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 Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The federal election-day statutes—2 U.S.C. § 7, 2 U.S.C. § 1, and 3 U.S.C. § 1—set the Tuesday after the first Monday in November in certain years as the "election" day for federal offices. Like all other States, Mississippi requires that ballots for federal offices be cast—marked and submitted to election officials—by that day. And like most other States, Mississippi allows some of those timely cast ballots (mail-in absentee ballots, in Mississippi's case) to be counted if they are received by election officials a short time after election day (in Mississippi, within 5 business days after election day). Miss. Code Ann. § 23-15-637(1)(a). In the decision below, the Fifth Circuit held that the federal election-day statutes require that ballots be both cast by voters and received by election officials by election day and thus preempt Mississippi's law.

The question presented is whether the federal election-day statutes preempt a state law that allows ballots that are cast by federal election day to be received by election officials after that day.

PARTIES TO THE PROCEEDING

Petitioner is Michael Watson, in his official capacity as the Mississippi Secretary of State. He was a defendant-appellee in the court of appeals.

Respondents the Republican National Committee, the Mississippi Republican Party, James Perry, Matthew Lamb, and the Libertarian Party of Mississippi were plaintiffs-appellants in the court of appeals. Respondents Vet Voice Foundation and Mississippi Alliance for Retired Americans were intervenor defendants-appellees in the court of appeals. Respondents Justin Wetzel, in his official capacity as the clerk and registrar of the Circuit Court of Harrison County, and Toni Jo Diaz, Becky Payne, Barbara Kimball, Christene Brice, and Carolyn Handler, in their official capacities as members of the Harrison County Election Commission, were defendants-appellees in the court of appeals.

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INTRODUCTION

This case turns on the meaning of the federal election-day statutes. Those statutes set the Tuesday after the first Monday in November in certain years as federal "election" day. 2 U.S.C. § 7; 2 U.S.C. § 1; 3 U.S.C. § 1. Like all States, Mississippi requires that ballots for federal offices be cast—marked and submitted to election officials—by federal election day. And like most States, Mississippi allows some of those timely cast ballots (mail-in absentee ballots, in Mississippi) to be counted if election officials receive them soon after election day (in Mississippi, within 5 business days after election day). Miss. Code Ann. § 23-15-637(1)(a). The court of appeals held here that federal law requires that ballots be received by election day and so preempts Mississippi's law.

The decision below is wrong. An "election" is the conclusive choice of an officer. The voters make that choice by casting—marking and submitting—their ballots. So the federal election-day statutes require only that the voters cast their ballots by election day. The election has then occurred, even if election officials do not receive all ballots by that day. Under Mississippi law, the voters cast their ballots by election day. So federal law does not preempt Mississippi law. Text, precedent, and history show that the court of appeals erred in ruling otherwise.

As a matter of plain meaning, an *election* is the voters' conclusive choice of an officer—which is made when ballots are cast. When each federal election-day statute was enacted, *election* meant the "final choice of an officer by the duly qualified electors." *Newberry v. United States*, 256 U.S. 232, 250 (1921). As this Court recognized when construing two of those

statutes, an *election* is "'[t]he act of choosing a person to fill an office.'" *Foster v. Love*, 522 U.S. 67, 71 (1997) (quoting Noah Webster, An American Dictionary of the English Language 433 (1869)). A raft of authorities reaffirms that the voters' choice defines an election. And because the voters' choice defines an election, an election requires only ballot casting.

This Court's holdings confirm that an *election* requires ballot casting—not ballot receipt. This Court has held that "election" day is the day to "conclude[ ]" the election through a "final selection" of officers. *Foster*, 522 U.S. at 71, 72. That occurs when voters have marked and submitted their ballots as state law requires: that concludes the final selection—even if that selection cannot be effectuated until ballots are received. That view is reinforced by *Republican National Committee v. Democratic National Committee*, 589 U.S. 423 (2020) (per curiam), which recognized that ballot "cast[ing]" is "fundamental[ ]" to an election, but ballot "recei[pt]" is not. *Id.* at 424, 426. Ballot receipt is, of course, critical to effectuating the voters' choice. But that is also true of counting votes. Yet—as the court of appeals and respondents agree—counting votes is not part of the election. That is why counting votes lawfully can and does occur after election day. So too with ballot receipt: it is vital—but it is not part of the election itself. So States may do what the Mississippi Legislature has done: make a "policy choice" to "require only that absentee ballots be *mailed* by election day." *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

History confirms that the federal election-day statutes do not set a ballot-receipt deadline. In

enacting those laws, Congress was moved by problems from States holding elections on different days: fraud—people could cross state lines and vote in multiple States' elections; unfair advantage—States that held voting early could influence voting in other States; and burdens on voters—some voters had to vote in presidential and congressional elections on different days. *E.g.*, *Foster*, 522 U.S. at 73-74. Post-election-day ballot receipt produces none of those evils. History also explains the prevalence, in the 19th century, of election-day ballot-receipt practices: at the time, voting largely occurred in person, so States had little reason to use a different practice. As the world changed, States began to adopt different practices—as they have in many areas of election administration. History defeats the view that the federal election-day statutes block States from doing that.

The rule the court of appeals adopted would doom the laws of the nearly 30 States that today accept some ballots after election day—including for military voters. But the damage would reach farther. The logic driving the decision below is that the federal election-day statutes set in stone the electoral practices that prevailed when those statutes were enacted. That logic condemns countless state laws of the last 165 years—laws allowing Union soldiers to vote for President during the Civil War, laws embracing the secret-ballot system since the 1890s, laws allowing civilians to vote absentee for over a century, and more. That is not a sound view of Congress's work.

This Court should reverse the judgment below and hold that the federal election-day statutes do not preempt state laws, like Mississippi's, that allow ballots that are cast by election day to be received after that day.

OPINIONS BELOW

The court of appeals' opinion (App.1a-26a) is reported at 120 F.4th 200. The court of appeals' order denying rehearing en banc and the opinions accompanying that denial (App.27a-58a) are reported at 132 F.4th 775. The district court's opinion (App.59a-85a) is reported at 742 F. Supp. 3d 587.

JURISDICTION

The court of appeals' judgment was entered on October 25, 2024. The court of appeals denied rehearing en banc on March 14, 2025. The petition for a writ of certiorari was filed on June 6, 2025, and granted on November 10, 2025. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the appendix to the petition for a writ of certiorari. App.86a-91a.

STATEMENT

1.a. As a "default" rule, the Constitution "invests the States with responsibility" over most of "the mechanics" of elections to federal offices. *Foster v. Love*, 522 U.S. 67, 69 (1997). And States enjoy "a wide discretion" in establishing a system for federal elections. *United States v. Classic*, 313 U.S. 299, 311 (1941). At the same time, the Constitution grants to Congress authority over some aspects of federal elections and "the power to override" certain state election regulations. *Foster*, 522 U.S. at 69.

Articles I and II set out this framework. Article I addresses congressional elections. The Elections Clause provides: "The 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, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Article II addresses presidential elections. The Electors Clause provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" to vote for President and Vice President. *Id.* art. II, § 1, cl. 2; *see id.* art. II, § 1, cl. 1. But "[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes." *Id.* art. II, § 1, cl. 4.

b. For decades after the Founding, "Congress left the actual conduct of federal elections to the diversity of state arrangements." *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1171 (9th Cir. 2001). But Congress eventually set some "uniform" national "rules" for federal elections. *Foster*, 522 U.S. at 69.

This case involves one of those rules: the rule setting the election day for federal offices. In three statutes, Congress has set federal "election" day as the Tuesday after the first Monday in November in certain years. 2 U.S.C. § 7; 2 U.S.C. § 1; 3 U.S.C. § 1.

The federal election-day statutes were not enacted all at once. They were enacted decades apart, in the 1800s and 1900s. And other efforts preceded them.

In 1792, Congress addressed the timing of presidential elections. It did not fix one day for holding those elections. Instead, it required that electors "for the election of a President and Vice

President" "be appointed in each state" "within thirty-four days preceding the first Wednesday in December in every fourth year succeeding the last election." Act of Mar. 1, 1792, ch. 8, § 1, 1 Stat. 239. That framework allowed for "flagitious frauds": because States could hold elections on different days, people could vote in multiple States. Cong. Globe, 28th Cong. 2d Sess. 28 (1844). By the 1840s, "both parties" were "charging each other with having committed great frauds" in elections. *Id.* at 29; *see* Robert Gray Gunderson, The Log-Cabin Campaign 248-53 (1957) (noting "extensive" allegations of "frauds" leading up to the 1840 presidential election, including "import[ing] voters" across state lines); George Stimpson, A Book About American Politics 29-30 (1952) ("election frauds"—like the "pipe-laying" scandals of 1840 and 1844, where parties "were accused of sending gangs of voters across [s]tate lines" to "vote for Presidential electors several times"—"created a popular demand for a uniform national election day").

