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 OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has a strong interest in ensuring that important federal statutes are interpreted in a manner consistent with their text and history. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mississippi, like numerous other states, provides under state law that as long as ballots are completed and mailed by election day, they should be counted if they are received shortly after election day. Miss. Code § 23-15-637(1)(a) (providing that ballots must be "received by the registrar no more than five (5) business days after the election"). In allowing receipt of ballots shortly after election day, the Mississippi legislature ensured that absentee voters would have the same deadline to vote for their candidate of choice as in-person voters, but would not be penalized because of delays in the mail.

Mississippi's law was challenged on the ground that it violates federal election laws that set the date for elections to federal office. Although the district court rejected the challenge on the merits, the Fifth Circuit disagreed, concluding that under the federal laws governing elections, an "election" encompasses both the casting of votes and their receipt by officials

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

and that ballots therefore must be received by election day. Pet. App. 2a-3a. That decision is wrong. The federal election-day statutes establish when voters must make their choice, but they say nothing about when officials must receive the ballot evincing that choice, giving state legislatures broad authority to regulate the counting of ballots. This reading of the statutes is consistent with the Constitution's treatment of elections, the history of precursor federal election statutes, and a long tradition of historical practice. Mississippi's law, which counts ballots postmarked by election day and received within five business days, is fully consistent with federal law.

Federal law establishes that for elections to the House of Representatives, "[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election," 2 U.S.C. § 7, and that the day when "a Representative to Congress is regularly by law to be chosen" is the day when "a United States Senator from said State shall be elected by the people thereof," *id.* § 1. Likewise, for presidential elections, federal law provides that "[t]he 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 *id.* § 1. All three of these laws establish only the date by which voters must choose their candidate; they say nothing about what must occur on that date beyond the act of voting itself. In other words, the plain text of all three statutes is silent with respect to when ballots must be received by election officials.

In establishing only the date on which voters must make their choice of candidate, these federal laws follow in the tradition of the Constitution, which makes clear that when Congress sets a presidential election day, it is setting only the date by which voters must

indicate their choice of candidate. Article II provides that "Congress may determine the Time of chusing the Electors." U.S. Const. art. II, § 1, cl. 4. The grant of power is specific: Congress sets the time of *choosing*—the act performed by voters—not the time of receiving, counting, or certifying those choices. This usage pervades the Constitution, and "Elections" are consistently treated as synonymous with "chusing." Representatives are "chosen . . . by the People." *Id.* art. I, § 2, cl. 1. When the House of Representatives selects a President, it "shall choose . . . by ballot." *Id.* amend. XII. And Founding-era dictionaries uniformly defined "election" as the act of choosing—not the receipt of choices by officials. *See infra* at 7.

This Court's precedents confirm this understanding. In *United States v. Classic*, 313 U.S. 299 (1941), this Court held that "an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates." *Id.* at 318. In other words, an election occurs when voters express their choice of candidates, period. It is immaterial when officials receive the ballots that express those choices. The structure of our electoral system reinforces this point: the election of the President by presidential electors occurs on the day electors cast their votes—even though those votes are not received by the President of the Senate until weeks later. Thus, while states must respect the day chosen by Congress for election day, states retain broad authority to regulate the counting of ballots cast by election day.

History supports this textual understanding. During the Civil War, when absentee voting first emerged at scale, states across the Union and Confederacy enacted soldier-voting laws that expressly contemplated post-election day receipt of ballots. Multiple states

established an explicit grace period of fifteen to twenty days after election day for receipt of ballots—far longer than the time period permitted under Mississippi's law. State statutes directed that soldiers' ballots be transmitted by mail after election day and that election judges in the states delay counting until weeks after the election. Congress enacted the first federal statute establishing a uniform day for congressional elections, codified today at 2 U.S.C. § 7, in 1872—just seven years after the Civil War ended—against the backdrop of these widespread state practices. In passing that law, Congress chose not to mandate same-day receipt of ballots.

