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 RESPONDENTS VET VOICE FOUNDATION AND MISSISSIPPI ALLIANCE FOR RETIRED AMERICANS SUPPORTING PETITIONER

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QUESTION PRESENTED

Under Mississippi law, voters who vote absentee must mark their absentee ballot and either deliver it directly to their clerk's office before election day or place it in the mail so that it is postmarked by election day, and the ballot will be considered timely as long as it is delivered within five business days after election day. Miss. Code § 23-15-637(1)(a). The question presented is whether federal statutes designating a single, nationwide "day of the election" for members of Congress and presidential electors preempt Mississippi's law. *See* 2 U.S.C. §§ 1, 7; 3 U.S.C. §§ 1, 21(1).

RULE 29.6 DISCLOSURE STATEMENT

I, Marc E. Elias, counsel for Vet Voice Foundation and the Mississippi Alliance for Retired Americans, and a member of the Bar of this Court, certify that Vet Voice Foundation and the Mississippi Alliance for Retired Americans have no parent corporation, and that no publicly held company owns 10% or more of their stock.

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INTRODUCTION

Mississippi law requires all voters, no matter their means of voting, to make their final choice by election day. For in-person voters, that means going to their polling place, marking their ballot, and submitting it. For absentee voters, that means marking their ballot and either delivering it directly to their clerk's office before election day or placing it in the mail, where it must be postmarked by election day and delivered within five business days after. Either way, all voters have made their final choice by the end of election day. All that remains is for election officials to receive and canvass the ballots and declare a winner.

The Fifth Circuit reached the extraordinary conclusion that this straightforward set of rules is preempted by longstanding federal statutes designating a single, nationwide "day of the election" for members of Congress and presidential electors. *See* 2 U.S.C. §§ 1, 7; 3 U.S.C. §§ 1, 21(1). That conclusion is unsupported by text, precedent, statutory purpose, and longstanding historical practice.

Even the Fifth Circuit acknowledged that the statutory text does nothing to support its holding. Pet.App.8a n.5. "Election," the key term, means "[t]he act of *choosing* a person to fill an office." *Foster v. Love*, 522 U.S. 67, 71 (1997) (emphasis added) (quoting N. Webster, *An American Dictionary of the English Language* 433 (C. Goodrich & N. Porter eds., 1869)). Mississippi law is consistent with that definition because

it requires all voters to make their final choice on or before election day.

Precedent does not support the Fifth Circuit's holding either. The relevant decision is *Foster*, which invalidated a Louisiana law that held congressional elections in October, with a general election to follow in November only if no candidate won a majority the month before. 522 U.S. at 70. Eighty percent of the time, no election at all was held on federal election day. *Id.* Mississippi law is nothing like that. Mississippi holds its elections on the designated day and requires all voters to complete and submit their ballots by that day.

Statutory purpose, too, supports Mississippi's law. The purposes of setting a single federal election day, *Foster* explained, were to prevent "an early federal election in one State" from "influenc[ing] later voting in other States," and to eliminate the "burden on citizens" from multiple federal elections in a single year. *Id.* at 73–74. The challenged law threatens neither purpose. All voters must make their final choice by election day and no results are announced until after, so there is no danger of interstate influence. And all federal elections in Mississippi are held on the same day.

Finally, historical practice is on Mississippi's side. While the challenged law is relatively recent, there is nothing novel or unusual about States allowing some or all absentee voters to submit their ballots by election day and have them counted even if election offi-

cials do not receive them until later. Some States followed that approach for soldiers during the Civil War; some adopted that approach for soldiers and civilians prior to World War II. Today, at least 30 States and several territories allow some or all voters to vote in that way. Florida's acceptance of military and overseas ballots received after election day decided the 2000 presidential election. *See Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317 (N.D. Fla.), *aff'd*, 235 F.3d 578 (11th Cir. 2000). And Congress has repeatedly acknowledged and incorporated state post-election day receipt deadlines in federal law, while *never* seeking to preempt them.

The Court should not adopt, by judicial decree, a fundamental change to American election law that Congress has not seen fit to enact. The Fifth Circuit erred in holding otherwise. The Court should reverse.

OPINIONS BELOW

The court of appeals' opinion is reported at 120 F.4th 200. The denial of rehearing en banc is reported at 132 F.4th 775. The district court's opinion is reported at 742 F. Supp. 3d 587.

JURISDICTION

The court of appeals entered judgment on October 25, 2024. It denied rehearing en banc on March 14, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provisions are: U.S. Const. art. I, § 4, cl.1; *id.* art. II, § 1, cl.2; *id.* art. II, § 1, cl.4; 2 U.S.C. §§ 1, 7; 3 U.S.C. §§ 1, 21; Miss. Code § 23-15-637; 1 Miss. Admin. Code pt. 17, R. 2.1. They are reproduced at Pet.App.86a–91a.

STATEMENT

I. The Elections Clause and the Election Day Statutes

The Elections Clause grants States the principal power to set the "Times, Places and Manner of holding Elections for Senators and Representatives," but it allows Congress to "at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. Similarly, Article II, Section 1, Clause 4 provides that "Congress may determine the Time of ch[oo]sing the [presidential] Electors, and the Day on which they shall give their Votes," *id.* art. II, § 1, cl. 4, while the Electors Clause reserves to the States the power to choose the "Manner" of appointing electors, *id.* art. II, § 1, cl. 2. Thus, while Congress *may* displace state laws governing federal elections, its power to do so extends "so far as it is exercised, and no farther." *Ex parte Siebold*, 100 U.S. 371, 392 (1879).

In the nineteenth century, Congress enacted a series of statutes establishing a uniform federal election day. *See* 2 U.S.C. § 7; 3 U.S.C. §§ 1, 21. Today, these statutes specify "the day for the election," 2 U.S.C. § 7,

and provide that presidential electors must "be appointed . . . on election day," 3 U.S.C. § 1. But they do not say and have never said anything about the procedures to be used in casting and tabulating votes. They "simply regulate the time of the election." *Foster*, 522 U.S. at 71–72. States retain "wide discretion in the formulation of a system for the choice by the people of representatives in Congress." *United States v. Classic*, 313 U.S. 299, 311 (1941).

In the more than 150 years since their enactment, these laws have never been understood to require that all acts related to voting occur on election day. Courts have repeatedly upheld early and absentee voting procedures as consistent with federal law, so long as they do not cause the *final* selection of an officeholder before election day. *See Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1176 (9th Cir. 2001); *Millsaps v. Thompson*, 259 F.3d 535, 547 (6th Cir. 2001); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776–77 (5th Cir. 2000); *see also Foster*, 522 U.S. at 68–69. Absentee voting has been part of American elections for centuries, and "all states currently provide for it in some form." *Bomer*, 199 F.3d at 776. Likewise, the counting and canvassing of votes routinely stretches for days or weeks after election day, and neither courts nor Congress have ever suggested that this violates federal law. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 116 (2000) (per curiam) (Rehnquist, C.J., concurring) (cataloguing administrative actions occurring in Florida after election day to conclude the election process).

II. Absentee Voting in Mississippi

Like every State, Mississippi offers absentee voting. But Mississippi limits absentee voting to just a few categories of voters, including the elderly, the disabled, those away from their home county on election day, and military servicemembers. *See* Miss. Code §§ 23-15-713, 23-15-673.

In 2020, nearly unanimous bipartisan majorities of the Mississippi legislature enacted the law challenged here, which provides that absentee ballots returned by mail 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(a)(1).[1] This deadline ensures that ballots completed and placed in the mail by election day are not rejected because of minor mail delivery delays, and it gives absentee voters the same clear deadline to make their final choices as in-person voters—election day.

Fourteen U.S. States plus three territories and the District of Columbia have similar laws, allowing for the counting of ballots that are mailed by election day

[1] *See* H.R. Roll Call Vote, H.B. 1521, 2020 Reg. Sess. (Miss. Mar. 10, 2020), perma.cc/56WK-5HYE; S. Roll Call Vote, H.B. 1521, 2020 Reg. Sess. (Miss. June 15, 2020), perma.cc/2CZR-7MQX.

and received shortly thereafter.[2] Another seventeen States apply a similar rule to military and overseas voters specifically.[3] In total, more than 30 States, the District of Columbia, and several U.S. territories permit the counting of ballots that are mailed by election day and received afterwards for at least some voters.