Congress responded in 1845 by enacting the first federal election-day statute: the statute setting "a uniform time for holding elections for electors of President and Vice President." Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (title; formatting omitted). The statute provided that "the electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed." *Ibid.*; *see ibid.* (calling that day "the day" for "h[o]ld[ing] an election for the purpose of choosing electors"). "The object of the bill was to prevent frauds at the ballot box, as in 1840." Cong. Globe, 28th Cong. 2d Sess. 14 (1844); *see* Jeffrey M. Stonecash et al., Congressional Intrusion to Specify State Voting Dates

for National Offices, 38 Publius: J. Federalism 137, 141-42 (2008) (law was "prompted" by "accusations of widespread fraud" in "[t]he [presidential] elections of 1840 and 1844"). Today the statute says: "The electors of President and Vice President shall 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. "[E]lection day" in 3 U.S.C. § 1 "means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State." *Id.* § 21(1). As of 2022, that definition has an exception: if a State that "appoints electors by popular vote" timely "modifies the period of voting" in response to certain "force majeure events," "election day" will "include the modified period of voting." *Ibid.*

In the 1860s and 1870s, Congress considered setting a uniform day for electing Representatives. Stonecash 145. It was again moved by problems associated with States holding elections on different days—indeed, in "different months." *Keisling*, 259 F.3d at 1173; *see* Stimpson 139-40. As in the 1840s, one concern with this situation was "fraud[ ]" through "the transmission of voters from one State to another." Cong. Globe, 42d Cong. 2d Sess. 618 (1872); *see* H.R. Rep. No. 40-31, at 77-78 (1869) (describing "the necessity" of electing Representatives "on the same day throughout" the country to avoid "fraudulent importation of voters" across state lines). Different voting days also gave some States "undue advantage." Cong. Globe, 42d Cong. 2d Sess. 141 (1871). States that voted early could "influence" national elections by "indicating to the country the first sentiment on great political questions." *Id.* at 141, 116; *see* Stimpson 139 (noting "customary"

practice of "mak[ing] especially intensive campaigns" in early-voting States to "influenc[e] the 'bandwagon vote' throughout the country"). Further, without a uniform day, voters in some States faced the "great burden" in presidential-election years of having to vote in "two elections" that were held on separate days. Cong. Globe, 42d Cong. 2d Sess. 112, 141; *see* H.R. Rep. No. 40-31, at 78 (noting "expenses" and "loss of time" from voting "in two elections").

Congress responded in 1872 by enacting the second federal election-day statute, which set "the day for the election" of Representatives. Act of Feb. 2, 1872, ch. 11, § 3, 17 Stat. 28. It set that election on the same Tuesday specified in the presidential election-day statute, in even-numbered years. *Ibid.* Today the statute says: "The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter." 2 U.S.C. § 7.

In 1914, Congress enacted the third federal election-day statute: the statute setting the day for "elect[ing]" Senators. Act of June 4, 1914, ch. 103, § 1, 38 Stat. 384. That statute, enacted the year after the Seventeenth Amendment called for the popular election of Senators, replaced an 1866 statute that the Seventeenth Amendment made obsolete. The 1866 statute had directed that "the legislature of each State" chosen before the end of a term for a Senator "shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a senator in Congress." Act of July 25, 1866, ch. 245, § 1, 14 Stat. 243. After setting the time for those elections, the

statute directed "the ... manner" in which the election would occur: a "viva voce" vote, taken "openly" in each legislative house, with the result "entered on the journal." *Ibid.* The statute detailed backup mechanisms for legislatures to use if no candidate secured a majority from both houses. *Ibid.*

The 1914 statute directed that Senators be "elected" "at" the "election" "at which ... a Representative to Congress is regularly by law to be chosen." 38 Stat. at 384. Today the statute says: "At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter." 2 U.S.C. § 1.

c. Over the decades in which the federal election-day statutes were enacted, States innovated in how they held elections and allowed voting. States have continued to do so. Elections thus looked different when each federal election-day statute was enacted—and different from how elections look today.

Consider the prevalence of absentee voting. For 125 years after the Founding, States overwhelmingly required voting to occur in person in voters' home districts. *See* Paul G. Steinbicker, Absentee Voting in the United States, 32 Am. Pol. Sci. Rev. 898, 898 (1938) (before 1913, only two States had general civilian absentee-voting laws); Josiah Henry Benton, Voting in the Field: A Forgotten Chapter of the Civil War 4-8, 308 (1915) (surveying state laws and stating that, before the Civil War, "[n]obody had ever

conceived" that States could "authorize elections to be held outside of their own territory"). Absentee voting was almost non-existent in 1845. Pennsylvania (in a law later struck down for violating the state constitution's in-district voting requirement) and New Jersey (for five years) allowed limited absentee voting by soldiers. George Frederick Miller, Absentee Voters and Suffrage Laws 31-32 (1948). The situation changed—for a time—with the Civil War, when 20 of 25 Union States passed laws allowing soldiers to vote away from home. Benton 4-5, 312-15. But absentee voting largely vanished after the war. *See id.* at 314-15. Only in the 1910s, as the nature of work changed, did States widely embrace "absent voting" and extend it to civilians more generally. Charles Kettleborough, Absent Voting, 11 Am. Pol. Sci. Rev. 320, 320 (1917) (connecting expansion of absent voting to the rise of work requiring "absence from home"). By 1914, 5 States had civilian absentee-voting laws. *Ibid.* By 1924, 45 of the 48 States had absent-voting laws. P. Orman Ray, Absent-Voting Legislation, 1924-1925, 20 Am. Pol. Sci. Rev. 347, 347 (1926). But most of these laws were "limited in scope"—to "select categories of people," certain reasons, or certain elections. John C. Fortier & Norman J. Ornstein, The Absentee Ballot and the Secret Ballot: Challenges for Election Reform, 36 U. Mich. J. L. Reform 483, 504-05 (2003); *see* Steinbicker 898-900.

Today absentee voting is far more prevalent than when any of the federal election-day statutes were enacted. Federal law requires that States allow absentee voting in presidential elections, 52 U.S.C. § 10502(c)-(d), and by military and overseas voters, *id.* § 20302(a). But States go far beyond that. About 70% of States allow any qualified voter to vote

absentee in federal elections without an excuse. *See*, *e.g.*, National Conference of State Legislatures (NCSL), Table 1: States with No-Excuse Absentee Voting, bit.ly/45d2UZC (updated Dec. 20, 2023). Even States that require an excuse are far more lenient than in the eras when absentee voting was largely confined to those in military service (1860s) or was otherwise quite limited (1910s). *See*, *e.g.*, NCSL, Table 2: Excuses to Vote Absentee, bit.ly/44FNWv3 (updated Aug. 26, 2025).

Next take the methods of absentee voting. In the 1800s and early 1900s, absentee voting was largely a form of supervised, in-person voting. In the Civil War—the only time of large-scale absentee voting in the 1800s—States used two main methods. The most widely used method—"voting in the field"—allowed in-person voting by soldiers who were outside of their home election districts. Benton 15. States set up polling places in camps—with ballot boxes, officials to oversee the election, and mechanisms to combat fraud and challenge voters' qualifications. *See*, *e.g.*, *id.* at 15, 49-50, 64, 74, 87-89, 105-06, 115-16, 122-23, 217-18; *infra* p. 33 (collecting some of those laws). The other method—"proxy voting"—allowed a soldier to "prepare his ballot in the field and send it to" a "proxy" "to cast into the ballot box in his voting precinct at home." Benton 15. This process also often simulated in-person voting: Connecticut and Minnesota sent commissioners to camps to receive sealed ballots, certify compliance with formalities, and transmit ballots to state election officials. 1864 Conn. Pub. Acts 51, 52-53 §§ 2-6; 1862 Minn. Laws 13, 14-17 §§ 2-4, 6. When States failed to adopt such mechanisms, elections often went poorly. Benton 153, 156, 159-70 (New York's proxy-voting law resulted in fraud; in

1865 the State switched to voting in the field), 187 (nearly 70% of Rhode Island votes were rejected as deficient), 265 (Illinois' law had the same flaws as New York's).