The contrary interpretation of the court below finds no support in statutory text, constitutional text, the original public meaning of the federal election statutes, this Court's precedent, or historical practice. This Court should reverse.

ARGUMENT

I. The Text and History of the Federal Election Laws Establish that "Election Day" Is the Day by Which Voters Must Cast Their Ballots.

In three federal statutes, Congress has established that on the first Tuesday after the first Monday in November in certain years, the American people will elect the President, the Vice-President, and Members of Congress. In setting the date for these elections, these statutes specify the date by which voters must choose their candidates of choice, but they say nothing about when those choices must be received or counted by election officials. In so doing, they are consistent with precursor federal statutes and the Constitution itself, all of which establish that an "election" is the act of choosing by voters, and that "election day" is the

deadline for that choice. What happens after voters cast their ballots—receipt, counting, certification—are administrative steps distinct from what must happen on election day. States enjoy broad authority to regulate these facets of the electoral process, as they have throughout American history.

A. Three federal statutes establish the day for federal elections. For elections to the House of Representatives, 2 U.S.C. § 7 provides: "The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election." For Senate elections, the day when "a Representative to Congress is regularly by law to be chosen" is the day when "a United States Senator from said State shall be elected by the people thereof." 2 U.S.C. § 1. And for presidential elections, 3 U.S.C. § 1 provides: "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."

The federal election-day statutes all share a notable feature: they establish a date for federal elections but say nothing about what must occur on that date beyond the act of voting itself. In other words, the plain text of all three statutes is silent with respect to when ballots must be received by election officials. They are silent with respect to when ballots must be counted. They are silent with respect to when results must be certified. They simply establish "the day for the election"—the deadline by which voters must make their choice.

B. In setting "the day for the election" and nothing else, these federal laws mirror the Constitution's treatment of elections, which makes explicit that what Congress may regulate when it sets the date for the presidential election is the date voters express their choice

of candidate. Article II, Section 1 provides: "The Congress may determine the Time of chusing the Electors." U.S. Const. art. II, § 1, cl. 4. The grant of power is specific: Congress sets the time of *choosing*—the act performed by voters—not the time of receiving, counting, or certifying. *See* Richard D. Bernstein, *To Elect Is to Choose: Federal Law Does Not Prevent a State from Counting Mail-In Ballots Postmarked by Election Day and Received After* 5-6 (SSRN Working Paper, 2025), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5667370. States retain broad authority to regulate these aspects of the electoral process.

Other constitutional provisions underscore the equivalence between elections and the act of choosing. Representatives are "chosen . . . by the People." U.S. Const. art. I, § 2, cl. 1. Each Representative, "when elected," must "be an Inhabitant of that State in which he shall be chosen." *Id.* § 2, cl. 2. Each Senator, "when elected," likewise must "be an Inhabitant of that State for which he shall be chosen." *Id.* § 3, cl. 3. The Elections Clause itself treats "Elections" and "chusing" as synonyms. It provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* § 4, cl. 1. The exception for "the Places of chusing Senators" carves out a subset of Congress's power over "Elections"—confirming that "holding Elections" and "chusing" describe the same act. Likewise, the Twelfth Amendment provides that if no presidential candidate wins a majority of electoral votes, the House "shall choose" the President "by ballot," and "in choosing the President, the Votes shall be taken by states." U.S. Const.

amend. XII. If no vice-presidential candidate prevails, "the Senate shall choose the Vice-President." *Id.*

Founding-era dictionaries uniformly defined "election" as the act of choosing. Samuel Johnson's influential dictionary defined "election" as "[t]he act of chusing one or more from a greater number" and "[t]he ceremony of a public choice." Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792). Nathan Bailey's dictionary defined it simply as "[c]husing or [c]hoice." Nathan Bailey, *An Universal Etymological English Dictionary* (26th ed. 1789). Other contemporary dictionaries all point in the same direction: "election" is the act of choosing—what voters do.[2] No Founding-era definition encompassed the receipt of choices by officials.