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[2] Alaska Stat. § 15.20.081(e); Cal. Elec. Code § 3020(b); D.C. Code § 1-1001.05(a)(10B); 3 Guam Code Ann. § 10114; 10 Ill. Comp. Stat. 5/19-8(c); Md. Code Regs. 33.11.03.08(B)(4); Mass. Gen. Laws ch. 54, § 93; Miss. Code § 23-15-637(1)(a); Nev. Rev. Stat. § 293.269921(1)(b), (2); N.J. Stat. Ann. § 19:63-22(a); N.Y. Elec. Law § 8-412(1); Or. Rev. Stat. § 253.070(3)(b); P.R. Laws Ann. tit. 16, § 4736(2); Tex. Elec. Code § 86.007(a)(2); V.I. Code Ann. tit. 18, § 665(a); Va. Code § 24.2-709(B); Wash. Rev. Code §§ 29A.40.091(4), 29A.60.190; W. Va. Code § 3-3-5(g)(2). Kansas, North Dakota, Utah, and Ohio have recently amended their election laws to require receipt by election day for all or most absentee voters. *See* 2025 Kan. Sess. Laws 33; 2025 N.D. Laws ch. 200; 2025 Utah H.B. 300; S.B. 293, 136th Gen. Assemb., Reg. Sess. (Ohio 2025). The Governor of Ohio cited uncertainty resulting from this lawsuit as his reason for signing the bill, which he said he otherwise would veto. Julie Carr Smyth, *Ohio governor 'reluctantly' signs bill eliminating grace period for late ballots*, ABC News (Dec. 23, 2025), https://perma.cc/B5B3-ZKR5.

[3] Ala. Code § 17-11-18(b); Ark. Code § 7-5-411(a)(1)(A)(ii); Colo. Rev. Stat. § 1-8.3-113(2); Fla. Stat. § 101.6952(5); Ga. Code § 21-2-386(a)(1)(G); Ind. Code § 3-12-1-17(b); Iowa Code § 53.44; Mich. Comp. Laws § 168.759a(18); Mo. Rev. Stat. § 115.920(1); N.C. Gen. Stat. § 163-258.12(a); N.D. Cent. Code § 16.1-07-24; Ohio Rev. Code Ann. § 3511.11(B); 25 Pa. Cons. Stat. § 3511(a); R.I. Gen. Laws § 17-20-16; S.C. Code § 7-15-700(A); Utah Code Ann. § 20A-16-408. Montana has similar laws for federal write-in absentee ballots and military-overseas ballots transmitted electronically. Mont. Code §§ 13-21-206(1)(c), 13-21-226(1).

III. Proceedings Below

In early 2024, nearly four years after Mississippi's law was enacted and after two federal general elections were held under it, the Republican National Committee, the Mississippi Republican Party, an individual Mississippi voter, and a Commissioner for the George County Election Commission (collectively, the "RNC") sued to enjoin Mississippi officials from counting ballots postmarked by election day but received by mail after election day. The RNC argues that the statute is preempted by federal law.

Several weeks later, the Libertarian Party of Mississippi filed its own, similar complaint (together with the RNC, "Respondents"). The district court consolidated the cases and granted the Vet Voice Respondents leave to intervene to defend Mississippi's law alongside the Secretary of State. Pet.App.61a.

The parties filed cross-motions for summary judgment, and the district court granted summary judgment to defendants. Pet.App.84a. It held that Respondents had standing "in the form of economic loss and diversion of resources," based on declarations attesting that they spent more money on "ballot-chase programs" and poll-watching as a result of the challenged law. Pet.App.66a–67a, 70a. But it rejected Respondents' claims on the merits, holding that precedent, legislative history, statutory purpose, and historical practice all show that the Mississippi law "operates consistently with and does not conflict with the Electors Clause or the election-day statutes." Pet.App.82a.

The Fifth Circuit reversed on the merits. Pet.App.3a. It acknowledged that early and absentee voting is lawful even though it involves the state receiving ballots *before* election day. Pet.App.12a. And it acknowledged that not *all* steps related to the election need to take place on election day, and that "it can take additional time" after election day to count ballots and tabulate the results. Pet.App.13a. But the Fifth Circuit held that *receiving* ballots after election day—even ones that were completed and placed in the mail before election day—is different. *Id.*

The Fifth Circuit denied Vet Voice Respondents' petition for rehearing en banc, over five dissents. Pet.App.29a. Among other things, the dissenting judges emphasized the oddity of the Fifth Circuit's ruling that "among all of the processing duties that election officials perform after voters have cast ballots, *only* ballot receipt must occur by the end of election day." Pet.App.41a (Graves, J., dissenting).

SUMMARY OF ARGUMENT

Mississippi's ballot receipt deadline does not conflict with federal law. States enjoy the principal power to set the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl.1, as well as the "Manner" of appointing presidential electors, *id.* art. II, § 1, cl. 2. States have "wide discretion in the formulation of a system for the choice by the people of representatives in Congress." *Classic*, 313 U.S. at 311.

Congress may preempt certain State election laws, but its power to do so extends only "so far as it is exercised, and no farther." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 9 (2013) ("*ITCA*") (quoting *Ex parte Siebold*, 100 U.S. at 391). The Court uses traditional tools of statutory interpretation to determine whether Mississippi's law "conflict[s]" with federal law. *Id.* at 14.

I. Federal law designates election day as the "day for the election," 2 U.S.C. § 7, and dictionaries consistently define "election" as "choice." *See, e.g.*, *Foster*, 522 U.S. at 71 ("[T]he act of choosing a person to fill an office." (quoting N. Webster, *An American Dictionary of the English Language* 433 (Charles Goodrich & N. Porter eds., 1869))). Mississippi law is consistent with that definition because, by requiring absentee voters to complete and mail their ballot by election day, it requires them to make their final "choice" on or before that day. Miss. Code § 23-15-637(1)(a). The preemption analysis should end there.

The Fifth Circuit *assumed* that federal law must say something about ballot receipt deadlines and then twisted itself in knots trying to decide what the federal deadline is. But Congress has not spoken to every election administration question that might arise, and where Congress is silent, the answers are left to the States.

II.A. Mississippi law is also consistent with the Court's precedent. It does not raise the same problems as the Louisiana law at issue in *Foster*, 522 U.S. 67,

under which most congressional elections were concluded—and the results announced—before the federal election day.

Respondents' and the Fifth Circuit's focus on *Foster*'s statement that election day refers to "the combined actions of voters and officials meant to make a final selection" is misplaced. 522 U.S. at 71 *Foster* expressly did not seek to precisely define what must occur on election day to comply with federal law. *Id.* at 72. And Mississippi law is consistent with *Foster*'s formulation, because "the combined actions of voters and officials" end on election day when Mississippi law requires ballots to be mailed. After that date, all that remains is for officials, alone, to receive and tally the ballots. All agree the tally may occur after election day, and there is no reason to treat receipt differently.

The Court's decision in *Republican National Committee v. Democratic National Committee* confirms the lawfulness of Mississippi's approach. 589 U.S. 423 (2020) (per curiam). There, the Court stayed a COVID-19–era court order extending the *mailing* deadline for absentee ballots, without questioning the lower court's extension of the *receipt* deadline. *Id.* at 426. While that case involved a primary election that was not subject to the federal laws at issue here, the Court's explanation that the mailing date was the key date, the extension of which would transform the "election" and risk allowing voters to change their votes after initial results had been announced, is inconsistent with the Fifth Circuit's analysis here. *Id.* at 425.

B. The Fifth Circuit's reliance on the Montana Supreme Court's decision in *Maddox v. Board of State Canvassers*, 149 P.2d 112 (Mont. 1944), is misplaced. *Maddox* turned on a specific feature of Montana law, which did not treat a ballot as having been formally cast until election officials received it. Mississippi law does not share that feature. While a Mississippi regulation provides that an absentee ballot becomes the "final vote of the voter" when election officials accept and count it, that regulation is concerned with handling voters who submit multiple ballots—it does not purport to define when a ballot is cast, and it could not overrule Mississippi statutes even if it sought to.

III. Mississippi law is also consistent with the purposes of federal law. By requiring all voters to make their final choice and surrender their ballot by election day, it prevents one State's election results from affecting election results in another State, and it ensures that Mississippi voters need to vote in only one federal general election per year.

IV. Finally, history shows that state laws allowing post-election ballot receipt are nothing new, and that federal law has never been understood to preempt them. During the Civil War, many States allowed soldiers in the field to vote using a "field voting" system that necessarily guaranteed their votes would not be received by state officials and entered into the final tally until well after election day. *See* Josiah Henry Benton, *Voting in the Field* 318 (1915). There was no objection made that these practices violated the first of the federal election day statutes, enacted in 1845,

and Congress made no attempt to prohibit them when the second was enacted in 1872.

The Fifth Circuit was wrong to dismiss "field voting" as involving soldiers directly voting "with no carrier or intermediary." Pet.App.15a. True, some States formally deputized military officers as election officials. But others did not. *See, e.g.*, Benton at 171–73, 186–87. And whether deputized or not, the substance is the same—ballots were cast on election day and were not received by officials for counting until later, just like under Mississippi's law.