When civilian absentee voting began to spread in the 1910s, it remained formalized and supervised. Two methods emerged. Under the Kansas and Missouri approach, a voter absent from his home district could vote in person on election day at another polling place, after signing an affidavit attesting to his qualifications. P. Orman Ray, Absent Voters, 8 Am. Pol. Sci. Rev. 442, 443 (1914); *see* Fortier 502, 505. Under the North Dakota approach, a voter applied for and obtained an absentee ballot from state officials, went before a notary, took an oath, marked his ballot in the notary's presence, had the notary certify compliance with formalities, then mailed the ballot to his home district. Ray 444 (1914); *see* Fortier 502-03, 505; P. Orman Ray, Absent-Voting Laws, 1917, 12 Am. Pol. Sci. Rev. 251, 253-61 (1918).

Today, absentee voters mark their ballots "in an unsupervised environment," usually at home. NCSL, Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options, bit.ly/4qnJcm2 (updated Aug. 1, 2025). Most States have dropped any requirement to appear before a notary or even to have a witness. By one recent count, only 8 States require that an absentee ballot include a witness's signature and only 3 States require that the absentee-ballot envelope be notarized. NCSL, Table 14: How States Verify Voted Absentee/Mail Ballots, bit.ly/45q2z5V (updated Oct. 21, 2025).

Last consider the ballot system itself. Today in-person voters are familiar with the secret-ballot

system (or "Australian system"): "a secret ballot, furnished by the state and supplied to the electors on the day of election within the polling place, and marked in secret by the electors." Eldon Cobb Evans, A History of the Australian Ballot System in the United States v (1917); *see id.* at 28-35. This was not the system that prevailed in 1845 or 1872. Most States "incorporated the paper ballot" soon after the Union formed. Jerrold Glenn Rusk, The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876-1908 at 38 (1968). For a time voters prepared their own paper ballots: they handwrote them, marked them at home, and brought them to the polls. *Id.* at 14, 38. To gain influence, political parties began printing and distributing ballots—which they made "distinctive" and "recogniz[able] at a distance" so that they revealed the voter's intentions. *Burson v. Freeman*, 504 U.S. 191, 200-01 (1992) (plurality opinion); *see* Evans 2, 6-16. By the mid-1800s, most States used written ballots prepared by parties, which spurred "bribery, intimidation, and corruption" at polling places. Evans 6-7, 10-11; *see* Rusk 15, 38.

Only late in the 19th century did States respond by adopting the secret-ballot system. States began considering that system in the 1880s. Joseph P. Harris, Election Administration in the United States 153 (1934); Evans 18-21. After some States rejected it (as Michigan and Wisconsin did in 1887), the system began to catch on in the late 1880s and then spread rapidly. Rusk 26; Harris 153-54. By 1896, almost 90% of States had adopted it. Evans 27; Rusk 29-30.

2.a. This case concerns another area in which state election administration has been dynamic: the receipt of absentee ballots.

As noted, until the 20th century States largely required voting to occur in person. Steinbicker 898. When people vote in person, it makes little sense for them to do anything but cast a ballot that is immediately received. So for much of our history, States generally received ballots on election day. But as the world changed and more States adopted "absent voting," States had reason to change ballot-receipt practices. *Supra* p. 10; Kettleborough 320. Some did; some did not. *See* Steinbicker 905-06 ("usual" ballot-receipt deadline in early-20th-century absentee voting was on or before election day, but deadlines "range[d] from six days before to six days after" election day). And innovation continued.

Today all States require ballots for federal offices to be cast—marked and submitted to election officials—by federal election day. And many States require that ballots be received by election officials by that day. But nearly 30 States and the District of Columbia allow at least some ballots that are cast by election day to be counted if they are received soon after that. *See*, *e.g.*, NCSL, Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots, bit.ly/3MQ95N0 (updated Dec. 24, 2025). Some of those States allow post-election-day ballot receipt generally; some allow it for military and overseas voters only. *See ibid.*

b. Mississippi is among the States that allow some timely cast ballots to be received after election day.

Mississippi law allows qualified residents to vote in federal elections in person on election day or (in limited circumstances) absentee. Miss. Code Ann. §§ 23-15-541 *et seq.*, 23-15-621 *et seq.* Mississippians wishing to vote absentee may do so "either by mail or

in person with a regular paper ballot." *Id.* § 23-15-637(3). For in-person absentee ballots to be counted, they must be "cast ... and deposited into a sealed ballot box by the voter, not later than 12:00 noon on the Saturday immediately preceding elections held on Tuesday." *Id.* § 23-15-637(1)(b). For mail-in absentee ballots (including ballots sent by "common carrier") to be counted, they "must be postmarked on or before the date of the election and received by the registrar no more than five (5) business days after the election." *Id.* § 23-15-637(1)(a). "[A]ny" ballots "received after such time ... shall not be counted." *Ibid.* A mail-in absentee ballot is thus "cast" when it is mailed to the registrar, "timely cast" when it is postmarked on or before election day, and "timely ... received" when received within 5 business days after election day. *Id.* § 23-15-637(1)(a), (2). Absentee ballots (like other ballots) are counted only after "the polls close" on election day. *Id.* § 23-15-639(1)(c); *see id.* § 23-15-581.

3. In 2024 the Republican National Committee, the Mississippi Republican Party, James Perry (a Mississippi voter), and Matthew Lamb (a county election commissioner) filed a lawsuit challenging Mississippi's mail-in absentee-ballot law, Miss. Code Ann. § 23-15-637(1)(a). ROA.23-36 (complaint). The Libertarian Party of Mississippi filed a similar suit. ROA.1281-94 (complaint). Plaintiffs are respondents here. They sued the Mississippi Secretary of State (petitioner here) because of his role in administering election laws enacted by the Legislature, along with several county election officials.

Respondents contend that the federal election-day statutes require ballots to be received by election officials—not just cast by voters—by election day. They claim that Mississippi's law allowing mail-in

absentee ballots cast by election day to be received within 5 business days after that day (Miss. Code Ann. § 23-15-637(1)(a)) therefore is preempted by the federal election-day statutes, violates the right to stand for office protected by the First and Fourteenth Amendments, and violates the right to vote protected by the Fourteenth Amendment. App.5a. The district court consolidated the cases and allowed Vet Voice Foundation and Mississippi Alliance for Retired Americans to intervene as defendants. App.5a & n.2.

The district court granted summary judgment to petitioner. App.59a-85a. It rejected respondents' preemption claim, holding that Mississippi's law "does not conflict with" the federal election-day statutes. App.84a; *see* App.72a-82a. When Congress enacted those statutes, the court explained, the "ordinary meaning" of *election* was "'*final* choice of an officer by the duly qualified electors'" or "'the combined actions of voters and officials meant to make *a final selection* of an officeholder.'" App.77a, 78a (quoting *Newberry v. United States*, 256 U.S. 232, 250 (1921), then *Foster v. Love*, 522 U.S. 67, 71 (1997); district court's emphases). Mississippi's law, the court held, comports with that meaning by requiring that the "election" be held on federal election day. "[U]nder Mississippi's law," "no 'final selection' is made *after* the federal election day." App.79a. "All that occurs after election day is the delivery and counting of ballots cast on or before election day." *Ibid.* The court also rejected respondents' right-to-vote and right-to-stand-for-office claims, ruling that those claims "stand or fall on whether" Mississippi's law is preempted—and thus fall. App.83a.

4. The court of appeals reversed in part, vacated in part, and remanded. App.1a-26a.

The court held that "Mississippi's law is preempted." App.6a; *see* App.2a-3a, 6a-24a. Under the federal election-day statutes, it ruled, "election" day "is the day by which ballots must be both *cast* by voters and *received* by state officials." App.3a. That holding, the court said, flows from "[t]ext, precedent, and historical practice." App.2a-3a.

On text: The court said that preemption here "turns on the meaning of *election*" in the federal election-day statutes. App.8a (emphasis added). The court acknowledged that "dictionary definitions often help" in "understanding ... statutory text," but declared that those definitions "do not shed light on Congress's use of the word 'election' in the nineteenth century." App.8a n.5. The court said that one cited definition "largely restates the federal election statutes" and that "most other contemporary sources make no mention of deadlines or ballot receipt." *Ibid.*

On precedent: The court focused (App.8a-13a) on this Court's decision in *Foster v. Love*. *Foster* held that 2 U.S.C. §§ 1 and 7 preempted a Louisiana law allowing Senators and Representatives to be elected in October, "without any action to be taken on federal election day" in November. 522 U.S. at 68-69, 74. *Foster* ruled 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. Because the election must occur on federal election day, this Court held, a congressional election "may not be consummated prior to federal election day." *Id.* at 72 n.4.

From *Foster* the court of appeals drew three "elements" to an "election" that the federal election-

day statutes require by election day: "official action"; "finality"; and "consummation." App.9a. The court faulted Mississippi's law on each one. App.9a-13a.

