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 *AMICUS CURIAE* OF THE SOCIETY FOR THE RULE OF LAW INSTITUTE IN SUPPORT OF PETITIONER


NANCY A. TEMPLE
ELLIE BUCHANAN
Katten & Temple, LLP
209 S. LaSalle Street
Suite 950
Chicago, IL 60604

BRENDAN J. HASKIN
2950 Van Ness Street,
NW, No. 607
Washington, D.C. 20008

RICHARD BERNSTEIN
*Counsel of Record*
1875 K Street, NW
Washington, D.C. 20006
(301) 775-2064
Rbernsteinlaw@gmail.com

*Counsel for Amicus Curiae*


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitution

Other Authorities

## INTEREST OF AMICUS CURIAE

*Amicus* The Society for the Rule of Law Institute ("SRLI") is a non-profit, non-partisan organization dedicated to defending the conservative legal principles of the rule of law, separation of powers, federalism, and government by the people.[1] SLRI has an interest in seeing that these principles are not violated by improperly taking from the States their authority over the manner of federal elections.

## INTRODUCTION AND SUMMARY OF ARGUMENT

A federal election "may not be consummated prior to federal election day." *Foster v. Love*, 522 U.S. 67, 72 n.4 (1997). The issue is whether the federal election day statutes specify (a) by when voters must mail their choices versus (b) by when state election officials must receive the mailed ballots. The text and history of the pertinent federal statutory provisions, and the constitutional provisions they implement, show that a federal election consummates when voters must transmit their choices.

Start with presidential electors. Article II, § 1, Clause 4 empowered Congress to set an election day as "the Time of *chusing* the Electors." (All emphases in this brief are added.) From 1792 until today in 3 U.S.C. § 3, the presidential election statutes have

[1] *Amicus* states that no counsel for any party authored this brief in whole or in part and that no entity, aside from *amicus* and its counsel, made any monetary contribution toward the preparation or submission of this brief.

described the time when the election of presidential electors occurs as "the time of *choosing* electors."

The Constitutional Convention illustrated the original understanding that an election day consummates when the pertinent voters must transmit their votes, not when those votes are received. A Sept. 17, 1787, Resolution of the Constitutional Convention ("the 1787 Resolution"), states that "the *Day* fixed for the *Election* of the President" is when the electors "vote" and "should *transmit their votes*" to the seat of the federal government. 2 *Records of the Federal Convention* 665-66 (M. Farrand ed. 1911) ("*Farrand's Records"*). Only subsequently to that "Day fixed for the Election," after the new Congress and the President of the Senate convene, does the "*receiving*, opening and counting the Votes for President" occur. *Id.* at 666.

Turn to Senators. The Elections Clause itself– Article I, § 4, Clause 1–states that "holding Elections for Senators" refers to "*chusing* Senators." Article I, § 3, Clause 3 connects the time of their election to this choosing by requiring that each Senator "*when elected*, be an Inhabitant of that State for which he *shall be chosen*." In turn, 2 U.S.C. § 1a states that a "Senator has been *chosen*" at an "election."

Next are Representatives in the House. Article I, § 2, Clause 2 connects the time of the election to choosing by voters by requiring that each Representative "*when elected*, be an Inhabitant of that State in which he *shall be chosen*." Indeed, *United States v. Classic,* 313 U.S. 299 (1941),

interpreted "Elections" in the Elections Clause, examined "the words of the Constitution read in their historical setting," *id.* at 317, and concluded that: "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 [voters] of their choice* of candidates." *Id.* at 318. The word "election" in 2 U.S.C. § 7, which sets the day for a House election, is transplanted from "Elections" in the Elections Clause, and therefore has the same meaning. 2 U.S.C. § 1 confirms this by stating that "*at* [an] *election* a Representative to Congress is regularly by law to be *chosen*."

An election is choosing and choosing consummates on election day. Here, the people choose—not states or officials. Article I, § 2, Clause 1 says Representatives are "chosen . . . by the People." The Seventeenth Amendment says Senators are "elected by the people." Article II, § 1, Clause 2 (the "Electors Clause") says presidential electors are chosen "in such Manner as the Legislature [of the State] may direct," and all states have enacted voting by the people as the manner of choosing electors. That is why our presidential elections satisfy "the trust of a Nation that here, We the People rule." *Chiafalo v. Washington*, 591 U.S. 578, 597 (2020).