States continued to adopt various forms of post-election day receipt during the beginning of the 20th century. In Washington, for example, voters who were unable to vote in their home counties could cast a ballot in another county on election day which would then be "sealed and returned to the voter's home county," and counted if it arrived within six days. P. Orman Ray, *Absent-Voting Laws, 1917*, 12 Am. Pol. Sci. Rev. 251, 253–54 (1918). In the wake of World War I, States such as Maryland, Kansas, and California enacted explicit post-election receipt deadlines that are materially indistinguishable from Mississippi's law. Act of Mar. 28th, 1918, ch. 78, sec. 1, § 223(g), 1918 Md. Laws 124, 130; Act of Mar. 22, 1919, ch. 189, § 6, 1919 Kan. Sess. Laws 250, 252–53; Cal. Political Code § 1360 (James H. Derring ed. 1924). The Fifth Circuit was therefore wrong to say that laws enacted after World War I universally provided that "a ballot could be counted only if *received* by Election Day." Pet.App.16a. And by the United States' entry

into World War II, at least *eight* States had post-election receipt deadlines—not just one State, as the Fifth Circuit erroneously claimed. *See Bill to Amend the Act of September 16, 1942: Hearing on H.R. 3436 Before the H. Comm. on Election of President, Vice President, and Representatives in Cong.*, 78th Cong. 102 (1943); Pet.App.17a.

Congress recognized these developments when it passed the 1942 Soldier Voting Act ("the 1942 Act") and then amended it in 1944. The 1942 Act created federal war ballots with an *explicit* election day receipt deadline, while still authorizing soldiers to instead vote using more lenient state procedures if available in their State. Act of Sept. 16, 1942, ch. 561, §§ 9, 12, 56 Stat. 753. And the 1944 Act allowed federal war ballot voters to benefit from post-election day receipt deadlines if available in their State, providing that "any extension of time for the receipt of absentee ballots permitted by State laws shall apply to ballots cast under this title." Act of Apr. 1, 1944, Pub. L. No. 78-277, § 311(b)(3), 58 Stat. 136, 146. In neither statute did Congress suggest that these post-election day deadlines were preempted by longstanding federal law, nor seek to preempt them for other voters.

In 1986, aware of state laws imposing post-election receipt deadlines, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Like the 1942 Act, it creates an alternative federal write-in absentee ballot, but it also provides that such ballots will not be counted if a *state* absentee ballot is received by the deadline for receipt *under state law*.

52 U.S.C. § 20303(b)(3). In 2009, the MOVE Act amended UOCAVA to require military officials to ensure that overseas servicemembers' ballots are delivered "to the appropriate election officials" "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(b)(1) (emphasis added). If federal law already required that all ballots nationwide be received by election day, it would make no sense for Congress—in both 1986 and 2009—to have referenced *state* receipt deadlines in these laws.

The historical record therefore shows that Congress was repeatedly mindful of various state post-election day receipt deadlines, yet never suggested that they were preempted by existing federal law or otherwise acted to disturb them.

ARGUMENT

Federal laws establishing a uniform election day for members of Congress and presidential electors do not preempt Mississippi's law that absentee ballots completed and postmarked by election day will be counted as long as election officials receive them within five business days after.

The Constitution gives States the primary duty to regulate the time, place, and manner of federal elections, while allowing Congress to preempt state law with federal legislation. *ITCA*, 570 U.S. at 8; *see also Moore v. Harper*, 600 U.S. 1, 10 (2023). But Congress's preemptive authority extends "so far as it is exercised, and no farther." *ITCA*, 570 U.S. at 9 (quoting *Ex parte*

Siebold, 100 U.S. at 391). Whether a state election law has been preempted is a question of statutory interpretation. *Foster*, 522 U.S. at 72. The Court "read[s] Elections Clause legislation simply to mean what it says." *ITCA*, 570 U.S. at 15. "The straightforward textual question" is whether the state law "conflicts with" the federal one. *Id.* at 9. To answer that question, the Court considers text, context, and statutory purpose. *Id.* at 9–13; *see also Foster*, 522 U.S. at 71–74.

Text, precedent, statutory purpose, and more than 150 years of historical practice all make clear that counting ballots postmarked by election day and delivered shortly thereafter is entirely consistent with—and therefore not preempted by—federal laws establishing a uniform federal election day. The Fifth Circuit erred in holding otherwise.

I. Mississippi's law is consistent with the federal laws' plain text.

The analysis starts with the federal laws' text. *ITCA*, 570 U.S. at 9. There are three relevant provisions, governing elections for the House, the Senate, and the Presidency, respectively. Together, these statutes "mandate[] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster*, 522 U.S. at 70.

First, 2 U.S.C. § 7, which dates to 1872, provides that the Tuesday after the first Monday in November in even-numbered years "is established as *the day for the election* . . . of Representatives and Delegates to" Congress. *See* Act of Feb. 2, 1872, ch. 11, § 3, 17 Stat.

28 (codified as amended at 2 U.S.C. § 7) (emphasis added). Second, 2 U.S.C. § 1, enacted in 1914 after the ratification of the Seventeenth Amendment, provides that Senators "shall *be elected*" at the relevant "regular election" for House members. *See* Act of June 4, 1914, ch. 103, § 1, 38 Stat. 384 (codified as amended at 2 U.S.C. § 1) (emphasis added). Finally, 3 U.S.C. § 1 provides that presidential electors "shall *be appointed* . . . on election day," defined as "the Tuesday next after the first Monday in November, in every" presidential election year, 3 U.S.C. § 21(1).[4]

Respondents' argument—and the Fifth Circuit's decision—focused on the term "election" within the phrase "the day for the election" in 2 U.S.C. § 7. *See* Pet.App.8a. That term must be interpreted "as taking [its] ordinary meaning at the time Congress enacted the statute," in 1872. *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019) (citation modified). Contemporaneous dictionaries provide a consistent definition. *Foster* cited one: "[t]he act of choosing a person to fill an office." 522 U.S. at 71 (quoting N. Webster, *An American Dictionary of the English Language* 433 (Charles Goodrich & N. Porter eds., 1869)). Other definitions similarly emphasize an "election" as the voters' choice or act of choosing. *See, e.g.*, *New Dictionary of the English Language* 649 (Charles Richardson ed., 1846) (defining "elect" as "[t]o choose or pick out");

[4] 3 U.S.C. §§ 1 and 21 are part of a 2022 enactment, but substantially similar language dates to 1845. *See* Act of Jan. 23, 1845, ch.1, 5 Stat. 721; Act of June 25, 1948, Pub. L. No. 771, § 1, 62 Stat. 672.

N. Webster, *An American Dictionary of the English Language* (1st ed. 1828) ("1. The act of choosing; choice; the act of selecting one or more from others. Hence appropriately, 2. 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; as the *election* of a king, of a president, or a mayor."); *Black's Law Dictionary* 608 (Rev. 4th ed. 1968) ("The selection of one person from a specified class to discharge certain duties in a state, corporation, or society."). And the Court has consistently interpreted "election" similarly in other provisions. *See Newberry v. United States*, 256 U.S. 232, 250 (1921) (defining "election" as the "final choice of an officer by the duly qualified electors"); *Classic*, 313 U.S. at 318 (explaining "election" refers to "the expression by qualified electors of their choice of candidates").[5]

By specifying a "day for the election," then, federal law mandates a day by which voters must make their

[5] The first of the relevant statutes, now 3 U.S.C. § 1, used the term "appointment" rather than "election" because it was describing presidential electors. *See* Act of Jan. 23, 1845, ch.1, 5 Stat. 721. The analysis is materially the same. "Appointment" meant "designation to office," N. Webster, *An American Dictionary of the English Language* 46 (2d ed. 1844), again making the voters' act of designating, or choosing, what matters. The 1845 statute also equates "election" to "choice" by providing that "when any State shall have held an *election* for the purpose of *choosing* electors, and shall fail to make a *choice* on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide." 5 Stat. at 721 (emphasis added).

final "choice" for federal office. Mississippi law complies with that mandate. It requires every absentee voter—like every other voter—to make their final "choice" by election day, by completing their ballot and placing it in the mail to be postmarked by election day. Miss. Code § 23-15-637(1)(a). No absentee voter can make their choice after election day, because an absentee ballot postmarked after election day will not count, regardless of it when it is received. Mississippi law thus ensures that all voters complete their "act of choosing a person to fill an office" by election day, *Foster*, 522 U.S. at 71, as federal law demands. Mississippi law therefore does not "conflict[] with," and so is not preempted by, federal law. *ITCA*, 570 U.S. at 9. The Court could stop there.