First, the court ruled that, by not requiring ballot receipt by election officials by election day, Mississippi law lacks the "official action" that must occur on that day. App.9a-10a. Citing "hypotheticals" that it called "obviously absurd"—what if a State allowed voters to mark ballots and then "place them in a drawer" or "post a picture on social media"?—the court declared it "equally obvious" that "a ballot is 'cast' when the State takes custody of it." App.10a.

Second, the court ruled that Mississippi law does not provide the "finality" that must occur on election day. App.10a-12a. The court said that an election involves "the polity's final choice of an officeholder"—not just individual voters' "selection[s]"—and that the polity has not "finally chosen the winner before all voters' selections are received." App.10a (emphases omitted). The court contrasted ballot receipt with ballot counting—which it agreed need not occur on election day. *Ibid.* Even if ballots have not been counted on election day, the court said, "the result is fixed when all of the ballots are received and the proverbial ballot box is closed": "[t]he selections are done and final." *Ibid.* But "while election officials are still receiving ballots, the election is ongoing": "[t]he result is not yet fixed." *Ibid.* The court cited state-agency regulations saying that mail-in absentee ballots are "final" when "accepted," processed, and deposited in a ballot box. 1 Miss. Admin. Code pt. 17, R. 2.1, 2.3(a). The court took those regulations to mean that ballots are not final when mailed. App.11a. The court also declared that "mail-in ballots are less

final than Mississippi claims" because "[t]he postal service permits senders to recall mail." App.12a.

Third, the court ruled that under Mississippi law an election is not "consummated" on election day. App.12a-13a. "[T]he election is consummated," the court said, only "when the last ballot is received and the ballot box is closed." App.13a. "[S]o long as the State continue[s] to receive ballots, the election [is] ongoing and ha[s] not been consummated." App.12a-13a. By contrast, when officials just count ballots after election day, the election is still "consummated" because "officials know there are X ballots to count" since "the proverbial ballot box is closed." App.13a.

The court saw no conflict (App.23a-24a) between its holding and *Republican National Committee v. Democratic National Committee*, 589 U.S. 423 (2020) (per curiam), which stayed an injunction that allowed ballots in Wisconsin to be mailed after primary election day because "allow[ing] voters to mail their ballots after election day ... would fundamentally alter the nature of the election by allowing voting ... after the election." *Id.* at 426. That conclusion, the court of appeals said, "is equally consistent with the ballot-receipt requirement" as it is with the view that an election requires only ballot casting: "If voters can mail their ballots after Election Day, those ballots are necessarily received after Election Day, too." App.24a. The court added that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Ibid.*

On history: The court believed that "[h]istory confirms that 'election' includes both ballot casting and ballot receipt." App.14a; *see* App.14a-18a. "For over a century after Congress established a uniform

federal Election Day," the court said, "States understood those statutes to mean ... that ballots must be *received*" by federal election day. App.14a. According to the court, early American voting occurred ("[b]y necessity") "contemporaneously with receipt of votes," *ibid.*, absentee voting (from soldier absentee voting in the Civil War to broader civilian absentee voting deep into the 20th century) largely required ballot receipt by election day, App.15a-17a, and "[e]ven today" most States "prohibit officials from counting ballots received after" election day, App.17a.

The court said that other federal laws are "silent on the deadline for ballot receipt" (and so do "nothing at all" to allow post-election-day ballot receipt) or "show that Congress knew how to authorize post-Election Day voting when it wanted to do so." App.19a, 20a (emphasis omitted); *see* App.19a-23a.

On the former set of laws, the court cited the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. § 20301 *et seq.*, which regulates military and overseas voting, and the Voting Rights Act Amendments of 1970, *id.* § 10502, which adopted an absentee-ballot framework for presidential elections. App.19a-20a. Those statutes, the court said, require voters to submit ballots "on the same timeline as absentee ballots in the voter's State," and so at most "are silent about—and hence do not expressly prohibit—receiving and counting ballots after Election Day." App.19a, 20a. But that silence does not help the State, the court said, because the federal election-day statutes themselves "require States to receive all ballots by Election Day." App.20a.

On the latter set of laws, the court cited the Help America Vote Act of 2002 (HAVA), 52 U.S.C. § 20901

et seq., which sets a procedure for voters whose eligibility is in question: such a voter submits a provisional ballot that is counted if the voter is later determined eligible. *Id.* § 21082(a). The court said: "All jurisdictions that issue such ballots accept them after Election Day." App.21a (citing U.S. CA5 Amicus Br. 16 (Dkt. 148)). The court then again cited UOCAVA. It said that UOCAVA "permits post-Election Day balloting, but it does so through its statutory text," which "authorize[s] the Attorney General to bring civil actions in federal court for declaratory or injunctive relief needed to enforce the Act." App.22a (citing 52 U.S.C. § 20307(a)). In "many" UOCAVA cases, the court said, courts have issued injunctions "extending ballot-receipt deadlines." *Ibid.* The court last cited 2 U.S.C. § 8(a) (which lets States hold congressional elections on days other than federal election day for vacancies and runoffs) and 3 U.S.C. § 21(1) (which lets States "modif[y]" the "period of voting" in presidential elections for certain "force majeure events"). App.22a-23a. Those statutes, the court said, again show that, "[w]here Congress wants to make exceptions to the federal Election Day statutes, it has done so." App.23a.

The court of appeals reversed the district court's judgment on respondents' preemption claims, vacated the judgment on respondents' other claims (since that judgment rested on the district court's preemption ruling), and remanded. App.24-26a.

The court of appeals denied rehearing en banc by a 10-5 vote. App.29a. Four opinions accompanied that denial. App.30a-58a.

In the lead dissent, joined by five judges, Judge Graves concluded that "federal law does not mandate

that ballots be received by state officials" by election day. App.35a; *see* App.35a-56a. He maintained: that dictionaries show that an "election" requires that voters "ma[ke] choices for public officers—nothing more," App.38a; *see* App.38a-39a; that the panel's analysis under *Foster* is flawed, App.39a-47a; and that "[h]istorical practice" confirms that an election requires only ballot casting, App.47a; *see* App.47a-51a. He observed that the panel's holding deems preempted "ballot receipt laws in at least twenty-eight states and the District of Columbia." App.56a.

In a concurrence joined by all members of the three-judge panel (plus Judge Smith), Judge Oldham said that the panel "did not hold that the States' common practice of counting timely-cast ballots received after Election Day was preempted," because the panel "recognized" that States "obviously can accept ballots after Election Day under circumstances authorized by federal law," as in UOCAVA and HAVA. App.33a (cleaned up). And without "time limits" on "ballot acceptance," he added, States could extend congressional-election ballot-receipt deadlines "2 months, or even 2 years, after Election Day" and could "engage in gamesmanship, experiment with deadlines, and renew the very ills Congress sought to eliminate: fraud, uncertainty, and delay." App.34a.

SUMMARY OF ARGUMENT

The federal election-day statutes do not preempt state laws, like Mississippi's, that allow mail-in absentee ballots that are cast by election day to be received after that day. The court of appeals erred in ruling otherwise. This Court should reverse.

A. Under the federal election-day statutes, ballots must be cast—not received—by election day. That

conclusion flows from text, precedent, and history. Those statutes set the federal "election" day. An "election" is the conclusive choice of an officer. The voters make that choice by casting their ballots. So federal law requires only that voters cast their ballots by election day. The election has then occurred, even if state officials do not receive all ballots by that day.

B. Mississippi law comports with the federal election-day statutes. Under Mississippi law, the voters—including mail-in absentee voters—make their conclusive choice of officers by federal election day because they must cast their ballots by that day.

C. The court of appeals erred in holding that the federal election-day statutes require ballots to be received by election day. The decision defies text, precedent, and history; it would doom laws in most States today; and it would condemn countless state laws enacted in the last 165 years.

ARGUMENT

The Federal Election-Day Statutes Do Not Preempt State Laws, Like Mississippi's, That Allow Ballots That Are Cast By Federal Election Day To Be Received After That Day.

A. Under The Federal Election-Day Statutes, Ballots Must Be Cast—Not Received—By Federal Election Day.

The federal election-day statutes set the federal "election" day. An "election" is the conclusive choice of an officer. Voters make that choice when they cast their ballots—mark and submit them to election officials. So federal law requires only that ballots be cast—not received—by election day. That conclusion

flows from text, structure, and context, from precedent, and from history.

1. Start with text. The federal election-day statutes set the "election" day for federal offices: the Tuesday after the first Monday in November in certain years. 2 U.S.C. § 7; 2 U.S.C. § 1; 3 U.S.C. § 1. The core term uniting those statutes is "election." So that word's meaning dictates what those statutes require of federal election day.