A state statute "in relation to . . . counting of votes . . . and making and publication of election returns" by officials governs the "manner" of an election, *not* its time. *Smiley v. Holm*, 285 U.S. 355, 366 (1932). A state statutory deadline for when an election official receives a ballot mailed by election day is one of the permissible "manner" deadlines that

varies by state and governs the counting and announcing by election officials. Such a deadline merely cuts off the counting by officials of timely-cast votes, so that officials may announce the final results sooner. Because an election official's time of receipt is not part of the time of the election, no federal statute requires that an election official receive the ballot by election day.

What the federal election day statutes require is that voters submit their choices by election day. Mailing by a voter satisfies this. The federal election day statutes do not preempt the many other deadlines set by state law for other aspects of the election process–including registration, application for absentee ballots, receipt by an official of mail-in ballots, counts, recounts, protests, and certification. The election day statutes leave the policy judgments as to when to set those deadlines to each state. The federal courts should not arrogate to themselves any of those policy judgments.

## ARGUMENT

### I. PRESIDENTIAL ELECTION DAY CONSUMMATES WHEN VOTERS CHOOSE PRESIDENTIAL ELECTORS.

#### A. *Article II, § 1, Clause 4 Of the Constitution Defines Every Presidential Election Day As "the Time of Chusing the Electors."*

The power that Article II gives Congress to set an election day for appointing electors is very

specific. Clause 4 of § 1 of Article II starts: "The Congress may determine the *Time of chusing* the Electors." Thus, this election is choosing and the election consummates at the time of choosing, *not* any subsequent activity by an official.

### B. *3 U.S.C. § 3 Says "the time of choosing electors."*

In 1792, Congress enacted "An Act relative to the *Election* of a President and Vice President of the United States . . . ." 1 Stat. 239 ("1792 Election Time Statute"). § 1 of this statute 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." *Id.*

Most important, § 1 described the time when "electors shall be appointed in each state" as "the *time of choosing* electors." *Id.* Specifically, in addressing how many electoral votes each state had, § 1 added a provision: "That where no apportionment of Representatives shall have been made after any enumeration [census], *at the time of choosing electors*, then the number of electors shall be according to the existing apportionment of Senators and Representatives." *Id.*

This provision, including the words "the time of choosing electors," remains in 3 U.S.C. § 3. Because 3 U.S.C. § 1 and 3 U.S.C. § 3 relate to the same subject, they should be read *in pari materia*, "as though they were one law." A. Scalia & B. Garner, *Reading Law* 252 (2012). Indeed in the 1792

Election Time Statute, the time-of-the-election provision and the predecessor of 3 U.S.C. § 3 were enacted in the same statute. In the first codification of federal law, the election day statute and what is now 3 U.S.C. § 3 were back-to-back. *See* Revised Statutes, Title III, §§ 131-132 (1874). As they are today in 3 U.S.C. §§ 1, 3, after the former 3 U.S.C. § 2 has been repealed. 3 U.S.C. §§ 1 and 3 exemplify where one provision is "clarified by the remainder of the statutory scheme." *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). The "election day" in 3 U.S.C. § 1 consummates the "time of choosing" by the voters, as 3 U.S.C. § 3 states.

### C. *An 1845 Statute Enacted An Election Day For "choosing electors."*

By 1845, every one of the 24 states except South Carolina used popular voting for presidential elections. *McPherson v. Blacker*, 146 U.S. 1, 32 (1892).[2] News of the announced results from the popular voting in some states was settling who would

[2] The Founding generation understood that whether choosing the electors was done by popular voting or voting in the legislature, each constituted an "election." *See e.g.*, *McPherson*, 146 U.S. at 29-30 (in 1789 presidential election, six states used popular voting and five used legislative voting); 4 *The Debates in the Several State Conventions* 104-06 (J. Elliot ed., 2d ed. 1836) ("*Elliot's Debates*") (North Carolina ratification debates refer interchangeably to the "choosing of the electors" and "the election" of the electors); Article I, §§ 2–4 (describing both when Representatives are "chosen . . . by the People" and when Senators are "chosen by the Legislature" as "Elections"); Article I, § 6, Clause 2 (describing both Senators and Representatives as "elected").

be the next President before the people of other states had voted. *See Foster v. Love*, 522 U.S. at 74.