In concluding otherwise, the Fifth Circuit failed to give effect to this plain meaning. The Fifth Circuit acknowledged the contemporaneous dictionary definitions cited above. Pet.App.8a n.5. But it set them aside because they "make no mention of deadlines or ballot receipt," concluding that they "do not shed light on Congress's use of the word 'election' in the nineteenth century." *Id.*

That reasoning is backwards. In discerning how far Congress has exercised its Elections Clause power, "the reasonable assumption is that the statutory text accurately communicates the scope of Congress's preemptive intent." *ITCA*, 570 U.S. at 14. That contemporaneous definitions of "election" say nothing about ballot receipt only proves that federal laws using that term do not address ballot receipt. And when federal

law is silent, questions of election administration are left to the States.

The Fifth Circuit also pointed to a distinction between "[a] voter's *selection* of a candidate" and "the public's *election* of a candidate." Pet.App.10a. But it had no adequate explanation for why this distinction matters here. Mississippi law requires *every* voter to complete and surrender their ballot by election day, so whether the focus is on an individual voter or the electorate as a whole, the choice has been made. And while which candidate the public has elected is not *known* until all ballots have been received, it also is not known until all ballots have been counted and the election has been certified. The Fifth Circuit acknowledged that counting and certification could occur after election day, and it had no adequate explanation for why receipt could not. *See id.*

More broadly, the Fifth Circuit seems to have thought that federal law must have *something* to say about ballot receipt deadlines, so it cast about for extra-textual clues about what the deadline might be. That was error. Election law—even for federal elections—is primarily state law, and federal law does not answer every election administration question. *E.g.*, *Moore*, 600 U.S. at 10. And whether a state election law "conflicts" with a federal statute is a "straightforward textual question." *ITCA*, 570 U.S. at 9; *see also Kansas v. Garcia*, 589 U.S. 191, 208 (2020) ("[*A*]*ll* preemption arguments[] must be grounded 'in the text and structure of the statute at issue.'" (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664

(1993))). Having found no basis for preemption in the text of the relevant statutes, the Fifth Circuit should have gone no further.

II. Mississippi's law is consistent with relevant precedent.

A. Mississippi's law is consistent with *Foster* and *RNC v. DNC*.

Mississippi's law is consistent with *Foster v. Love*, 522 U.S. 67 (1997), the only prior case from this Court construing the federal laws at issue. *Foster* addressed Louisiana's unique electoral system where an "open primary" for congressional offices was held in October of each federal election year. *Id.* at 70. If no candidate received a majority, the State would hold a run-off between the top two vote-getters on federal election day. *Id.* But if one such candidate *did* receive a majority of votes in the pre-election day "open primary," that candidate was deemed "elected" and "no further act is done on federal election day to fill the office in question." *Id.* After this system took effect, "over 80% of the contested congressional elections in Louisiana . . . ended as a matter of law with the open primary" and "without any action . . . taken on federal election day." *Id.* at 68–69, 70.

Unsurprisingly, *Foster* held that system—which often left "no act in law or in fact to take place on the date chosen by Congress"—preempted by federal law. *Id.* at 72. In doing so, however, *Foster* declined to "isolat[e] precisely what acts a State must cause to be done on federal election day (and not before it) in order

to satisfy the statute." *Id.* And it did not try to "par[e] the term 'election' in § 7 down to the definitional bone." *Id.*

Mississippi's challenged law is nothing like the law in *Foster*. Counting absentee ballots received after election day does not "conclude[]" a contested election "*before* the federal election day," as the system in *Foster* did. 522 U.S. at 72 (emphasis added). Nor does Mississippi law allow voters to make their choice *after* election day—the requirement for a pre-election day postmark precludes it. *Foster* involved a law under which the election was held on the wrong day; this case involves no analogous problem.

Foster's statement that the term "election" refers to "the combined actions of voters and officials meant to make a final selection of an officeholder" does not change the result. *Id.* at 71. Over-emphasizing the precise wording of that statement would be inconsistent with *Foster*'s own caution that it did not "isolat[e] precisely what acts" must be "done on election day" or "par[e] the term 'election' . . . down to the definitional bone." *Id.* at 72. But even if the Court were to do so, Mississippi's postmark requirement ensures that every voter makes their "final selection of an officeholder" and places their ballot in the mail by election day. *Id.* at 71. That marks the end of the "combined actions of voters and officials" to "select[] . . . an officeholder"—the voter's role is over. *Id.*

True, election officials then must receive and count the ballots and announce a winner—but election offi-

cials in *every* State canvass votes and announce winners after election day. These are events that occur "[*a*]*fter* the election has taken place." *Bush*, 531 U.S. at 116 (Rehnquist, J., concurring) (emphasis added); *see also, e.g.*, *Millsaps*, 259 F.3d at 546 n.5 ("[O]fficial action to confirm or verify the results of the election extends well beyond federal election day: county election officials must meet to verify and certify the results announced on election day, preserve pollbooks and ballots, and transmit certified results and various additional materials to the secretary of state, who then with the governor and attorney general formally announces the official results." (citations omitted)).

The Fifth Circuit acknowledged that such steps can and by necessity do often occur in the days or weeks following election day, before final results can be announced. Pet.App.10a–11a. And neither Respondents nor the Fifth Circuit offered any adequate reason why all this post-election day activity should be lawful but the receipt alone of an already marked, sealed, and mailed ballot should not. *Cf. Millsaps*, 259 F.3d at 546 (rejecting "plaintiffs' focus on the single act of receiving a ballot from a voter" as "an unnatural and stilted conception of the actions taken by" election officials).

The Northern District of Florida's decision on this issue during the 2000 presidential recount is particularly instructive. *See Harris*, 122 F. Supp. 2d at 1317. There, plaintiffs who voted for Al Gore challenged the counting of overseas absentee ballots "received after November 7," election day, as inconsistent with 3

U.S.C. § 1's requirement that electors be appointed on election day. *Id.* at 1320, 1324. But the court found no basis to distinguish receipt from counting for that purpose, so it characterized plaintiffs as arguing that "every vote must be made by a voter and counted by election officials by midnight on that day." *Id.* at 1324.

Not surprisingly, the court rejected that position as impossible: "[W]hile it is possible for everyone to vote on election day, it is highly unlikely that every precinct will be able to guarantee that its votes would be counted by midnight on election day. This has been the case for years, yet votes are not routinely being thrown out because they could not be counted on election day." *Id.* at 1324–25. What mattered, the court explained, was not receipt and not counting but rather mailing: the military and overseas ballots at issue had been "mailed or signed by election day," so that "absentee voters, like all the rest of the voters, cast their votes on election day. The only difference is when those votes are counted." *Id.* at 1325. This holding determined the outcome of the 2000 presidential election. *See id.* at 1320 (explaining that Bush's margin in the votes at issue was 739 votes, more than the 537-vote margin in the State).

This Court, too, has held that *marking and mailing*, not *receipt*, is the critical event that must occur on or before election day to avoid transforming the election—albeit in a case that did not involve the federal laws defining election day. In *Republican National Committee v. Democratic National Committee*, 589 U.S. 423 (2020) (per curiam), the Court stayed an

injunction that allowed ballots to be *mailed* after primary election day in Wisconsin, without questioning a court-imposed post-election day *receipt* deadline. The Court held that while the extended *receipt* deadline "was designed to ensure that the voters of Wisconsin can cast their ballots and have their votes count," *id.* at 426, the extended *mailing* deadline "would fundamentally alter the nature of the election by allowing voting for six additional days after the election." *Id.* In particular, the Court was concerned that the extended mailing deadline "would gravely affect the integrity of the election process" if any election results were released, *id.* at 425—the exact sort of "distortion" that a uniform election day was meant to guard against. *Foster*, 522 U.S. at 73–74. The Court had no such qualms about the *receipt* deadline, no doubt because ballots that have already been marked and mailed cannot be influenced by the release of election results. That reasoning applies in full to Mississippi's law.

The Fifth Circuit's contrary conclusion that "receipt" by election officials is the *sine qua non* of determining when a ballot is "cast," Pet.App.9a–10a, was supported primarily by a series of outlandish hypotheticals in which the voter never relinquishes custody of her ballot. Pet.App.9a. But Mississippi's law is distinct from those hypotheticals because it requires voters to establish by postmark that they relinquished their ballots on or before election day. *See* Miss. Code § 23-15-637(1)(a); *cf. Trump v. United States*, 603 U.S. 593, 640 (2024) (rejecting arguments offered by the dissents as based on "extreme hypotheticals").

