: fraud, uncertainty, and delay." Pet. App. 34a. And many states do, with several allowing weeks to receive ballots after Election Day, leaving electoral results in a constant state of flux in federal races. In passing the Election Day statutes, Congress sought "uniform[ity]" in "holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster*, 522 U.S. at 69, 70 (1997). Mississippi's Receipt Deadline does not allow for such uniformity. The panel was correct in finding it preempted.

II. Though Important, the Issues Do Not Need to be Addressed Now.

While Respondent acknowledges the issues are important, immediate review is unwarranted. Seventeen states and the District of Columbia accept late-arriving mail ballots after Election Day in some capacity. *See* Nat'l Conf. of State Legs., *Tbl. 11: Receipt & Postmark Deadlines for Absentee/Mail Ballots*.[1]

Petitioner argues that the panel's decision should be immediately reviewed by this Court because it would "necessarily invalidate" the "laws in most States and thus has significant nationwide 'implications.'" Pet. 31 (citing *Democratic Nat'l Comm.*, 141 S. Ct. at 35 (Kavanaugh, J., concurring)). This is incorrect. The Fifth Circuit's decision would be controlling in only three states: Mississippi, Louisiana, and Texas. Of those, only Texas and Mississippi allow ballots to be received after Election Day. Moreover, the panel issued no remedy and included instructions on remand for the district court to give "due consideration to 'the value of preserving the status quo in a voting case on the eve of an election.'" Pet. App. 24a-25a (citing *Tex. All. for Retired Ams.*, 976 F.3d at 567 and *Purcell*, 549 U.S. at 4-5. In short, there is no guarantee that any remedy will be issued before the 2026 general election. And the parties agreed in the district court

[1] Petitioner contends that the number of states that accept mail ballots after Election Day is 30. However, when reviewing the citation to the National Conference of State Legislatures, it indicates that 17 states accept mail ballots after Election Day.

to stay all proceedings pending the outcome of this petition.

Petitioner also contends that review is necessary because the "decision below will spark litigation challenging many States' laws—risking chaos in the next federal elections." But as Respondents Vet Voice Foundation and Mississippi Alliance for Retired Americans, who were intervenor-defendants below, correctly point out, cases are already ongoing regarding a similar issue in district courts in Nevada, Massachusetts, and North Dakota. Vet Voice Response at 10. Petitioner acknowledges that a similar "case 'involv[ing] nearly identical claims' to those here" has been granted for review by this Court next term. Pet. 32 (citing *Bost v. Illinois Board of Elections*, No. 24-568, cert. granted, — S. Ct. —, 2025 WL 1549779 (June 2, 2025)). There is no need to grant review in this case now while this Court considers the jurisdictional Article III standing question next term.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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August 11, 2025