In 1845, Congress enacted "An Act to establish a uniform time for holding *elections* for electors of President and Vice President in all the states of the Union." 5 Stat. 721 ("1845 Election Day Statute"). That 1845 Election Day Statute enacted what has remained the rule in presidential election years that "the electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November." *Id; see* 62 Stat. 672 (1948) (codifying 3 U.S.C § 1). As of 1845, for the states with popular election of the electors, "appointed" was understood to mean "chosen . . . by the people." 3 J. Story, *Commentaries on the Constitution*, § 1466 (1833) ("At present, in nearly all the states, the electors are chosen either by the people by a general ticket, or by the state legislature.").

Indeed, the 1845 Election Day Statute added an exception that confirmed that the touchstone of election day was voters "choosing electors": "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. 721. The reason for adding this exception was that a New Hampshire statute required a run-off election if, on the day for "the choice of electors," no electors were chosen by "a majority of all the votes cast." Cong. Globe, 28th Cong., 2d Sess. 14 (Dec. 9, 1844) (Rep. Hale). Most important, the 1845 Election Day

Statute left in place "the time of choosing electors" language from the 1792 Election Time Statute. *See* Revised Statutes, Title III, §§ 131-32 (1874).

In 1845, states generally used in-person voting as the manner of choosing electors. Pet. Br. 10. There, the popular voter's choice and the official's receipt occurred on the same day. But that does not diminish that election day consummates "the time of choosing electors," not the receipt of votes.

No one argues that states are preempted from adopting mail-in voting. As was well known in 1788, 1792, and 1845, and remains true, the methods of popular elections have changed frequently. Advance voter registration, secret ballots, printed ballots, voting booths, voting machines, identification of voters by photo or social security number, and more were once innovations. *See, e.g.,* Pet. Br. 12-13; A. Keyssar, *Voter Registration: A Very Short History*, available at www.responsivegov.org ("Voter registration laws initially appeared in a handful of states (mostly in the Northeast) during the first half of the nineteenth century.").

*Classic* held in interpreting "Elections" in the Elections Clause:

> Long before the adoption of the Constitution the form and mode of that expression [of voters' choice of candidates] had changed from time to time. There is no historical warrant for supposing that the framers were under the illusion that the method of

> effecting the choice of the electors [voters] would never change . . . . 313 U.S. at 318.

As Justice Scalia described more generally, when "[t]he changing content of [a] term . . . was well recognized at the time [a provision] was enacted," the provision "adopted the term *along with its dynamic potential*." *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731-32 (1988).

A federal court should never apply federal election law to mail-in voting based on a judge's view that this policy change is prudent or unwise. As Justice Scalia wrote regarding requiring voters to provide photo identification: "It is for state legislatures to weigh the costs and benefits of possible changes to their election codes." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., joined by Thomas and Alito, JJ., concurring).

Instead, a court should apply the election day statutes to mail-in voting based on the principle revealed by the pertinent federal texts. *See Classic*, 313 U.S. at 318. "Historical regulations reveal a principle, not a mold." *United States v. Rahimi*, 602 U.S. 680, 740 (2024) (Barrett, J., concurring). Here, the Constitution, the 1792 Election Time Statute, and the 1845 Election Day Statute reveal that a presidential election day consummates "the time of choosing electors" by the voters.

Indeed, as the next subsection explains, before 1845, there already existed an application

demonstrating this principle. An election day for President *by* the electors consummated when those voters transmitted their votes, even though those votes were *not* first received by any election official until many days later. Nothing in the 1845 Election Day Statute intimated that Congress was forever banning states from adopting a similar procedure for the popular voting *for* the electors.

a. *The Election Day For The President Remained When Electoral Votes Are Transmitted, Not Received.*

Article II, § 1, Clause 1 states that the President is "chosen" and "elected." Clause 4 empowers Congress to determine "the Day on which they [the Electors] shall give their Votes; which day shall be the same throughout the United States." When the electors "'vote' by 'ballot'" on the day set by Congress, "they do indeed elect a President." *Chiafalo,* 591 U.S. at 592 (internal quotes in original). That day when the electors "meet and *cast ballots to send to the Capitol*," *id.*, is when the election of the President and Vice President consummates. What occurs every four years in Washington, D.C., happens *after* that election day– including *receipt* of the electoral votes by the President of the Senate.