B. The Fifth Circuit relied on inapposite precedent.

The Fifth Circuit cited no competent authority for its question-begging reasoning that, under *Foster*, an "election" has not occurred until "all voters' selections are *received*," rather than merely *made*. Pet.App.10a (emphasis added). The court's sole authority for this invented requirement was a 1944 Montana Supreme Court decision that expressly relied on Montana law. Pet.App.11a (citing *Maddox v. Bd. of State Canvassers*, 149 P.2d 112 (Mont. 1944)). Under Montana law at the time, "voting is done not merely by marking the ballot but by having it delivered to the election officials and deposited in the ballot box before the closing of the polls on election day," in part to facilitate canvassing "immediately after the polls close." 149 P.2d at 115 (reviewing Montana statutes). "[*S*]*ince the state law* provides for voting by ballots deposited with the election officials [during polling hours], that act must be completed on the day designated by state and federal laws." *Id.* (emphasis added). *Maddox* thus holds that *state law* determines when ballots must be received

In a prior decision cited in *Maddox*, the Montana Supreme Court itself acknowledged that other States had different rules about casting and receiving ballots, and distinguished Montana's rule that ballots are only cast when received. *See Goodell v. Judith Basin County*, 224 P. 1110, 1113 (Mont. 1924) (citing *In re Op. of the Justs.*, 113 A. 293 (N.H. 1921)). New Hampshire, for example, provided that "the elector parts

with all control over his ballot and *has in fact voted* when the ballot is marked and deposited in the mail addressed to the proper election officer." *Id.* (emphasis added).[6] And New Hampshire did not stand alone. Kansas, for example, similarly provided that a "vote is cast when the ballot is marked . . . [and] placed in envelopes and mailed on election day." *Burke v. State Bd. of Canvassers*, 107 P.2d 773, 778 (Kan. 1940). *Maddox* therefore only confirms that the proper ballot receipt deadline is a "policy choice" left to the States. *See Democratic Nat'l Comm. v. Wis. State Leg.*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring).[7]

The Fifth Circuit believed that Mississippi's law falls within the holding of *Maddox* in part because of a Mississippi regulation explaining that "an absentee ballot is the final vote of a voter when, during absentee ballot processing by the Resolution Board, *the ballot is marked accepted*." Pet.App.11a–12a. (quoting 01-17 Miss. Admin. Code R2.1). But under Mississippi law, "absentee processing by the Resolution Board" involves more than just "receipt." It requires the board to, for example, examine the ballot envelope and

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[6] New Hampshire at the time nevertheless required *receipt* by election day N.H. Rev. Laws tit. VI, ch. 34 § 66 (1942), further demonstrating a common understanding that "casting" and "receipt" are distinct events, *contra* Pet.App.10a. ("The State's problem is that it thinks a ballot can be 'cast' before it is received.").

[7] Montana has since changed its laws to permit post-election receipt for certain military-overseas ballots—laws the Fifth Circuit's reasoning would preempt. *See* Mont. Code §§ 13-21-206(1)(c), 13-21-226(1).

match the signature. Miss. Code § 23-15-639. Applying the Fifth Circuit's logic would mean that *all* these processing steps must take place on election day. But even the Fifth Circuit acknowledged such actions can and often by necessity do take place after election day. Pet.App.10a–11a. The regulation therefore provides no support for the notion that receipt is the point at which an election has occurred in Mississippi.

Further, a Mississippi *regulation* cannot modify the plain meaning of a Mississippi *statute*. Pet.App.44a (Graves, J., dissenting) (citing *Miss. Pub. Serv. Comm'n v. Miss. Power & Light Co.*, 593 So. 2d 997, 1000 (Miss. 1991)). And the regulation does not determine timeliness under Mississippi law—the ballot receipt statute does that. *See* Miss. Code § 23-15-637(1). Instead, the regulation serves "to ensure that . . . a qualified elector who is qualified to vote absentee" casts only a single ballot that is counted, such that she "may not [also] vote at the polling place on election day," including by provisional ballot. Miss. Code § 23-15-637(3). In other words, it determines which ballot is "final" for purposes of counting—a task that by necessity often occurs after election day.

III. Mississippi's law is consistent with the purpose and legislative history of federal law.

The purpose and legislative history of the federal laws establishing a uniform election day confirm that they do not preempt Mississippi's challenged law. As *Foster* explains, Congress mandated a uniform elec-

tion day to prevent (1) the "distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States" and (2) the "burden on citizens forced to turn out on two different election days to make final selections of federal officers in presidential election years." *Foster*, 522 U.S. at 73–74; *see also* Cong. Globe, 42d Cong., 2d Sess. 141 (1871). In adopting a uniform presidential election day, Congress also wished to prevent a situation where voters could travel "from one part of the Union to another[] in order to vote" in multiple States. Cong. Globe, 28th Cong., 1st Sess. 679 (1844).

Foster relied upon the first two of those legislative purposes to "buttress[]" its textual conclusion that Louisiana's open primary system was preempted. *See* 522 U.S. at 73; *see also Millsaps*, 259 F.3d at 541–42; *Bomer*, 199 F.3d at 777. As *Foster* explained, Louisiana's open primary system "foster[ed] both evils," by allowing for a final selection of officeholders in Louisiana before the elections in other States, and by requiring voters to turn out twice in two months for federal elections in presidential years. 522 U.S. at 74.

Mississippi's ballot receipt law, in contrast, causes none of the problems that Congress sought to address. It does not require voters to cast multiple ballots on multiple days. It does not allow for improper interstate influence of election results, because it neither leads to the announcement of Mississippi's results before election day nor allows Mississippi voters to make

their final choice after election day. Just the opposite—Mississippi law demands that every absentee voter complete their ballot and deposit it in the mail for postmarking by election day. And Mississippi law does nothing to allow or encourage voters to vote in multiple States. The challenged law therefore does not "foster [the] evils" Congress enacted a uniform federal election day to prevent, confirming that it is not preempted. *Id.*; *see also, e.g.*, *Bomer*, 199 F.3d at 777 (upholding Texas early voting law, in part, because it was consistent with purposes of a uniform federal election day).

The Fifth Circuit hypothesized that Mississippi's law might permit "voters [to] change their votes after Election Day" by recalling their ballots through the postal service. Pet.App.12a. The court cited no record evidence for that proposition because none exists. Respondents raised this theory for the first time in their reply brief on appeal, and they identified no instance of a voter ever retrieving their ballot after election day, much less somehow amending and recasting it. *See* Pet.App.45a–46a & n.4 (Graves, J., dissenting). Doing so would be impossible. Even if a voter could recall their ballot—a concept without record support—Mississippi law ensures that they could not alter it after election day to change their vote, because doing so would result in a ballot that was not postmarked on or before election day, or hand-delivered by the Saturday before. Miss. Code § 23-15-637(1). The panel's suggestion that voters could "change their votes after Election Day" is entirely hypothetical and irreconcilable with Mississippi law. The Court should

not base its rulings on "extreme hypotheticals." *Trump*, 603 U.S. at 640.

In fact, the Mississippi law *furthers* Congress's intent. Legislative history "reflects Congress's concern that citizens be able to exercise their right to vote." *Bomer*, 199 F.3d at 777 (citing Cong. Globe, 42d Cong., 2d Sess. 3407–08 (1872)). To interpret federal law to require rejecting the ballots of otherwise lawful voters simply because of mail delays would flout that purpose. Mississippi law sets a clear deadline for voters: they must mail their ballots on or before election day, and if voters comply with that deadline, they are reasonably assured that their ballot will be counted. Without that rule, voters are left to guess at how long the Postal Service may take to deliver their ballots and will be forced to mail their ballots far in advance of election day without any assurance that the ballot will be counted.

In recent years, mail delays have meant that even voters who mail their ballots well in advance of election day may find themselves disenfranchised as the result of postal service delays that are entirely outside of their control. The Postal Service has even settled litigation stemming from delays in delivery of ballots. *See* Stipulation & Consent Order, *Democratic Party of Va. v. Veal*, No. 3:21-cv-671-MHL (E.D. Va. Oct. 28, 2021), ECF No. 27; *NAACP v. U.S. Postal Serv.*, No. 20-cv-2295 (EGS), 2020 WL 6469845 (D.D.C. Nov. 1, 2020) (ordering USPS to take steps to ensure the timely delivery of mail-in ballots). The Mississippi Legislature acted sensibly to protect these voters. To

hold the challenged law preempted would "have the effect of impeding citizens in exercising their right to vote," *Bomer*, 199 F.3d at 777, without serving any of Congress's objectives in creating a uniform national election day. *See also Harris*, 122 F. Supp. 2d at 1325 (holding that Congress, in enacting 3 U.S.C. § 1 "certainly did not intend to disenfranchise voters whose only reason for not being able to have their ballots arrive by the close of election day is that they were serving their country overseas").