As a matter of plain meaning, an *election* is the conclusive choice of an officer. In 1845, when Congress set a uniform day for presidential elections, *election* meant "final choice of an officer by the duly qualified electors." *Newberry v. United States*, 256 U.S. 232, 250 (1921); *see* Noah Webster, An American Dictionary of the English Language 288 (1841) ("The act of choosing a person to fill an office or employment, by any manifestation of preference, as by ballot, uplifted hands, or *viva voce*"; "The public choice of officers"). In 1872, when Congress set a uniform day for electing Representatives, *election* had the same meaning: "'[t]he act of choosing a person to fill an office.'" *Foster v. Love*, 522 U.S. 67, 71 (1997) (quoting Noah Webster, An American Dictionary of the English Language 433 (1869)); *see* Noah Webster, An American Dictionary of the English Language 433 (1865) ("The act of choosing a person to fill an office or employment, by any manifestation of preference, as by ballot, uplifted hands, or *viva voce*"); Joseph E. Worcester, Dictionary of the English Language 469 (1860) ("The act or the public ceremony of choosing officers of government."). In 1914, Congress tied the election day of Senators to the "election" for Representatives—and thus to the 1872 statute. Still, in 1914 *election* had the same meaning: "The selecting

of a person or persons for office, as by ballot." Funk and Wagnalls, Desk Standard Dictionary 266 (1919); *see Newberry*, 256 U.S. at 250; *United States v. Classic*, 313 U.S. 299, 318 (1941) ("the expression by qualified electors of their choice of candidates").

This plain-text understanding means that an election occurs when the voters have cast their ballots—marked and submitted them to election officials as state law requires. The voters have then chosen and their choice is conclusive: the election is over. An election thus does not depend on when ballots are received. As the authorities above reflect, the plain meaning of *election* includes no requirement of ballot receipt. Ballot receipt is, of course, critical to effectuating the voters' choice. But that is also true of counting votes. Yet—as the court of appeals and respondents agree—counting votes is not part of the election itself. App.10a, 13a; RNC CA5 Br. 21 (Dkt. 71) ("tally[ing]" votes is a "back-end administrative process[ ]" that is not part of the "election"); LP CA5 Br. 23 (Dkt. 73) ("counting" votes is not part of the "election"). That is why counting votes lawfully can and does occur after election day. App.10a, 13a. The same is true of ballot receipt: it is critical, but it is not part of the election itself. So the federal election-day statutes require that ballots be cast—not received by election officials—by election day.

Statutory structure confirms that the federal election-day statutes do not set a ballot-receipt deadline. Those statutes are spare. In one sentence, each sets the time for the "election"—no more. Those statutes do not dictate how States must hold elections—including what ballot-receipt practices they must use. Reading these statutes to set a ballot-receipt deadline reads more into them than they can

bear. *See infra* pp. 34-35. Indeed, by "default," States decide how to hold elections. *Foster*, 522 U.S. at 69; *see Smiley v. Holm*, 285 U.S. 355, 366 (1932) (that power reaches "registration," "supervision of voting," "protection of voters," "prevention of fraud," "counting of votes," "publication of election returns," and more). If Congress wanted to override that power, it would have used words showing that.

Statutory context reinforces that the federal election-day statutes do not set a ballot-receipt deadline. Consider the precursor to 2 U.S.C. § 1: the 1866 statute that set the time for state legislatures "to elect a senator in Congress." 14 Stat. 243, 243. That statute set the time for holding those elections and directed "the ... manner" for conducting those elections: a "viva voce" vote, taken "openly" in each house, with the result "entered on the journal," with backup mechanisms if no candidate secured a majority from both houses. *Ibid.* That statute, passed near in time to the main federal election-day statutes and addressing the same subject, shows that when Congress wanted to dictate how to hold an election for federal officers—including how voting would occur—it did so in statutory text. It did not do that in the federal election-day statutes. Those statutes do not set a ballot-receipt deadline.

2. Precedent confirms that the federal election-day statutes require ballot casting—not ballot receipt—by election day.

Start with *Foster v. Love*. It confirms that an *election* requires a final choice—not ballot receipt—by election day. *Foster* held that 2 U.S.C. §§ 1 and 7 preempted Louisiana's "open primary" law allowing Senators and Representatives to be elected in

October, "without any action to be taken on federal election day." 522 U.S. at 68-69, 74. This Court ruled that, "[w]hen the federal [election-day] 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 (emphasis added). So "a contested selection of candidates for a congressional office that is *concluded* as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violates" federal law. *Id.* at 72 (emphasis added). An election "may not be *consummated* prior to federal election day." *Id.* at 72 n.4 (emphasis added).

Under *Foster*, election day is the day to "conclude[ ]" and "consummate[ ]" the election—through a "final selection." 522 U.S. at 71, 72 & n.4. That occurs when the voters have marked and submitted their ballots to election officials as state law requires. Ballots are then cast, and the voters have made their final choice using the State's official process for facilitating voting. *See id.* at 71 (an election entails "the combined actions of voters and officials"). So the final selection is concluded and consummated—even if the final selection cannot be effectuated until ballots are received and counted. Nothing in *Foster* requires that ballots be received as part of the election itself.

Now take *Republican National Committee v. Democratic National Committee*, 589 U.S. 423 (2020) (per curiam). It reinforces that ballot receipt is not part of an election. *RNC* stayed an injunction that allowed ballots to be mailed after primary election day in Wisconsin. In granting that relief, this Court distinguished "the date by which ballots may be *cast*

by voters" from "the date by which ballots may be ... *received* by the municipal clerks," and ruled that extending the former date "fundamentally alters the nature of the election." *Id.* at 424 (emphases added). "[A]llow[ing] voters to mail their ballots *after* election day," *RNC* declared, "would fundamentally alter the nature of the election by allowing *voting* ... after the election." *Id.* at 426 (emphases added). *RNC* thus recognizes that ballot "cast[ing]" is "fundamental[ ]" to voting and thus to the election itself, but ballot "recei[pt]" is not. *Id.* at 424, 426.

Because, as *Foster* and *RNC* confirm, ballot receipt is not part of the election itself, a State that adopts a post-election-day ballot-receipt deadline is making a permissible "policy choice." *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). "[V]ariation" in state "election-deadline rules" accordingly "reflects our constitutional system of federalism," *id.* at 32—not a breach of federal law.

Against these authorities, respondents have relied on the Montana Supreme Court's decision in *Maddox v. Board of State Canvassers*, 149 P.2d 112 (Mont. 1944). *Maddox*, they claim, shows "that '[n]othing short of the delivery of the ballot to the election officials for deposit in the ballot box constitutes casting the ballot.'" *E.g.*, RNC BIO 21 (quoting 149 P.2d at 115). That is not so. *Maddox* holds that, when "state law" directs that a ballot is cast (and voting occurs) *only when* "deposited with the election officials," *then* ballots must be received by federal election "day" because otherwise voting would extend beyond that day. 149 P.2d at 115. *Maddox* leaves open the option of post-election-day ballot receipt where

state law says that a ballot is cast when submitted (rather than received). And States have that option because the federal election-day statutes do not set a ballot-receipt deadline and so do not preempt state laws allowing post-election-day ballot receipt.

That view gains support from leading 19th-century judicial decisions addressing state laws enabling soldiers to vote during the Civil War. A recurring question in those cases was whether a State could allow voting outside one's home district or home state. Courts' answers to that question show that in the 1800s an election was not confined to particular practices—even practices that had been as universal as voting in one's home district or home state. *Contra* RNC BIO 22 ("The States' unbroken, uniform, decades-long practice of ending ballot receipt on election day is strong evidence that the practice was part and parcel of conducting an 'election.'").

Consider the Wisconsin, Iowa, and Ohio Supreme Courts' decisions upholding soldier-voting laws. Although "the uniform practice" had long been to vote in one's home district, the Wisconsin Supreme Court rejected the view that an election requires that practice. *State ex rel. Chandler v. Main*, 16 Wis. 398, 417-18 (1863). "If an act may be accomplished in several different modes," the court explained, "the fact that the legislature, for a given time, uniformly provides for only one mode, does not at all imply that in their opinion they could not have provided any other." *Id.* at 418. As the Iowa Supreme Court put it, a State *can* require each voter to "present" himself at his home-district polling place and "make manual delivery of the ballot to the officers appointed by law to receive it"—but an election does not require that practice. *Morrison v. Springer*, 15 Iowa 304, 346-47

(1863). In regulating the "manner" of elections, the Ohio Supreme Court explained, the State may "declare" that soldiers "may cast their ballots at any place of which they hold actual military occupation, whether within or outside of the state," and may "declare the effect which shall be given ... to ballots thus cast." *Lehman v. McBride*, 15 Ohio St. 573, 609 (Ohio 1863). When state supreme courts struck down soldier-voting laws, it was not because in-district or in-state voting "was part and parcel of conducting an 'election'" (RNC BIO 22) but because the state constitution required that practice. *E.g.*, *Chase v. Miller*, 41 Pa. 403, 419, 425 (1862) (state constitution required voting "in" one's home district).