This was established by the 1787 Resolution, which the Constitutional Convention adopted at the conception of our federal Republic, immediately after the Framers witnessed the Constitution. 2 *Farrand's Records* 663-65. That Resolution provided that "the Day fixed for the Election of the President" by

statute is when the electors meet, "vote," and "should *transmit their votes*" to the seat of the federal government. *Id.* at 665-66. Only subsequently, after the new Congress and the President of the Senate convene, does the "*receiving*, opening, and counting the Votes for President" occur. *Id.* at 666.

Article II, § 1, Clause 3 provides that the first election official who receives electoral votes for President is the President of the Senate:

> The Electors shall meet in their respective states, and *vote by ballot* . . . and they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and *transmit* sealed to the Seat of the Government of the United States, *directed to the President of the Senate*.

The Twelfth Amendment uses the same language, except, "List" became "Lists," because the Amendment requires a separate vote for Vice President. Importantly, in the Constitution, no state official acts as an election official who receives electoral votes.

The presidential electors are *not* themselves officials who receive their own electoral votes on the day they cast them. This Court has twice rejected that presidential electors are officials or act in any other capacity other than as voters. *See Ray v. Blair*, 343 U.S. 214, 224 (1952); *In re Green*, 134 U.S. 377, 379-80 (1890).

Section 2 of the 1792 Election Time Statute required the electors in each state to "meet and give their votes on the said first Wednesday in December." 1 Stat. 239. § 2 further required these electors to "deliver" a sealed certificate of "all the votes by them given" to the President of the Senate in two ways. *Id.* at 239-40. The first way was that the electors had to appoint a person to "*deliver* [one certificate] to the President of the Senate, at the seat of government, before the first Wednesday in January then next ensuing." *Id.* at 240. The electors thus had *27 to 34 days* after the day on which the election consummated to effectuate receipt of their votes by the pertinent election official. The second way was that § 2 also required the electors to "forthwith *forward by the post-office* to the President of the Senate, at the seat of government, one other of the said certificates." *Id.* at 240.

Section 4 provided that if both the by-hand delivery and mailed certificates "shall not have been *received* at the seat of government on the said first Wednesday in January"–*28 days or 35 after* the presidential election had occurred–the U.S. Secretary of State was commanded to send a special messenger to the district judge in the pertinent state who had the third sealed certificate, "who shall forthwith transmit the same to the seat of government."[3] *Id.*

[3] The district judge's receipt is irrelevant to the issue in this case for four reasons. First, neither the Constitution nor the 1787 Resolution required receipt by a district judge. Second, no federal statute has ever specified that receipt by the district judge must occur by the statutory day on which electors must vote. Third, no President of the Senate or Congress has ever rejected an electoral vote because it was not received by a district judge by that statutory day. Fourth, apparently no

Necessarily, this third sealed certificate would not be received by the President of the Senate until *28 days* or more after the day set by statute for casting the electoral votes. Under the provisions of the 1792 Election Time Statute, no state official received electoral votes. These provisions of the 1792 Election Time Statute remained in effect when and after the 1845 Election Day Statute was enacted. *See* Revised Statutes, Title III, §§ 140-41 (1874).

This is relevant because the Congress that enacted the 1845 Election Day Statute was well aware of the 1792 Election Time Statute, amending only some of its provisions. Specifically, (1) changing from the 1792 statute's 34-day period for voters to choose the electors to choosing by a single day, and (2) adding a provision for filling vacancies in the electors. 5 Stat. 721.

In contrast, the 1845 Election Day Statute left in place the provisions in §§ 2 and 4 of the 1792 Election Time Statute under which the presidential election consummates when the electors cast their ballots on the day set by Congress, even though their votes are not delivered to or received by any election official until up to 27 or more days later. Most important, nothing in the 1845 Election Day Statute hinted that it was banning a state from choosing a procedure for the voting *for* electors that resembled the decades-old federal statutory procedure for the voting *by* electors. Put another way, nothing in the 1845 Election Day Statute hinted that it was silently

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electoral vote certificate sent to a district judge has ever been used in the electoral vote counting by the President of the Senate or Congress.

adding a federal deadline for delivery to or receipt by an election official in the "election for the purpose of *choosing* electors." 5 Stat. 721.