The Founders spoke in the same terms. Alexander Hamilton declared at the New York Ratifying Convention that "the true principle of a republic" is "that the people should choose whom they please to govern them"—which he called "popular election." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (Jonathan Elliot ed.,

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[2] *See* 1 John Ash, *The New and Complete Dictionary of the English Language* (1775) ("[t]he act of choosing, the power of choice, voluntary choice"); 1 Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789) ("[t]he act of chusing one or more from a greater number; the power of choice; voluntary preference; . . . the ceremony of a publick choice"); John Walker, *A Critical Pronouncing Dictionary* (1791) (same); William Perry, *The Royal Standard English Dictionary* (1st Am. ed. 1788) ("an act of choosing; choice"); James Barclay, *A Complete and Universal English Dictionary* (1792) ("the act of choosing a person from other competitors, to discharge any office or employ"); Thomas Dyche & William Pardon, *A New General English Dictionary* (18th ed. 1781) ("the choosing, appointing, or separating a person or thing to some particular purpose").

1836). In *The Federalist Papers*, James Madison defended the Constitution as republican because "the President is indirectly derived from the choice of the people." *The Federalist No. 39* (Clinton Rossiter ed., 1961).

C. Every federal statute addressing presidential election timing has implemented Article II's definition of election day as "the Time of chusing the Electors," and the 1872 congressional election-day statute did the same. *See* Bernstein, *supra*, at 7-9, 19-23.

Presidential Election Statutes. The 1792 statute—the first to address presidential election timing—provided that "electors shall be appointed in each state for the election of a President and Vice President of the United States, within thirty-four days preceding the first Wednesday in December." Act of Mar. 1, 1792, ch. 8, § 1, 1 Stat. 239, 239. Critically, it described the time when "electors shall be appointed" as "the time of choosing electors." *Id.* This phrase has remained in federal law continuously for over 230 years and appears today in 3 U.S.C. § 3.

In 1845, Congress established a single, uniform presidential election day: "the Tuesday next after the first Monday in the month of November." Act of Jan. 23, 1845, ch. 1, 5 Stat. 721, 721. The statute provided that presidential electors "shall be appointed" on that day. *Id.* While states had previously adopted varying methods for appointing electors, 3 Joseph Story, *Commentaries on the Constitution* § 1466 (1833) ("In some states the legislatures have directly chosen the electors by themselves; in others they have been chosen by the people by a general ticket throughout the whole state; and in others by the people in electoral districts"), by 1845, every state except South Carolina chose electors by popular vote, *see McPherson v. Blacker*, 146 U.S. 1, 32 (1892). Thus, in the context of

the 1845 statute, "appointed" meant "chosen . . . by the people," *see* Story, *supra*, § 1466; Bernstein, *supra*, at 9.

The text of the 1845 statute confirms this equivalence. It provided an exception for 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." 5 Stat. at 721. This exception addressed states like New Hampshire that required run-off elections if no candidate received a majority. *See* Cong. Globe, 28th Cong., 2d Sess. 14 (Dec. 9, 1844) (statement of Rep. Hale); Bernstein, *supra*, at 9. The statute thus used "appointed," "elected," choosing," and "choice" interchangeably—all to describe what voters do on election day.

Congressional Election Statutes. Congress enacted the first statute establishing a uniform day for congressional elections in 1872. It provided that "the Tuesday next after the first Monday in November . . . is hereby fixed and established as the day for the election . . . of Representatives and Delegates to the Congress." Act of Feb. 2, 1872, ch. 11, § 3, 17 Stat. 28, 28 (codified at 2 U.S.C. § 7). This provision, together with the presidential election-day statute, "mandates holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster v. Love*, 522 U.S. 67, 70 (1997).

The related statutes governing Senate elections use the same terms. An 1866 statute required a state's governor, when "any senator shall have been chosen," to "certify his election . . . to the President of the Senate." Act of July 25, 1866, ch. 245, § 3, 14 Stat. 243, 244. Today, 2 U.S.C. § 1 specifies the day "at which election [of] a Representative to Congress is regularly by law to be chosen" and when "a United States

Senator . . . shall be elected by the people." The statutes consistently equate "election" with being "chosen."