Under these cases and their understanding of an election, even a "uniform practice" of receiving ballots by election day would not mean that an election requires that practice: a State may choose a "different mode[ ]" of ballot receipt—such as post-election-day receipt. *Chandler*, 16 Wis. at 418. A State *can* require "delivery of the ballot to the officers appointed by law to receive it" by election day—but an election does not require that. *Morrison*, 15 Iowa at 346-47. In allowing post-election-day ballot receipt, States are validly deciding how voters "may cast their ballots" and "the effect which shall be given" to them. *Lehman*, 15 Ohio St. at 609. Under the 19th-century understanding of an *election*—and so under the federal election-day statutes—States have leeway over ballot-receipt deadlines.

3. History confirms that the federal election-day statutes require ballot casting—not ballot receipt.

First, the history surrounding the federal election-day statutes confirms that they do not address ballot

receipt. Historical context shows what drove Congress to pass those statutes. It was not a problem of ballot receipt. Congress set a uniform election day to address problems from States holding elections on different days. *Supra* pp. 5-8. That generated a host of evils: fraud, when people voted in multiple States' elections; undue influence, for States that held voting early; and burdens on voters, who in some States had to vote in presidential and congressional elections on different days. *Foster*, 522 U.S. at 73-74; *supra* pp. 5-8. Congress was not addressing or deciding an issue of ballot receipt.

Second, broader historical context shows that the federal election-day statutes do not impose particular electoral practices—including particular ballot-receipt practices. Election administration was dynamic across the decades in which the federal election-day statutes were enacted. States were innovating—on whether, when, and by whom to allow absentee voting; on the manner in which absentee voting would occur; on how balloting itself occurred; and more. *Supra* pp. 9-13. In that context, it is implausible to conclude that in setting the "election" day, in three one-sentence provisions, Congress froze in place a practice—election-day ballot receipt—that States had not yet even had wide reason to explore. And, as explained below, embracing the view that the federal election-day statutes froze that practice in place requires accepting that they froze in place other electoral practices that dominated at the time—and condemning practices that later came to dominate.

Third, history explains 19th-century election-day ballot-receipt practices. The reason for those practices is simple: for much of our history, there was little reason for another practice. For 125 years after the

Founding—and for decades after the main federal election-day statutes were enacted—States largely required voting to occur in person. *Supra* pp. 9-10. When people vote in person on election day, it makes little sense for them to do anything but cast a ballot that is immediately received. That does not mean that the federal election-day statutes require that practice. It means that the timing of ballot receipt was not yet a ripe issue—let alone one that had been settled. Once it ripened, States began to change practices. *Supra* pp. 10, 14. History confirms that the federal election-day statutes did not block them from doing so.

Respondents draw a different conclusion from 19th-century ballot-receipt practices. They claim that post-election-day ballot receipt "was not a practice" when "Congress enacted the election-day statutes"—States "required" or "assume[d]" that ballots would be received by election day—and so those statutes bar that practice. *E.g.*, RNC CA5 Br. 22 (because "States did not count mail ballots received after election day" in the 1800s, "[e]lection-day receipt of ballots" is "necessary" under federal law); *cf.* LP CA5 Br. 30. But even if States generally received ballots by election day in the 1800s, the federal election-day statutes would not require that practice. Respondents have never cited anything showing that any State set an election-day ballot-receipt deadline because it thought the federal election-day statutes require it. So their historical case falls short.

Consider respondents' view of state laws allowing absent soldiers to vote during the Civil War. Respondents claim that States "conducted an election [in the field] on election day"—rather than "simply collect[ing] ballots and ship[ping] them back home"—because "States understood the 'election' to require

receipt of ballots by election officials." *E.g.*, RNC BIO 23 (emphasis omitted). Many States did hold elections in the field, but not because of any election-day ballot-receipt requirement. States did that to ensure fair and honest elections: elections limited to qualified voters and free of fraud. "[S]ecur[ing] purity of election" and preventing "odious frauds" was manageable when people voted in their home districts: a voter's "neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful." *Chase*, 41 Pa. at 419, 425, 427. Achieving those ends was "conceded[ly]" more "difficult" in the field. *Lehman*, 15 Ohio St. at 609. But States crafted laws with those ends in mind. *See id.* at 609-10. States required those overseeing elections in the field to ensure voters' qualifications, prevent "fraud," or do both. *E.g.*, 1862 Laws of Iowa 28, 30 § 11 (judges are "to prevent fraud, deceit and abuse"), 32 §§ 17-18 (judges enforce qualifications); 1864 Laws of Kan. 101, 102-03 §§ 5, 7 (process for judges to check qualifications); 1864 Acts and Resolves of Me. 209, 210 § 4 (supervisors must determine qualifications); 1864 Acts of Ky. 122, 123-24 §§ 5, 7 (judges take oath "to prevent all fraud, deceit, or abuse" and enforce qualifications); 1863 Ohio Gen. Laws 80, 80-81 §§ 5, 6, 8 (same); 1862 Laws of Wis. 17, 18-19 §§ 5, 7, 8 (same, for inspectors). If States' concern had been ballot receipt by an election official, they could have dispatched a functionary to just gather up ballots. That was not their practice.

Next consider what it means to read history as respondents do. In their view, because post-election-day ballot receipt "was not a practice at the time Congress enacted the election-day statutes," those statutes bar that practice. *E.g.*, RNC CA5 Br. 22. That

view—that "election" is defined by whatever practices prevailed when those statutes were enacted—would doom countless state election laws. Indeed, that view would condemn any electoral practices that were not in place when the first election-day statute was enacted in 1845: "election" must mean the same thing in each federal election-day statute, otherwise those statutes would require different things of "election" day and would not achieve the uniformity that (all agree) Congress sought to secure. The implications of respondents' approach are profound.

On respondents' approach, the federal election-day statutes would preempt legions of absentee-voting laws. Absentee voting "was not a practice" when the 1845 federal election-day statute was passed. *Supra* pp. 9-10. So that statute would preempt every state law that allowed Union soldiers to vote in the presidential election during the Civil War—and many more laws after that. The other federal election-day statutes would have a similar sweep. Even if those statutes could draw meaning from Civil War absentee-voting practices, they still would preempt many general civilian absentee-voting laws, which did not take hold until after all the federal election-day statutes were enacted. *Supra* pp. 9-12.

On respondents' approach, the federal election-day statutes would preempt much of how States practice absentee voting today. Assume for the moment that respondents' approach would allow some absentee voting (beyond what other federal statutes require): elections would still be confined to the practices when the federal election-day statutes were enacted. When absentee voting occurred on any meaningful scale in the 19th century, it largely was (or closely resembled) in-person voting. *Supra* pp. 11-12. Only long after the

federal election-day statutes were enacted did absentee voting become what it widely is today: remote, unwitnessed, permissive. *Supra* pp. 11-12. On respondents' view of history, the federal election-day statutes block that because it "was not a practice" when those statutes were enacted.

On respondents' approach, the federal election-day statutes would preempt States' use of the secret-ballot system. That system "was not a practice" in 1845 or even 1872. It did not take hold until the 1890s. *Supra* pp. 12-13. So the federal election-day statutes would bar States from using that system.

This is not a sound approach to history. This Court should reject that approach and read the federal election-day statutes in line with text, precedent, and solid history: to require the voters' conclusive choice by election day, achieved when they cast ballots by that day.

B. Mississippi Law Requires That Ballots Be Cast By Federal Election Day And Thus Comports With The Federal Election-Day Statutes.

Mississippi requires the voters—including mail-in absentee voters—to cast their ballots by federal election day, so the State's law comports with the federal election-day statutes.