Finally, the electoral vote procedure rebuts the argument that consummation of an election requires the ballot box to be closed. *See* Pet. App. 13a. A presidential election consummates when the electors send their votes from their home states. *See supra*, at 8-10. But U.S. Senate staff only put any electors' certificates in the ballot boxes *after* the certificates are received on a later day in Washington D.C. *See* Ballot Box/Electoral College, Object Description, available at https://www.senate.gov/art-artifacts/decorative-art/other/79_00051_001.htm.

### D. *The ECRA Did Not Silently Add A Mail-In Ballot Receipt Deadline.*

In the 2020 election, 21 states and the District of Columbia counted all mail-in ballots that were postmarked by election day and were received by election officials by a subsequent specified day. *The Evolution of Absentee/Mail Voting Laws 2020-22, Table 6: Absentee/Mail Ballot Received-By Deadlines*, Nat'l Conf. of State Legislatures ("NCSL") (updated Oct. 26, 2023). After election day in 2020, when election results indicated that the Democratic nominee had won the Presidency, some publicly argued that the "failed" choice exception from the 1845 Election Day Statute–by 2020 codified as 3 U.S.C. § 2–enabled state legislatures to award their states' electoral votes to the Republican nominee, even *after* the electors had voted. *E.g.,* Motion For Preliminary Injunction And Temporary Restraining

Order, at 4-5, 19, 26, 32, 35, filed Dec. 7, 2020, in *Texas v. Pennsylvania,* No. 22O155 ("*Texas*"); Bill Of Complaint In Intervention, at 17-18, filed Dec. 9, 2020, in *Texas*.

Congress responded in the Electoral Count Reform Act of 2022 ("ECRA"). In pertinent part, the ECRA (a) defined the term "election day" as continuing to be the "Tuesday next after the first Monday in November" and (b) replaced the fail-to-make-a-choice exception from the 1845 Election Day Statute with an exception limited to when "prior to such day" a state has enacted a law that extends "the period of voting" when "necessitated by force majeure events that are extraordinary and catastrophic" and such events had occurred. 3 U.S.C. § 21(1). Thus, federal law remained unchanged that, except for the narrower "force majeure" exception, "[t]he electors of President and Vice President shall be appointed, in each State, on" "the Tuesday next after the first Monday in November." 3 U.S.C. §§ 1, 21(1).

The ECRA's use of "election day" in 3 U.S.C. § 1 did not change the prior statutory rule for over 200 years that election day consummates "the time of choosing electors" by the voters that 3 U.S.C. § 3 *still* codifies. "Election" or "elections" had been in the title and text of prior statutes that linked elections to choosing: the 1845 Election Day Statute, 5 Stat. 721, and the 1792 Election Time Statute, 1 Stat. 239, which language an 1804 statute made continue to "extend and apply to every election of a President and Vice President," 2 Stat. 295. Constitutional provisions and the 1787 Resolution also linked "election" and "Elections" to the day, time, and place

of choosing and transmitting votes, *not* receiving. *See supra*, at 1-5, 10-11. Nothing suggested that in 2022, the reference to "election day" in 3 U.S.C. § 1 somehow secretly changed any of this. *See Reading Law*, at 256 ("stylistic or nonsubstantive changes" do not change meaning); *id.* at 257 (in a "recodification[,] . . . new language does not amend prior enactments unless it does so clearly"). This silence was despite the fact that some had objected in 2020 that Pennsylvania (pursuant to a state supreme court decision) and Nevada (pursuant to a state statute) had violated 3 U.S.C. § 1 by requiring election officials to count mail-in ballots received after election day. *See* Petition for Certiorari, at 32, in *Republican Party of Pennsylvania v. Boockvar,* No. 20-542, filed Oct. 23, 2020 (S. Ct.); Petition for Certiorari, at 2-3, in *Scarnati v. Pennsylvania Democratic Party,* No. 20-574, filed Oct. 27, 2020 (S. Ct.); *Donald J. Trump for President, Inc. v. Cegavske,* 488 F. Supp. 3d 993, 996-97 & n.5 (D. Nev. 2020).