D. The structure of presidential elections confirms that an "election" occurs when votes are cast, not when they are received. Article II empowers Congress to set "the Day on which [the Electors] shall give their Votes." U.S. Const. art. II, § 1, cl. 4. When electors "meet and cast ballots" on the designated day, "they do indeed elect a President," *Chiafalo v. Washington*, 591 U.S. 578, 592 (2020), even though electors do not "receive" their own votes, *see Ray v. Blair*, 343 U.S. 214, 224 (1952) ("[P]residential electors . . . are not federal officers or agents any more than the state elector who votes for congressmen."); *Fitzgerald v. Green*, 134 U.S. 377, 379-80 (1890) (Electors "are no more officers or agents of the United States than are . . . the people of the States when acting as electors of representatives in Congress."). In other words, the day the electors vote—and not the later day when Congress receives and counts electoral votes—is when the presidential election occurs. *See* Bernstein, *supra*, at 11-14.

The 1792 statute made this explicit. It required electors to "meet and give their votes on the said first Wednesday in December." Act of Mar. 1, 1792, ch. 8, § 2, 1 Stat. at 239. The electors then had until "the first Wednesday in January" to deliver their votes to the President of the Senate. *Id.* at 240. If neither hand-delivery nor mail succeeded in making delivery by that date, the Secretary of State would dispatch a messenger to retrieve a third certificate from the district judge—meaning receipt could occur days or even weeks after the January deadline. *See id.*

This structure was well established when Congress enacted the 1845 statute for popular elections. The 1845 statute left in place the 1792 provisions for

post-election transmission and receipt of electoral votes. If the election of the President occurs when electors cast their votes—not when those votes are received—then the election of the electors occurs when voters cast their votes—not when those votes are received. Nothing in the 1845 statute suggests otherwise. *See* Bernstein, *supra*, at 14.

E. This understanding that the term "election" refers to an exercise of voter choice is consistent with this Court's decision in *United States v. Classic*. *Classic* addressed whether Congress's authority under the Elections Clause extended to primary elections. To resolve that question, the Court examined "the words of the Constitution read in their historical setting as revealing the purpose of its framers." *Classic*, 313 U.S. at 317. This Court concluded that Section 2 of Article I was ratified to "secure to the people the right to choose representatives by the designated electors, that is to say, by some form of election." *Id.* at 318.

This Court then provided the definitive interpretation of "election": "From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates." *Id.* at 318. This understanding was not new in *Classic*. Twenty years earlier, this Court had explained that the word "election" "has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors." *Newberry v. United States*, 256 U.S. 232, 250 (1921). Put simply, an election is the voters' final choice—not an official's receipt of that choice.

Classic also recognized that the "form and mode" of voter expression may evolve without changing the statute's fundamental meaning. 313 U.S. at 318. There was "no historical warrant" for assuming the

Framers thought voting methods would remain static. *Id.*

The word "election" in 2 U.S.C. § 7 derives from "Elections" in the Elections Clause. *Classic*'s holding—that an "election" means "the expression by qualified electors of their choice," *id.* —thus governs Section 7. An election occurs when voters express their choice, not when officials receive it.

II. Historical Practice Supports the View that States May Count Ballots Cast by Election Day but Received Thereafter.

Absentee voting first emerged at scale during the Civil War. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 492 (2003) ("The Civil War inspired the first major effort for absentee balloting in the United States."). Congress enacted 2 U.S.C. § 7 just seven years after the war's end against the backdrop of widespread state practices that expressly contemplated post-election day receipt of ballots. These practices make clear that when Congress passed 2 U.S.C. § 7, "election day" referred to the day votes were *cast*, not the day they were *received*.