Under Mississippi law, the voters make their conclusive choice of federal officers by federal election day. In-person voters do that. *See*, *e.g.*, Miss. Code Ann. §§ 23-15-541, 23-15-551, 23-15-637(1)(b) (addressing in-person timing and casting). So do mail-in absentee voters. Mississippi law directs that, to be counted, mail-in absentee ballots "must be

postmarked on or before the date of the election" and "received by the registrar no more than five (5) business days after the election." *Id.* § 23-15-637(1)(a). Under that law, a mail-in absentee ballot is "cast" when it is mailed to the registrar and "timely cast" when it is postmarked on or before election day. *Id.* § 23-15-637(1)(a), (2). The law thus aligns with the ordinary understanding of casting a ballot by mail. *See Republican National Committee v. Democratic National Committee*, 589 U.S. 423, 424 (2020) (per curiam) (equating "cast[ing]" absentee ballots with "mail[ing] and postmark[ing]" them). So Mississippi requires that mail-in absentee ballots be cast by election day.

That framework harmonizes with federal law. Under Mississippi law, the "election" for federal officers occurs on federal election day. 2 U.S.C. § 7; 2 U.S.C. § 1; 3 U.S.C. § 1. In Mississippi "the duly qualified electors" make a "final choice" of officers by election day, as the federal election-day statutes require. *Newberry v. United States*, 256 U.S. 232, 250 (1921). Mississippi voters make a "public choice of officers" by that day. Noah Webster, An American Dictionary of the English Language 288 (1841); *supra* pp. 24-25. Mississippi law requires that mail-in absentee ballots (like other ballots) be cast by election day—"on or before the date of the election." Miss. Code Ann. § 23-15-637(1)(a). And the voters' choice, made by election day, is conclusive—"final." *Foster*, 522 U.S. at 71. Mississippi voters cannot change their votes after that day or submit votes after that day. *See* Miss. Code Ann. §§ 23-15-581, 23-15-637. And "voters" "combine[ ]" with election "officials" in making their "final selection." *Foster*, 522 U.S. at 71. When voters choose officers, they do so as part of—

and in line with—the State's process of facilitating voting. In Mississippi, officials provide the voters with ballots and a method to cast them, and the voters—including mail-in absentee voters—must submit those ballots to officials using that official method. *See* Miss. Code Ann. § 23-15-637(1)(a).

It does not matter—as far as the federal election-day statutes are concerned—that election officials in Mississippi may receive some ballots after election day. Only ballot casting is essential to an election. *Supra* Part A. Mississippi does not "allow voters to mail their ballots *after* election day," so it does not "allow[ ] *voting* ... after the election." *RNC*, 589 U.S. at 426 (emphases added). Under Mississippi law, "no 'final selection' is made *after* the federal election day." App.79a (district-court opinion). "All that occurs after election day is the delivery and counting of ballots cast on or before election day." *Ibid.* Under Mississippi law the election is "concluded" and "consummated" on federal election day because by that day voters make a "final selection" of officers. *Foster*, 522 U.S. at 71, 72 & n.4.

Beyond comporting with text and precedent, Mississippi law honors the historical context that drove the federal election-day statutes. *Supra* pp. 5-8. One: Mississippi law does not "distort[ ]" "the voting process" by allowing "the results of an early federal election in one State" to "influence later voting in other States." *Foster*, 522 U.S. at 73. Mississippi's absentee ballots—like other ballots—are not counted until after the polls close on election day. Miss. Code Ann. § 23-15-639(1)(c). Two: Mississippi law does not promote fraud. It guards against fraud—including in mail-in absentee voting. *See id.* § 23-15-621 *et seq.* (regulating absentee voting); *Campbell v.*

Whittington, 733 So. 2d 820, 827 (Miss. 1999) (state law provides "mandatory" "safeguards" to "ensure the integrity of the absentee ballot process"). Three: Mississippi does not "burden" citizens by "forc[ing]" them "to turn out on two different election days ... in Presidential election years." *Foster*, 522 U.S. at 73. In Mississippi, all federal elections occur the same day. Miss. Code Ann. §§ 23-15-781, 23-15-1033, 23-15-1041.

Reasonable people can disagree with Mississippi's "policy choice" to "require only that absentee ballots be mailed by election day." *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring) (emphasis omitted). But federal law "authori[zes]" Mississippi to make that choice. *Id.* at 32 (noting that Mississippi is among the States that "no longer require that absentee ballots be received before election day"). The federal election-day statutes do not preempt Mississippi's mail-in absentee-ballot law.

C. The Court Of Appeals Erred In Holding That The Federal Election-Day Statutes Preempt Mississippi Law.

The court of appeals held that, under the federal election-day statutes, "ballots must be both *cast* by voters and *received* by state officials" by election day. App.3a; *see* App.6a-24a. The court erred.

1. On text, although the court agreed that this case turns on the "meaning" of *election*, App.8a, the court cast aside a premier aid to assessing plain meaning: dictionaries. *See*, *e.g.*, *Foster*, 522 U.S. at 71 (relying on dictionary definition of *election* to interpret statutes at issue here); *District of Columbia v. Heller*, 554 U.S. 570, 581-82, 584, 586, 587-88, 597 (2008)

(relying on dictionary definitions to construe Second Amendment). The court declared that dictionary definitions "do not shed light on" Congress's use of the word "election" in the federal election-day statutes because those definitions "make no mention of deadlines or ballot receipt." App.8a n.5.

That was error. The failure of any dictionary definition of "election" to even mention ballot receipt is a strong signal that ballot receipt is not part of an election. App.39a (Graves, J., dissenting) ("[I]f, at the time of the statute's enactment, the ordinary meaning of 'election' carried no mandate as to when ballots were to be received, our inquiry should end."); *see Heller*, 554 U.S. at 586 (faulting proposed definition because "[n]o dictionary has ever adopted that definition"). When evidence cuts against a conclusion, that does not mean that the evidence is unhelpful. It means that the conclusion is likely wrong. So it is here. The dictionaries the panel cited all support the view that ballot casting defines an election. App.8a n.5. None supports the view that ballot receipt defines an election. *Cf.* RNC CA5 Br. 18 ("[d]ictionar[y]" definitions of *election* "don't directly address ballot receipt"). In statutory interpretation, that matters.

2. On precedent, the court drew from *Foster* three "elements" that must occur by election day—"official action," "finality," "consummation"—and faulted Mississippi law on each. App.8a-13a. The court erred.

First, the court ruled that the requirement for "official action" means that a ballot can be cast only when it is "received" by election officials. App.9a-10a. The court cited no authority saying that: it just deemed it "obvious." App.10a. But an "election" focuses on the voters' choice and imposes no ballot-

receipt requirement. *Supra* Part A. So election officials' only necessary involvement in the election is giving the voters the means to make a final selection—such as by offering a ballot and a method to cast it. In Mississippi that occurs by election day.

The court suggested that if a ballot could be cast before it is received then a State could allow voters to mark their ballots and then "place them in a drawer" or "post a picture on social media." App.10a. But the court cited nothing to show that its hypotheticals satisfy any plausible understanding of ballot casting. And there is no dispute that an election requires at least ballot casting—marking and submitting a ballot to election officials. Mississippi's law requires ballot casting. Indeed, that law requires that a mail-in absentee ballot be sent to "the registrar" and "postmarked on or before" election day and thus bear an objective indicator that it is cast—and cast timely. Miss. Code Ann. § 23-15-637(1)(a). That law has no resemblance to the panel's hypotheticals.

Second, the court ruled that an election requires "the polity's" final choice of officers—rather than just individual voters' selections—and that the polity's "final[ ]" choice is not made until "all voters' selections are received." App.10a. The court again cited nothing to support this view. And under Mississippi law, the polity does make its choice by election day: every ballot must be cast by that day, so the polity's final choice is made by that day. Even though "officials are still receiving ballots," "the result is fixed" on election day and the election is not "ongoing": voting is closed. *Contra ibid.* And if (as the court thought) the election were "ongoing" when the State is receiving ballots, it is also ongoing when the State is counting ballots: the "selections" are "done and final"—the result is

"fixed"—at both stages. *Ibid.* That means that ballot casting—not ballot receipt—defines an "election."

The court thought that state-agency regulations support its view. App.11a. But those regulations do not provide that ballots become "final" after election day. *Contra ibid.* Under those regulations, a mail-in absentee ballot is the voter's "final vote" (1 Miss. Admin. Code pt. 17, R. 2.1) and the voter cannot "cast a regular ballot" "at the polling place on election day" (*id.*, R. 2.3(a)). A voter who arrives at the polling place on election day can cast "an affidavit ballot"—but that affidavit ballot will be accepted and counted only if the voter's "absentee ballot has not been received within five (5) business days after the election" or is "rejected" because of a flaw. *Id.*, R. 2.3. So a mail-in absentee ballot *is* final when mailed—which must occur by election day. And affidavit ballots are all cast and received on election day—and thus also satisfy any election-day deadline.