IV. Historical practice and congressional action demonstrate that Mississippi law is consistent with federal law.

The historical record—and Congress's response to it—further confirms that federal law does not preempt Mississippi's ballot receipt deadline. Acceptance of ballots that voters completed and surrendered before election day, but that were received by election officials after election day, was already common when some of the federal laws at issue were enacted, and it became even more common over the decades that followed. The Fifth Circuit's claim that, since Congress established a single national election day, "States [have] understood those statutes to" require that "ballots must be *received* no later than [election day]," Pet.App.14a, is therefore wrong. And Congress has acknowledged the practice on multiple occasions without ever seeking to displace it.

1. Receipt deadlines analogous to Mississippi's first emerged alongside the adoption of absentee voting for Civil War soldiers. With thousands of soldiers

deployed and unable to return home to vote in person, many States adopted "field voting," which allowed soldiers to cast their ballots in the field on election day, far from their home precincts. *See* Benton at 317–18. Those ballots were then conveyed back to voters' home States to be counted and canvassed by local election officials after election day. *Id.* at 318. Many States, in both the North and South, extended their canvassing deadlines to accommodate this. *Id.* This was necessary because of "the difficulty of getting the votes home to the various States in season to be counted with the other votes." *Id.* at 316. It was "understood" in these States "that a sufficient period would elapse between the day of the election, which was the day on which the soldiers were to vote in the field, and the counting of the votes of the State by the officers who were to count them, to enable the votes to reach them." *Id.* at 318.

The exact procedures and formalities varied from State to State, but the substance of field voting—ballots completed and surrendered by soldiers by election day and transmitted to local election officials for counting after—was consistent. The result was indistinguishable from Mississippi's law.

In Nevada, for instance, soldiers voted on election day "under the immediate charge and direction of the three highest officers in command." Act of Mar. 9, 1866, ch. 107, § 25, 1866 Nev. Stat. 210, 215. When the voting was done, "[a]ll the ballots cast," were "immediately sealed up and sent forthwith, by mail or

otherwise, by the commanding officer, to the Secretary of State, at the seat of government," and copies of the returns were sent to the Boards of County Commissioners in the appropriate counties. *Id.* § 27. The Board of County Commissioners would then "open said returns" and "make abstracts of the votes" when all returns were received from the field, or 30 days after election day—whichever was sooner. *Id.* § 30; *see also* Benton at 173. Rhode Island similarly provided that any soldier in the field could deliver his ballot on election day "to the officer commanding the regiment or company to which he belongs," and all such ballots were then "returned by such commanding officer to the Secretary of State within the time prescribed by law for the counting of votes in such elections." *Id.* at 186–87.[8]

The Fifth Circuit suggested that this form of "field voting involved soldiers directly placing their ballots into official custody with no carrier or intermediary," such that the "act of voting simultaneously involved receipt by election officials." Pet.App.15a. Not so.

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[8] Similar laws were enacted in Missouri, Benton at 43, Iowa, *id.* at 49, Wisconsin, *id.* at 63–64, Minnesota, *id.* at 70–71, Ohio, *id.* at 74, Vermont, *id.* at 87–89, Michigan, *id.* at 100–01, California, *id.* at 129, New York, *id.* at 156, New Hampshire, *id.* at 218–19, Maryland, *id.* at 240–41; Md. Const. art. XII, §§ 11–14 (1864), and Connecticut. *In re Op. of Justs.*, 30 Conn. 591, 591 n.* (1862) (reproducing statute). Other States required that returns showing the results of the election, but not necessarily the physical ballots, be mailed to in-state officials to be added to the official canvass. Benton at 106 (Kentucky); *id.* at 115–16 (Kansas); *id.* at 122–24 (Maine); *id.* at 189–90 (Pennsylvania).

While some States deputized military officers as election officials, others did not. Nevada, Rhode Island, and Pennsylvania, for example, allowed ballots to be placed under the charge of high commanding officers without any such designation, meaning they were not *received* by election officials until after the election. 1866 Nev. Stat. at 215; Benton at 171–73, 186–87, 190. And either way, the Fifth Circuit did not explain why calling military officers "election officials" would change the analysis, when their role is the same as the Postal Service's role today—to convey the ballots to the real election officials who will then count them.

Congress enacted 2 U.S.C. § 7 just seven years after the Civil War, with this practice fresh in mind, but it said nothing to suggest disapproval of it. And Congress did not amend 3 U.S.C. § 1—which it had previously enacted in 1845—to disturb the common understanding that presidential ballots completed and surrendered by voters on election day could be received and counted *after* election day.

2. In the early 20th century, States adopted a variety of models of non-military absentee voting, consistent with the States' "constitutional duty to craft the rules governing federal elections" wherever Congress has not acted to displace them. *Moore*, 600 U.S. at 29. At least seven States permitted an absent voter to cast a ballot elsewhere within the State on election day and then have that ballot mailed back to election officials in the voter's home precinct after election day to be added into the count. P. Orman Ray, *Absent Voters*, 8 Am. Pol. Sci. Rev. 442, 442–43 (1914) (Kansas,

Missouri); P. Orman Ray, *Absent-Voting Laws, 1917*, 12 Am. Pol. Sci. Rev. 251, 253–54 (1918) (Washington, New Mexico, Oklahoma); Joseph P. Harris, *Election Administration in the United States* 287–88 (1934) (Oregon, Florida).

In Washington, for example, voters who were unable to vote in their home counties could cast a ballot in another county which would then be "sealed and returned to the voter's home county." Ray, *Absent-Voting Laws, 1917*, 12 Am. Pol. Sci. Rev. at 253–54. "In order to be counted the ballot must have been received by the [home] county auditor *within six days from the date of the election or primary*." *Id.* at 253–54 (emphasis added). Handing a ballot to a county election official who is not empowered to count or process it, for delivery to the correct county election official, is no different from handing the ballot to a postal worker, as Mississippi law allows.

Some States enacted military and absentee voting statutes that—just like Mississippi's law—explicitly allowed for post-election receipt by mail. In 1918, Maryland enacted a military voting statute requiring a military ballot to be "marked on or before election day, and mailed in time to arrive at its destination not more than 7 days after election day." Act of Mar. 28th, 1918, ch. 78, sec. 1, § 223(g), 1918 Md. Laws at 130; *see also* Md. Code Ann., Pub. Gen. L., art. 33, § 229(g) (1924). In 1919, Kansas similarly provided that a military ballot had to be "mailed in sufficient season that it shall reach the county clerk or secretary of state . . . before the tenth day following [the] election." Act of

Mar. 22, 1919, § 6, 1919 Kan. Sess. Laws at 252–53; Kan. Rev. Stat. § 25-1106 (Chester I. Long et al. eds., 1923). A California law enacted in 1923 required that all absentee ballots must be mailed by the voter and received "within fourteen days after the date of the election in which such ballots are to be counted." Cal. Political Code §§ 1359(b)–(c), 1360 (James H. Derring ed., 1924). In 1932, Rhode Island enacted a statute allowing any elector absent from the State to "mail" a completed ballot "on . . . election day" so that it would be received by "midnight of the Monday following said election." Act of Mar. 11, 1932, ch. 1863, § 6, 1932 R.I. Pub. Laws 16, 25. In 1933, Missouri amended its law to allow any elector who expected to be absent from his home county on election day to vote by mail provided the ballot was received by election officials "not later than 6 o'clock p.m. the day next succeeding the day of such election." Act of May 1, 1933, sec. 1, § 10185, 1933 Mo. Laws 218, 222. The Pennsylvania Election Code, enacted in 1937, permitted military absentee ballots to be counted even if they arrived after election day, and required county election boards to delay final vote tallies until the third Friday after election day to allow such ballots to be counted. *See Eakin v. Adams Cnty. Bd. of Elections*, 149 F.4th 291, 298–99 & n.4 (3d Cir. 2025) (citing Act of June 3, 1937, P.L. 1333, No. 320, § 1317).

The Fifth Circuit was therefore wrong to say that laws enacted during and after World War I provided that "a ballot could be counted only if *received* by Election Day." Pet.App.16a. And it was wrong to say that, by 1938, only a single State permitted post-election

day ballot receipt because "it was almost impossible to count a ballot received after Election Day." Pet.App.17a.[9]

By 1942, after the United States entered into World War II, at least eight States—California, Kansas, Maryland, Missouri, New York, Pennsylvania, Rhode Island, and Washington—had post-election receipt deadlines for civilians, servicemembers, or both, according to an advisory memorandum prepared by the Office of War Information for soldiers in the field. *See Bill to Amend the Act of September 16, 1942: Hearing on H.R. 3436 Before the H. Comm. on Election of President, Vice President, and Representatives in Congress*, 78th Cong. 100–02 (1943) (reproducing publication inserted into record).