A. The tradition of military absentee voting predates the Civil War. In 1775, the town of Hollis, New Hampshire counted votes "brought in writing" from soldiers fighting in the Continental Army, allowing them "as if the men were present themselves." Samuel T. Worcester, *Hollis, N.H., in the War of Revolution*, 30 New Eng. Hist. & Genealogical Reg. 288, 293 (1876). In 1813, Pennsylvania enacted a Military Absentee Act allowing militia members and soldiers in federal service to vote when stationed more than two miles from their polling place on election day. *See* Fortier &

Ornstein, *supra*, at 497 (citing Act of Mar. 29, 1813, ch. 171, 1813 Pa. Laws 213-14).

But the scale of Civil War absentee voting was unprecedented. "Voting in the field was provided for, or attempted to be provided for, between May 8, 1861 and October 13, 1864" in twenty-five states across the Union and Confederacy and "was also provided for in 1865 by legislation in Illinois." Josiah Henry Benton, *Voting in the Field: A Forgotten Chapter of the Civil War* 4 (1915). "When the war began, only one state allowed soldiers to vote outside their election districts, but by the presidential election of 1864, nineteen northern states had passed legislation permitting their soldiers in the field to vote." Jonathan W. White, *Canvassing the Troops: The Federal Government and the Soldiers' Right to Vote*, 50 Civ. War Hist. 291, 291 (2004). In total, "nineteen of twenty-five states in the Union and seven of eleven states in the Confederacy provided some form of absentee voting for soldiers in the field." Fortier & Ornstein, *supra*, at 493.

State lawmakers argued that without mechanisms for voting in the field, soldiers would face disenfranchisement. The Alabama General Assembly declared that its absentee voting law was necessary to "prevent the practical disenfranchisement of the volunteers from Alabama . . . in the next Congressional and Presidential election." Donald S. Inbody, *The Soldier Vote* 16 (2016). In the 1864 presidential election, approximately 230,000 to 235,000 soldiers cast ballots in the field or by proxy under various state laws. Benton, *supra*, at 313. This represented roughly seven-and-a-half percent of the total vote cast in states with soldier-voting laws. *Id.*

B. States implemented soldier voting during the Civil War through three broad models. First, some states adopted proxy voting. Soldiers would mark

their ballots in camp and send them home to be counted alongside civilian votes in their home precincts. Inbody, *supra*, at 43. "That method was essentially the form of absentee voting seen today." *Id.* Second, several states dispatched civilian election officials to military encampments, allowing soldiers to cast ballots on-site in portable ballot boxes. "In direct voting, soldiers would typically vote at a polling site set up by officers, personally depositing their ballots in a voting box, which would then be sent to the home precinct." Fortier & Ornstein, *supra*, at 500. Third, a number of states permitted unit-level voting. Soldiers would vote under the supervision of commanding officers who effectively acted as chaperones and were designated solely by their military ranks rather than being deputized as election officials. *See* Benton, *supra*, at 171-73, 186-87, 190. The commanding officers would then forward either the ballots or voting tallies to local election authorities for counting. *See* Inbody, *supra*, at 16-17; Benton, *supra*, at 186-90. Under this third model, post-election day receipt was inherent in the system's design: ballots cast by soldiers in distant theaters had to be transmitted to state capitals, and states enacted explicit grace periods to accommodate the resulting delays. *See* Benton, *supra,* at 317-18; Inbody, *supra*, at 17.

The court below discussed Civil War soldier voting, but seemingly believed Civil War soldier voting was limited to the first two models—either election officials brought ballot boxes to the battlefield, or soldiers gave ballots to proxies for deposit at home precincts. Pet. App. 15a-16a. Under both models, the court reasoned, "the voter voted when the vote was received by election officials." *Id.* at 16a. But this discussion omits the reality of unit-level voting entirely. In several states, soldiers voted under the supervision

of military officers—not civilian election officials—who then forwarded the ballots or certified results to state authorities for counting. *See, e.g.*, 1866 Nev. Stat. 215 § 25 (placing military polling sites "under the immediate charge and direction of the three highest officers in command"); R.I. Const. art. of amend. IV (1864) (permitting soldiers to "deliver a written or printed ballot . . . to the officer commanding the regiment or company to which he belongs").