The court also said that the postal service "permits senders to recall mail," so mail-in ballots "are less final than Mississippi claims." App.12a. The court erred. Mississippi law does not allow voters to recall a mailed ballot: a mail-in absentee ballot is "final" when cast—it cannot be "uncast." Miss. Code Ann. § 23-15-637(3). Even if that were not so, respondents never presented evidence that a mail-in ballot has ever been—or as a practical matter could ever be—recalled after mailing. *Cf.* App.45a-46a & n.4 (Graves, J., dissenting). Respondents never suggested such a possibility until their appellate reply briefs. And they were unable to defend that claim at oral argument. The court should not have relied on that forfeited claim to condemn Mississippi's law.

Third, the court ruled that an election is "consummated" only when the last ballot is received because officials then "know there are X ballots to count." App.13a; *see* App.12a-13a. But the election is just as consummated when no more ballots can be cast: the election is then finished and decided. Under Mississippi law, that occurs on federal election day.

The court brushed aside *Republican National Committee v. Democratic National Committee*, which stayed an injunction that allowed ballots to be mailed after primary election day in Wisconsin. The court claimed that *RNC* "is equally consistent with the ballot-receipt requirement" as it is with the view that an election requires only ballot casting. App.24a. Nonsense. *RNC* distinguished ballot "cast[ing]" from ballot "recei[pt]"; it emphasized that "[e]xtending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election"; and it reemphasized that "allow[ing] voters to mail their ballots after election day" is what "would fundamentally alter the nature of the election by allowing voting for six additional days after the election." 589 U.S. at 424, 426. The court below declared that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." App.24a. Granted. But this is not about mere "language" in an opinion: it is about an on-point holding of this Court. The court of appeals did not follow that holding.

3. On history, the court claimed: "For over a century after Congress established a uniform federal Election Day, States *understood those statutes to mean*" that ballots must be received by election day.

App.14a (emphasis added); *see* App.14a-18a. The court's historical discussion shows no such thing. The court cited nothing—no judicial decision, no statute, no legislative finding, no legislator's statement, no treatise, *nothing*—showing that any State imposed an election-day ballot-receipt deadline because it "understood those statutes" to require it. App.14a. The court's discussion shows at most that for much of our history States generally received ballots by election day. *See* App.14a-18a. That does not mean that federal law mandates that.

As discussed, a sounder inference from these election-day ballot-receipt practices is that for much of our history there was little or no reason for another practice. When people vote in person on election day—as they mostly did in the 1800s—it makes little sense for them to do anything but cast a ballot that is immediately received. *Supra* p. 14. That does not mean that an election requires that practice. When those statutes were enacted, ballot-receipt timing was not a live—let alone settled—issue. As the world changed, States had reason to change ballot-receipt practices and began to do so. *Supra* pp. 10, 14. Federal law allows that.

4. The court claimed that other federal statutes are "silent on the deadline for ballot receipt" or "show that Congress knew how to authorize post-Election Day voting when it wanted to do so." App.19a, 20a (emphasis omitted); *see* App.19a-23a. But the court cited no statute that shows that the federal election-day statutes require ballot receipt by election day.

The court cited the Help America Vote Act, which sets a voting procedure, using provisional ballots, when a voter's eligibility is in question. App.20a-21a.

The court said: "All jurisdictions that issue such ballots accept them after Election Day." App.21a. All the court cited on that point is the United States' brief noting that this is the universal practice. U.S. CA5 Amicus Br. 16. But HAVA's *text* is silent on provisional-ballot-receipt deadlines. *See* 52 U.S.C. § 21082(a). Because (according to the court of appeals) "congressional silence" means "nothing at all," on the court's own reasoning HAVA does not authorize post-election-day ballot receipt—let alone confirm that the federal election-day statutes require ballot receipt by election day. App.20a; *contra* App.33a-34a (Oldham, J., concurring). Worse: On the court's reasoning, laws in nearly every State on post-election-day HAVA ballot receipt (U.S. CA5 Amicus Br. 16) are subject to the federal election-day statutes and are all preempted.

The court claimed that UOCAVA "permits post-Election Day balloting, but it does so through its statutory text." App.22a. This is wrong too. UOCAVA says: "The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this chapter." 52 U.S.C. § 20307(a). That text is silent on ballot-receipt deadlines. Indeed, before claiming that UOCAVA's "text" permits "post-Election Day balloting," App.22a, the court had declared that "[n]othing in" UOCAVA "says that States are allowed to accept and count ballots received after Election Day," App.19a; *ibid.* (UOCAVA "say[s] nothing about the date or timing of ballot receipt"). And on the court's own view of congressional silence, the federal election-day statutes bar post-election-day receipt of UOCAVA ballots—and so render unlawful the injunctions "extending ballot-receipt deadlines" the

United States has obtained in "many" UOCAVA cases. App.22a; *see United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 496 (2001) (equity courts cannot issue injunctions that override a "clear and valid legislative command"); *contra* App.33a-34a (Oldham, J., concurring).

Last, the court cited 2 U.S.C. § 8(a) and 3 U.S.C. § 21(1). App.22a-23a. The former allows congressional elections on days other than federal election day to fill vacancies and for runoff elections. The latter defines "election day" in 3 U.S.C. § 1 as "the Tuesday next after the first Monday in November" in every fourth year, but has an exception: if a State that "appoints electors by popular vote" timely "modifies the period of voting" in response to certain "force majeure events," "election day" will "include the modified period of voting." The court viewed these statutes as exceptions to the rule that elections be held on federal election day and believed that they show that, "[w]here Congress wants to make exceptions to" the federal election-day statutes, "it has done so." App.23a. Even if that were right, it would not show that the federal election-day statutes require ballot receipt—rather than ballot casting—by election day. And because the "election" requires only ballot casting, a State that requires only ballot casting by election day is not seeking an exception to those statutes—it is following them.

5. In a concurrence in the denial of rehearing en banc, the panel members claimed that rejecting preemption here would mean that "federal law imposes no time limits at all on ballot acceptance"—so States could allow ballot receipt "2 months, or even 2 years, after Election Day." App.34a. That claim has many flaws. One: The Constitution supplies deadlines

that force action. The Twentieth Amendment provides that "the terms" of "the President and Vice President" "shall ... begin" "at noon on the 20th day of January" and that "the terms" of "Senators and Representatives" "shall ... begin" "at noon on the 3d day of January." U.S. Const. amend. XX, § 1. Two: If Congress is dissatisfied with state ballot-receipt deadlines, it can act. *See id.* art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 4. Three: Congress *has* imposed deadlines. *E.g.*, 2 U.S.C. §§ 1, 7 (recognizing January 3 as the start of congressional terms); 3 U.S.C. §§ 5(a)(1) (time for certifying electors), 7 (electors "shall meet and give their votes on the first Tuesday after the second Wednesday in December"). Four: The concurrence gave no basis for thinking that States will not timely conclude their electoral processes. States want representation and so have strong reason to act timely. Fifth: If none of these features produces timely state action, a ballot-receipt deadline will not do so. A recalcitrant State could just delay counting or certification.

The concurrence also claimed that, without an election-day ballot-receipt deadline, States could "engage in gamesmanship, experiment with deadlines, and renew the very ills Congress sought to eliminate: fraud, uncertainty, and delay." App.34a. The concurrence offered no support for that claim. And Mississippi law produces none of the ills that the federal election-day statutes address. Mississippi law respects the uniformity that Congress sought to achieve and does not distort the voting process, promote fraud, or burden voters with two election days. *Supra* pp. 37-38.

* * *

From top to bottom, the court of appeals erred. Embracing its decision would have profound ramifications. The rule that court adopted would "necessarily invalidate" laws in the nearly 30 States and the District of Columbia that allow some ballots mailed by election day to be received after that day. *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28, 35 (2020) (Kavanaugh, J., concurring); *see* App.56a (Graves, J., dissenting); *supra* p. 14. The rule would bar court orders under UOCAVA extending ballot-receipt deadlines for servicemembers. *Supra* pp. 44-45. The rule may doom the laws of the nearly 50 States that (according to the court below) allow post-election-day receipt of provisional HAVA ballots. *Supra* pp. 43-44. And the damage would spread far beyond that. On the court of appeals' logic, the federal election-day statutes override countless state laws from the past 165 years and largely require citizens to vote in person, on election day, in their home districts, without the secret-ballot system. *Supra* pp. 9-13, 33-35. That is not a sound view of Congress's work. Congress did not impose the destabilizing revolution in election administration that the ruling below would require. This Court should reverse.

CONCLUSION

This Court should hold that the federal election-day statutes do not preempt Mississippi's mail-in absentee-ballot law and reverse the judgment below.

Respectfully submitted.

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