This congressional silence contrasts with 3 U.S.C. §§ 12 and 13, as amended by the ECRA, *see* 136 Stat. 5237. 3 U.S.C. §§ 12 and 13 continue to provide procedures for obtaining a state's electoral votes when no electoral votes "from any State shall have been *received* by the President of the Senate by the fourth Wednesday in December"—eight days *after* the electors have voted, *see* 3 U.S.C. § 7. When Congress sets a day for votes to be "received," it does so expressly.

Most telling, the ECRA did not repeal or amend the language from the 1792 Election Time Statute that has described the day for the election of

the electors as "the time of choosing electors." That language remains codified in 3 U.S.C. § 3.

## II. ELECTION DAY CONSUMMATES WHEN VOTERS CHOOSE MEMBERS OF CONGRESS.

In 1872, Congress first enacted "the day for the election . . . of Representatives." 17 Stat. 28. This provision is codified in 2 U.S.C. § 7.

In 1866, Congress had enacted "An Act to regulate the Times and Manner of holding *Elections* for Senators in Congress." 14 Stat. 243. § 1 specified when each state's legislature was "*to choose*" a Senator. *Id.* § 3 of this 1866 statute required a Governor "of the State from which any Senator shall have been *chosen* . . . to certify his *election* . . . to the President of the senate." *Id.* at 244. As revised, 2 U.S.C. § 1a now requires a Governor "of the State from which any Senator has been *chosen* to certify his *election* . . . to the President of the Senate." Congress in 1914 adopted what is now codified as 2 U.S.C. § 1. *See* 38 Stat. 384. 2 U.S.C. § 1 continues to provide "the regular election . . . *at which election* a Representative to Congress is regularly by law to be *chosen*" is also when "a United States Senator . . . shall be elected by the people."

Given all these references to "to choose" and "chosen," from every perspective, the "day for the election" under 2 U.S.C. §§ 1, 1a, and 7–especially when read *in pari materia*, *see supra,* at 5-6–is by when the voters choose Representatives and

Senators. It is not a federal deadline by when an election official must receive a mail-in ballot.

*First*, *Foster v. Love* holds that election day is the same "for Congress and the Presidency." 522 U.S. at 70. The purpose of the later 1872 Election Day Statute was to align the day for consummating House elections with the day set by the 1845 Election Day Statute. *Id.* at 73-74. Thus, because the 1845 Election Day Statute sets a date by when voters express their choices, so must the 1872 Election Day Statute.

*Second*, "election" in 2 U.S.C. § 7 is transplanted from "Elections" in Article I, § 4, Clause 1 of the Constitution. The meaning of "Elections" in this Elections Clause is that congressional elections consummate when the applicable voters choose.

Article I, § 2, Clause 1 stated that "[t]he House of Representatives shall be composed of Members *chosen* every second Year *by the People*." Clause 2 tied the time of every Representative's election to this choosing by requiring that each Representative "*when elected*, be an Inhabitant of that State in which he *shall be chosen*." Clause 1 of § 3 of Article I stated that "[t]he Senate . . . shall be composed of two Senators from each State, *chosen* by the Legislature." (The Seventeenth Amendment transferred that choosing to "the people."). Clause 3 of § 3 of Article I tied the time of every Senator's election to choosing by requiring that each Senator "*when elected*, be an Inhabitant of that State for which he *shall be chosen*."

The Elections Clause itself states that the "Places . . . of *holding Elections* for Senators" are "the Places of *chusing* Senators." So, when the Elections Clause refers to "[t]he Times . . . of holding Elections for Senators and Representatives," it likewise refers to the times of choosing Senators and Representatives.