3. Against this background, Congress passed the 1942 Soldier Voting Act, which allowed servicemembers to vote absentee in federal elections using a new federal "war ballot" instead of an ordinary state absentee ballot. The 1942 Act explicitly specified that "no official war ballot shall be valid . . . if it is received by the appropriate election officials . . . after the hour of closing the polls on the date of the holding of the election." Act of Sep. 16, 1942, ch. 561, § 9, 56 Stat.

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[9] The Fifth Circuit's own cited source contradicts that claim. *See* Paul G. Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898, 905–06 (1938) (stating that all but one of the 42 States with absentee voting laws at that time had express "limits within which the ballot must be received . . . to be counted," "rang[ing] from six days before to *six days after the date of the election*").

753, 756. But it expressly did not displace existing state absentee voting laws—including in the many States that allowed post-election receipt. *Id.* § 12 ("Nothing in this Act shall be deemed to restrict the right of any member of the land or naval forces of the United States to vote, whenever practicable, in accordance with the law of the State of his residence, if he does not elect to vote in accordance with the provisions of this Act.").

The 1942 Act gave soldiers a choice: they could either vote absentee "in accordance with" state law, in which case state ballot receipt deadlines would apply, *or* they could use the alternative "federal war ballot," in which case the new federal election-day receipt deadline would apply. *See* Molly Guptill Manning, *Fighting to Lose the Vote: How the Soldier Voting Acts of 1942 and 1944 Disenfranchised America's Armed Forces*, 19 N.Y.U. J. Legis. & Pub. Pol'y 335, 342 (2016) (explaining that a principle of the 1942 Act was that if "the soldier was a qualified voter under the relevant state standards and the ballot was received by the deadline set by his home State, his vote would be counted").

The 1942 Act is significant for three reasons. First, it shows that, when Congress wishes to set election day as a categorical deadline for receipt of ballots, it can do so expressly—by specifying a ballot receipt deadline directly. Yet Congress did so *only* for voters who used a federal war ballot. Courts "do not lightly assume that Congress has omitted from its adopted

text requirements that it nonetheless intends to apply, and [such] reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005).

Second, that Congress explicitly specified election day as the receipt deadline for federal war ballots shows that the federal laws setting a uniform election day did not already impose such a deadline on everyone. Otherwise, that provision of the 1942 Act would have been entirely superfluous. "[T]he canon against interpreting any statutory provision in a manner that would render another provision superfluous . . . of course, applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times." *Bilski v. Kappos*, 561 U.S. 593, 607–08 (2010).

Third, Congress's decision to leave intact state-law post-election ballot receipt deadlines—and to reaffirm soldiers' rights to benefit from them if they voted by state ballot rather than federal war ballot—demonstrates that it had no intention of preempting state ballot receipt deadlines for other voters, and that it did not believe that it had already done so decades earlier.

4. In 1944, Congress amended the 1942 Act to allow federal war ballot voters, too, to benefit from state post-election receipt deadlines where available, providing that "any extension of time for the receipt of absentee ballots permitted by State laws shall apply

to ballots cast under this title"—i.e., federal war ballots. Act of Apr. 1, 1944, § 311(b)(3), 58 Stat. at 146; *see also* H.R. Rep. No. 78-1247, at 21 (1944) (Conf. Rep.) (explaining the conference committee agreed to adopt a House provision "providing that any extension of time for the receipt of State absentee ballots shall apply also in the case of the Federal ballot").

The legislative history shows that Congress, in doing so, knew that nine States then allowed post-election day receipt of military absentee ballots. At a hearing on the bill, the 1942 Office of War Information memorandum referenced above was inserted into the congressional record. *Bill to Amend the Act of September 16, 1942: Hearing on H.R. 3436 Before the H. Comm. on Election of President, Vice President, and Representatives in Congress*, 78th Cong. 100 (1943). It explained that "[a] number of State legislatures have liberalized their laws to facilitate voting by servicemen" including by "extension of the time in which application may be made *and the ballot returned*." *Id.* at 103 (emphasis added). It detailed each State's unique absentee rules, including the eight States with post-election day receipt deadlines described above. *See id.* at 105–36. Nebraska enacted a post-election day receipt law shortly thereafter. *See* Neb. Rev. Stat. § 32838 (1943) (requiring acceptance of mail-in ballots received "not later than 10:00 a.m. on the second day following election day"). By 1943, *nine* States had operative post-election ballot receipt deadlines—and Congress specifically acted to make sure federal war ballot voters could benefit from them.

Notably, this expansion was not uniform as to *all* federal war ballots—only voters whose state legislatures had enacted such laws enjoyed the benefit of these enlarged state receipt deadlines. As the amendment's sponsor, Senator Lucas of Illinois, explained, votes:

> must be in the hands of the State election officials in accordance with the laws of the particular States. In other words; some States will count absentee ballots 3 or 4 days after they arrive, while others provide they must be in the hands of the election officials a day in advance of the election, others on the day of the election. Whatever the State laws provide, we have cooperated along that line. We want the States to say whether a ballot is legal.

90 Cong. Rec. 607 (1944). Similarly, the House Report for the amendment noted the significant "variations" among States "as to the date on or before which the executed absentee ballot of the serviceman must be received back within the state." H.R. Rep. No. 78-993, at 15 (1944). This included state laws requiring receipt "on or before" election day, a prescribed day "preceding the election day," as well as "not later than some day following the election day." *Id.* Congress thus once more acknowledged the primacy of state law on the question of ballot receipt—and it never suggested that existing post-election day receipt deadlines were preempted by federal laws designating a uniform election day. *Cf. California v. FERC*, 495 U.S.

490, 497 (1990) (holding that courts must "give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme.")

5. After World War II, States continued to accept absentee ballots after election day. In Missouri in 1958, ballots needed to be "postmarked the day of the election and reach the election official the day next succeeding the election." *Elliott v. Hogan*, 315 S.W.2d 840, 848 (Mo. App. 1958) (citing Mo. Rev. Stat. § 112.050). In Alaska in 1978, ballots were required to be returned by the "most expeditious mail service, postmarked not later than the day of the election, to the election supervisor in [the voter's] district." *Hammond v. Hickel*, 588 P.2d 256, 268 (Alaska 1978) (citing Alaska Stat. § 15.20.150). Nebraska and Washington also allowed post-election ballot receipt at least through the 1970s. *See Overseas Absentee Voting: Hearing on S. 703 Before the S. Comm. on Rules and Admin.*, 95th Cong. 33–34 (1977) (statement of John C. Broger, Deputy Coordinator of the Fed. Voting Assistance Program, Dep't of Def.).

Congress again demonstrated its awareness—and approval—of state post-election day receipt deadlines in the 1970 amendments to the Voting Rights Act. The congressional record shows that Congress was aware several States permitted post-election day ballot receipt when debating the 1970 amendments. 116 Cong. Rec. 6996 (1970) (statement of Sen. Goldwater describing States that permit "absentee ballots of certain categories of their voters to be returned as late as

the day of the election or *even later*." (emphasis added)); *see also* 116 Cong. Rec. 28,876 (1970) (summarizing state laws). Some States also had *pre*-election day ballot receipt deadlines. 116 Cong. Rec. 28,876. Aware of this variation in state law, Congress required States, in presidential elections, to count the absentee ballots of voters who "returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election." 52 U.S.C. § 10502(d). But Congress *also* specified: "Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein." *Id.* § 10502(g). States therefore *must* accept absentee ballots that arrive by election day, but they *may* accept absentee ballots that arrive later.

6. In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Similar to the 1942 Act, UOCAVA provides for an alternative federal write-in ballot for military and overseas voters "who make timely application for, and do not receive, State[] absentee ballots." 52 U.S.C. § 20303(a)(1). The federal UOCAVA ballot must be "processed in the *manner provided by law for absentee ballots in the State involved*." 52 U.S.C. § 20303(b) (emphasis added). UOCAVA further provides that a federal write-in ballot shall not count "if a State absentee ballot of the absent uniformed services voter or overseas voter is received by the appropriate State election official not later than the deadline for receipt of the State absentee ballot *under State law*." 52

U.S.C. § 20303(b)(3) (emphasis added). UOCAVA therefore creates a federal fallback ballot that will be set aside if an ordinary state absentee ballot arrives before a State's own "deadline for receipt." *Id.*[10]

If federal law already required that all ballots nationwide be received by election day, it would make no sense for UOCAVA to repeatedly reference state "deadline[s] for receipt." This language cannot be explained away as referencing *pre-election* deadlines. The Congressional record shows that Congress, in enacting UOCAVA, knew many States had post-election-day receipt deadlines. Congress heard testimony that at least "[t]welve [states] ha[d] extended the deadline for the receipt of voted ballots to a specific number of days after the election" for at least some voters. *Uniformed and Overseas Citizens Absentee Voting: Hearing on H.R. 4393 Before the Subcomm. on*

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[10] In 1955, Congress enacted an early predecessor to UOCAVA, the Federal Voting Assistance Act of 1955. *See* Pub. L. No. 84-296, 69 Stat. 584. It observed that the "most critical problem under State laws for servicemen's voting is the time interval between the day on which a State ballot can be mailed to a serviceman and the final date on which it must be returned in order to be counted." *H.R. 7571 and S. 3061: Hearings Before the Subcomm. on Elections of the H. Comm. on Admin.*, 82d Cong. 145 (1955) (statement of Rep. John W. McCormack). To address that issue, Congress made recommendations, including that States "provide that absentee ballots will be available for mailing to the applicant as soon as practicable before the last date on which such ballot will be counted." § 102(12), 69 Stat. at 585. Thus, Congress again recognized that States had presumptive authority over both when ballots could be distributed to voters *and* when they had to be received by election officials.