The military officers overseeing unit-level voting were not election officials. They were designated to supervise voting in the field solely by virtue of their military rank—"the captain or commanding officer of each company or troop" serving as judge, and "the first lieutenant or officer second in command . . . as inspector." *See* 1839 Pa. Laws ch. 468, § XLIV; Benton, *supra*, at 189-90. Unlike election officials, who were typically required to swear oaths to conduct elections fairly, these military officers received no such deputization. *See* Benton, *supra*, at 171-73, 186-87, 190. They were battlefield commanders pressed into electoral service, not officials appointed to administer elections. When soldiers deposited ballots with these officers on election day, the ballots were not "received by election officials"—they were received by military officers who would later transmit them to actual election authorities for counting. *See* Bernstein, *supra*, at 23.

C. The statutory texts from the Civil War era leave no doubt that states understood election day as the day votes were *cast*, with receipt occurring thereafter.

Unit-Level Voting under Rhode Island, Nevada, and Pennsylvania Laws. Several states established systems under which soldiers voted on election day under military supervision, with ballots necessarily received by state election officials after election day.

Rhode Island's Constitution established unit-level voting for soldiers in the field. An 1864 constitutional amendment provided that soldiers "in time of war" who were "absent from the state in the actual military service of the United States" retained "a right to vote in all elections in the State for electors of president and vice president of the United States, representatives in congress, and general officers of the state." R.I. Const. art. of amend. IV (1864). To exercise that right, "every such absent elector on the day of such elections, may deliver a written or printed ballot with the names of the persons voted for thereon, and his christian and surname, and his voting residence in the State, written at length on the back thereof, to the officer commanding the regiment or company to which he belongs." *Id.*; *see* Benton, *supra*, at 186-87. Soldiers thus voted on election day by delivering ballots to their commanding officers in the field.

Under Rhode Island law, the commanding officer was then tasked with returning these ballots "to the secretary of state within the time prescribed by law for counting the votes"—not by election day. R.I. Const. art. of amend. IV (1864). Ballots received by the deadline "shall be received and counted with the same effect as if given by such elector in open town, ward, or district meeting." *Id.* Meanwhile, "the clerk of each town or city, until otherwise provided by law, shall within five days after any such election, transmit to the secretary of state a certified list of the names of all such electors on their respective voting lists." *Id.* The five-day post-election window for transmitting voter verification lists confirms that Rhode Island's system contemplated ballot receipt by the Secretary of State after election day. Otherwise, there would be no voter lists against which to verify the soldiers' ballots.

Nevada's Election Ordinance, adopted alongside its 1864 Constitution, employed a similar structure. It provided that on election day, soldiers would vote and "[t]he said Officers having charge of the election shall count the votes and compare them with the checked list immediately after the closing of the ballot box." Nev. Const. Election Ordinance § 10 (1864). The Ordinance then required: "All the ballots cast, together with the said voting list checked as aforesaid, shall be immediately sealed up and sent forthwith to the Governor of said Territory, at Carson City, by mail or otherwise." *Id.* § 11. The Commanding Officer was to "make out and certify duplicate returns" and "transmit the same to the said Governor at Carson City, by mail or otherwise, the day following the transmission of the ballots." *Id.* Given the distances involved—ballots cast by Nevada soldiers fighting in distant theaters had to reach Carson City—post-election day receipt of ballots was baked into the law's design.

Pennsylvania's 1839 election law likewise provided that soldiers "in any actual military service" on the day of the general election "may exercise the right of suffrage at such place as may be appointed by the commanding officer of the troop, or company, to which they shall respectively belong, as fully as if they were present at the usual place of election." 1839 Pa. Laws ch. 468, § XLIII. The statute specified that "the captain or commanding officer of each company or troop shall act as judge, and that the first lieutenant or officer second in command, shall act as inspector, at such election." *Id.* § XLIV. Critically, the statute provided that "[w]ithin three days after such election, the judges thereof shall respectively transmit through the nearest post office, a return thereof, together with the tickets, tally lists and lists of voters, to the prothonotary of the county in which such electors would have voted,

if not in military service." *Id.* § XLVII. The return judges were not required to meet until "the second Tuesday in November next after the election." *Id.* § XLIX.