This is also established by *United States v. Classic*, which decided that "the authority of Congress, given by § 4 [of Article I]," over congressional "elections" extended to primaries. 313 U.S. at 317. To ascertain "the meaning of § 4 of Article I," *Classic* explained, "we turn to the words of the Constitution read in their historical setting." *Id.* *Classic* interpreted "elections" to embody the "chosen . . . by the People" language that governed congressional elections under § 2 of Article I and the Seventeenth Amendment's revision to § 3. *Id.* at 318. *Classic* concluded that, in the Elections Clause: "*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 [voters] of their choice* of candidates." *Id.*

This original understanding is confirmed by founding era dictionaries that define "election" as "Chusing or Choice." Nathan Bailey, *A Universal Etymological English Dictionary* (20th ed. 1763); John Ash, *A New and Complete Dictionary of the English Language* (1775) ("the act of choosing, the power of choice, voluntary choice"). Indeed, at the New York Ratifying Convention, Hamilton encapsulated "the true principle of a republic . . . that the people should *choose* whom they please to govern them" as "popular

*election*," which "should be . . . the most unbounded liberty allowed." 2 *Elliot's Debates* 257, quoted in *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969). Most important, the 1787 Resolution stated that "on the *Day* fixed for the *Election* of the President" the electoral voters "should *transmit* their votes," but that "receiving . . . the Votes for President" by officials would occur on a *later* date in a different place. 2 *Farrand's Records* 665-66.

For popular voters who use mail-in ballots, they likewise "choose" when they transmit their ballots. Accordingly, under the constitutional definition of "Elections" in the Elections Clause–and transplanted into 2 U.S.C. § 7–an election official's post-choosing receipt of a mail-in ballot need not occur within the time set by Congress for a federal "election."

Respondents contend that a congressional "election" should be viewed as the "State's process." RNC Opp. to Pet. at 20 ("Opp."). That is rebutted by *Classic*'s holding that "Elections" in the Elections Clause embodies the meaning that "an *election* to public office has been . . . no more and no less than *the expression by qualified electors [voters] of their choice* of candidates." 313 U.S. at 318. This holding also distinguishes the extreme hypothetical that a state could permit a voter to leave a ballot in a drawer. Unlike mailing, the *untransmitted* ballot in the drawer is not an "expression" of the voter's choice.

*Third,* in construing the 1872 Election Day Statute, *Foster v. Love* quoted an 1869 dictionary as

"defining 'election' as '[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 (C. Goodrich & N. Porter, eds.) (1869)). This is another definition and case that, like many constitutional and federal statutory provisions, describe an election as the act of choosing by voters. The respondents and their *amici* have *never* cited any definition, Supreme Court decision, or federal provision that describes an election as receiving votes by election officials.

*Fourth,* as of the 1872 Election Day Statute and after, the election day for the President and Vice President by the electors was still consummated many days *before* the votes of the electors were due to be delivered to the first election official to *receive* them, the President of the Senate. *See* Revised Statutes, Title III, §§ 135, 140-41 (1874); *supra*, at 10-13. Nothing suggested that Congress was outlawing a similar procedure for receipt of popular votes.

Even *assuming* that state legislatures only adopted a similar procedure for mail-in popular voting in the 20th century, that timing would not matter. It is "flawed" originalism to "assume that [earlier] legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority." *Rahimi*, 602 U.S. at 739-40 (Barrett, J., concurring). Rather, as routinely occurs, the policy judgments of state legislatures changed over time as to how to conduct elections. *See supra*, at 8-9.

*Fifth*, making the time of receipt by an election official the touchstone of the election day statutes would enable states to make all voters choose well before election day. If an "election" does not occur until the deadline for an election official's receipt of mail-in ballots, the federal statutes would enable states to require all voters to stop voting weeks *before* election day. For example, if election day under the federal statutes were the received-by deadline, *any* state could (a) adopt all mail-in voting, (b) require voters to postmark their ballots by a given date in October (or earlier), *and* (c) require that the ballots be received by election day. Voters would be deprived of any ability to wait until the federal election day in November to make their choices.

Moreover, any other state could adopt a similar all mail-in voting system but with a required postmarking day in October (or earlier) that was *different* from the first state. Thus, voting could end in different states on different days. Further, any state could have *different* postmarking deadlines for House, Senate, and presidential elections, so long as the state had the same received-by deadline of election day for all federal elections.