Elections of the H. Comm. on Admin., 99th Cong. 21 (1986) (Statement of Henry Valentino, Director, Federal Voting Assistance Program). The UOCAVA House Report noted that "several States accept absentee ballots, particularly those from overseas, for a specified number of days after election day," and praised those laws as "aid[ing] in protecting the voting rights" of military and overseas voters. H.R. Rep. No. 99-765, at 8 (1986). And Congress, aware that several States had post-election-day receipt deadlines, explicitly incorporated those deadlines by reference into key provisions of UOCAVA.

7. After the 2000 presidential election, Congress again heard testimony that at least fifteen States had post-election day receipt deadlines for all or some voters.[11] And in 2009, Congress passed the MOVE Act, which updated key provisions of UOCAVA. As relevant here, the MOVE Act requires military officials to ensure that overseas servicemembers' ballots "for regularly scheduled general elections for Federal office" are delivered "to the appropriate election officials" "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(b)(1) (emphasis added); Pub. L. No.

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[11] *See* Testimony of David M. Walker, Comptroller General of the U.S., GAO-01-704T, *Issues Affecting Military and Overseas Absentee Voters* (2001), https://www.gao.gov/assets/gao-01-704t.pdf; *see also* Barbara D. Bovbjerg, U.S. Gov't Accountability Off., GAO-02-107, *Voters with Disabilities: Access to Polling Places and Alternative Voting Methods* 21 tbl.3 (2001), https://www.gao.gov/assets/gao-02-107.pdf (identifying 10 States permitting post-election receipt for all voters).

111-84, § 580(a), 123 Stat. 2190. The MOVE Act thus again incorporates state-law receipt deadlines into federal law. This language makes no sense if other federal laws already set a categorical election-day receipt deadline. Congress could just as easily have instructed officials to ensure that UOCAVA ballots are delivered "by election day." Instead, it again recognized the variation in state law and deferred to the States' constitutional prerogative to set this deadline.

8. Underscoring its contorted statutory analysis, the Fifth Circuit held *both* that UOCAVA is "silent" on ballot receipt rules *and* that UOCAVA's "statutory text" "permits post-Election Day balloting," for military voters, Pet.App.19a, 22a. Neither of these inconsistent conclusions is correct.

Many States authorize post-election ballot receipt *specifically* for military and overseas voters. *See supra* note 3. If the Fifth Circuit's holding were correct then these laws, too, would be preempted because 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1 are generally applicable to all voters.[12] The Fifth Circuit attempted to avoid that consequence of its ruling by suggesting that UOCAVA "permits post-Election Day balloting . . . through its statutory text." Pet.App.22a; *see also* Pet.App.33a (Oldham, J., concurring in denial of rehearing en banc) (suggesting that "federal statutes like

[12] The Fifth Circuit was therefore wrong that a "majority of States prohibit officials from counting ballots received after Election Day." Pet.App.17a. Most States and territories permit just that, at least for some categories of voters. *See supra* notes 2 & 3.

[UOCAVA] . . . authorize [post-election day] receipt for narrow classes of voters"). But there is no such text, aside from the references to state-law deadlines: Nothing in UOCAVA enacts a *federal* post-election day receipt deadline for military and overseas voters, or authorizes states to do so; it simply permits voters using federal write-in ballots to enjoy the benefit of *state* extended receipt laws where they exist. *See* 52 U.S.C. § 20303(b).

In arguing otherwise, the Fifth Circuit cited 52 U.S.C. § 20307(a), which permits the Attorney General to "bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this chapter." The United States sometimes brings suit under this provision "against States that transmitted ballots late, to prevent military and overseas voters from being disenfranchised in federal elections," by "extending the receipt deadline beyond Election Day." U.S. Amicus Br. 30–31, No. 24-60395 (5th Cir. Sep. 10, 2024), Doc. 148-1 ("U.S. 5th Cir. Amicus Br."). But that case-by-case remedial effort does not supply statutory authorization for the many state laws *guaranteeing* a post-election ballot receipt deadline to military-overseas voters in *every election*.[13] State laws extending receipt deadlines for these voters are not lawful because of the Attorney General's discretionary UOCAVA enforcement authority. They are lawful because nothing in federal

[13] The United States has brought only 29 such cases since 2000, despite thousands of statewide elections for federal offices held in that time. U.S. 5th Cir. Amicus Br. 30–31.

law preempts them. The Fifth Circuit's contrary holding imperils these military-overseas voter specific laws, which cannot be saved by the lower court's flimsy reliance on 52 U.S.C. § 20307(a).[14]

Further, the United States pursued those enforcement efforts based on its understanding that federal law imposed no ballot receipt deadline. U.S. 5th Cir. Amicus Br. 30–31. If the Fifth Circuit is affirmed, the United States may not be able to pursue such relief in the future, as federal courts are typically unable to grant equitable relief that clashes with other federal laws. *See INS v. Pangilinan*, 486 U.S. 875, 883 (1988) (explaining that even courts of equity cannot "disregard statutory [] requirements" or "create a remedy in violation of law" (quotations omitted)).

9. In sum, Congress again and again—in 1942, 1944, 1970, 1986, and 2009—was aware of state post-election day ballot receipt deadlines, yet never suggested that they were preempted by federal law nor acted to disturb them. That shows federal law has *never* been understood to speak to the issue of ballot receipt. *See Bob Jones Univ. v. United States*, 461 U.S.

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[14] The Fifth Circuit also misread the Help America Vote Act ("HAVA"), which requires States to offer provisional voting. 52 U.S.C. § 21082. The Fifth Circuit cited the fact that "[a]ll jurisdictions that issue such ballots accept them after Election Day" as proof that Congress "authorized a narrow exception" for post-election day receipt of provisional ballots. Pet.App.20a–21a. But HAVA says nothing at all about post-election day receipt. Like UOCAVA, it merely provides that if a provisional voter's eligibility to vote is confirmed, then the provisional ballot shall be counted "in accordance with State law." 52 U.S.C. § 21082(a)(4).

574, 599 (1983) (finding "unusually strong case of legislative acquiescence" where Congress was "constantly reminded" and "aware[]" of the issue "when enacting other and related legislation"); *see also Harris*, 122 F. Supp. 2d at 1325 ("The federal government . . . has surely been aware of the eight states around the country which allow post-election-day acceptance of absentee ballots. However, no state has been sued by the federal government for such practices, which lends further support to the notion that Congress did not intend 3 U.S.C. § 1 to impose irrational scheduling rules on state and local canvassing officials[.]"). Congress has not just "acquiesced" to longstanding post-election deadlines—it has acknowledged and incorporated them into various aspects of key federal statutes. And Congress has amended the federal laws imposing a uniform election day several times without ever addressing ballot receipt deadlines—as recently as December 2022. *See* Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328, div. P, tit. I, 136 Stat. 4459, 5233.

The Fifth Circuit's interpretations put federal statutes enacted over the course of a century and a half "at war with one another." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502 (2018). But "[i]t is this Court's duty to interpret Congress's statutes as a harmonious whole." *Id.* Where a harmonizing interpretation is readily available—and has been endorsed repeatedly by Congress—the Court should adopt that reading.

The Fifth Circuit's conclusion that it was historically "almost impossible to count a ballot received after Election Day," Pet.App.17a, would surprise the legislators who enacted these federal voting statutes and state ballot receipt laws across generations. Respondents would have the Court believe that, for over 150 years, federal law imposed a latent election-day receipt deadline. If they are correct, then state legislatures, federal courts, and even Congress itself have been wrong for decades. Neither Respondents nor the Fifth Circuit identify a single authority that has ever endorsed their view. The reason is clear—federal law has never required all ballots to be received in the mail by election day.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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