Pennsylvania's 1864 law was even more explicit about allowing post-election day receipt. It required judges to "transmit" ballots "through the nearest post-office, or by express, as soon as possible" to the prothonotary. 1864 Pa. Laws 994 § 17. The statute then mandated: "The return judges of the several counties, shall adjourn to meet at the places, now directed by law, on the third Friday, after any general or presidential election, for the purpose of counting the soldiers' vote." *Id.* § 19. The purpose of this delayed canvass was to allow time for ballots to arrive. As one commentator explained, "[t]he returning officers were required to postpone the final count until the third Friday following the general election, and were required to include in their enumeration the soldier-vote." Duncan Campbell Lee, *Absent Voting*, 16 J. Soc'y Comp. Legis. 333, 335 (1916). This was not an informal accommodation, but a statutory mandate designed to ensure that ballots sent from distant battlefields would be counted.

Statutory Grace Periods for Ballot Receipt under North Carolina, Maryland, Georgia, Florida, and Alabama Laws. Beyond these unit-level voting provisions, many states enacted explicit grace periods requiring election officials to wait days or weeks after election day before counting soldiers' ballots.

North Carolina enacted "the first legislation, north or south, authorizing soldiers to vote in the field." Benton, *supra*, at 30. A May 1862 ordinance provided: "the proper returning officers of every county in this State shall include in their returns the votes of officers and soldiers given in any election in which they may be

entitled to vote by law, if received within twenty days after they are cast, and the said returning officers shall not make up their returns and declare the result of said elections until the expiration of twenty days as aforesaid." *Ordinances and Resolutions Passed by the State Convention of North Carolina of 1861-1862*, Ordinance No. 14, at 146 (1862).

Maryland's Constitution was perhaps the most explicit of all in providing for post-election day receipt. It required the Governor to "wait for fifteen days after the day on which the State vote is taken, so as to allow the returns of the soldiers' vote to be made before the result of the whole vote is announced." Md. Const. art. XII, § 14 (1864). The Governor was to "receive the returns of the soldiers' vote on said other elections . . . and shall count the same with the aggregate home vote." *Id.* A subsequent statute specified that the soldiers' vote could be cast at "a poll . . . opened in each regiment or company, at the quarters of the commanding officer," and that ballots, "after having been counted by the judge acting at the head-quarters of the regiment or company, shall by him be carefully enclosed in an envelope and . . . forward the same at the expense of the county or city, as the case may be, by mail." 1865 Md. Laws art. XXXV.

Other states followed the same pattern. Georgia required returns to "reach the executive department within fifteen days after the day of the election." Benton, *supra*, at 36 (citing *Acts of the General Assembly of the State of Georgia*, no. 23, at 31 (1861)). Florida required soldiers' ballots to be counted "on the twentieth day after the election." *Id.* at 40 (citing *Acts and Resolutions of the General Assembly of Florida*, ch. 1379, no. 63, at 55 (1862)). Alabama counted soldiers' votes "on the 26th of November, which would be about two or three weeks after the election." *Id.* at 317-18.

Benton's study of Civil War voting also documents that even Northern states without explicit grace periods "understood" 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.

This Civil War-era historical evidence confirms what statutory text establishes: federal law sets the day by which votes must be cast, not the day by which they must be received. Congress enacted 2 U.S.C. § 7 in 1872 and chose not to disturb the contemporaneous practices of many states that allowed receipt of absentee ballots after election day. Federal law thus poses no bar to Mississippi's law, which allows ballots postmarked by election day to be counted so long as they are received within five business days.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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