Nothing in *Foster v. Love* supports a statutory reading that would allow a state to require all voting to *cease before* election day, and different states or the same state to have different days when voting stops. *Foster v. Love* was only about whether federal election day statutes allow a state to require *all* aspects of a federal election to be completed *before* election day, not which activities by an election official violate the federal election day statutes if

they occur after election day. In *Foster v. Love*, if one candidate received a majority in an October open primary, that candidate was elected to Congress without any voting in November. *See* 522 U.S. at 70. *Foster* stated that "election" in 2 U.S.C. § 7 refers "to the combined actions of voters and officials meant to make a final selection of an officeholder." *Id.* at 71. Because winning a majority in the October open primary meant that neither Louisiana voters nor officials were doing *any act* on election day, 2 U.S.C. § 7 was violated. *Id.* at 72. ("no act in law or in fact [was] to take place on the date chosen by Congress"). *Foster* expressly disclaimed that it was providing guidance on "what acts a state must cause to be done on federal election day (and not before it) in order to satisfy the statute" or "whether a State must always employ the conventional mechanics of an election." *Id.* at 72 & n. 4.

Unlike in *Foster v. Love,* in the states at issue and D.C., their election officials do *not* sit on their hands on election day. Those election officials are: (1) Receiving, opening, and processing mail-in ballots. (2) Manning facilities open for in-person voting, dropping off of mail-in ballots, or both. In 2024, in Mississippi, 1,010,752 votes were cast in person on election day. U.S. Election Assistance Commission, *Election Administration and Voting Survey Comprehensive Report*, Overview Table 2: In-Person and Other Modes of Voting 41 (June 2025). (3) Counting both in-person and mail-in votes.

In sum, the touchstone of voter choice underlies all federal election day provisions in the Constitution and federal statutes. Suppose, for

example, that Soldier Able and Soldier Baker are friends from Mississippi stationed in California. Both soldiers mail their ballots in the same California mailbox four days before election day. Each envelope is postmarked three days before the election. Able's ballot is received on election day, while Baker's vote is received the next day. A voter cannot choose how fast regular mail moves. If Able's vote is counted while Baker's vote is rejected, voter choice cannot be the reason.

## III. THIS COURT SHOULD NOT ARROGATE THE LEGISLATIVE POWER TO SET A MAIL-IN BALLOT RECEIPT DEADLINE.

### *A. A Mail-In Ballot Receipt Deadline Regulates "Manner," Not Time.*

The reason for setting a mail-in ballot receipt deadline to coincide with election day is to enable election officials to count votes earlier and announce results sooner. State statutes relating to when to count votes and announce results are regulations of the "manner" of holding federal elections, not the time of those elections. *Smiley v. Holm*, 285 U.S. 355 (1932), delineated which powers are over the "manner" of congressional elections, rather than powers "only as to times and places." *Id* at 366. In particular, statutes "*in relation to* . . . counting of votes . . . and making and publication of election returns" are laws regulating the "manner" of elections. *Id.* With respect to "manner" issues, state legislatures enact differing laws "as laboratories" of democracy. *Arizona State Legislature v. Arizona*

*Independent Redistricting Comm'n*, 576 U.S. 787, 817 (2015).

In *Bush v. Gore*, 531 U.S. 98 (2000), the concurrence concluded that the Florida Supreme Court had usurped the legislature's "manner" authority by badly misinterpreting statutes relating to when election officials "count the votes," "provid[e] results," and "certify the results," including "the certification deadline." *Id.* at 116-18. Most important, *Bush v. Gore* treated two post-election deadlines from the Florida legislature that cut off the counting of some properly and timely-cast votes as binding regulations of the "manner" of the election. First, the concurrence read Florida statutes to give its Secretary of State discretion, once the certification deadline occurred, to reject votes subsequently found by a recount to be cast timely and properly. *Id.* at 117-18. Second, the *per curiam* majority opinion said that the Florida "legislature intended" the counting of ballots to stop by the optional federal December 12 date in then-3 U.S.C. § 5, which in 2000 made conclusive a state's determination in a controversy or contest of which electors won. *Id.* at 110. The *per curiam* opinion therefore stopped the counting in Florida on December 12, even though some timely and properly-cast votes likely remained uncounted. *Id.*

A post-election day deadline for receiving mail-in ballots is a "manner" deadline, like the deadlines in *Bush v. Gore.* A mail-in receipt deadline for ballots mailed by election day embodies the state legislature's policy judgment, in the exercise of its "manner" power, as to what is the day on which

reaching finality sooner in the *counting* by officials of votes justifies a deadline that cuts off their counting of some properly and timely-cast mail-in votes.

This is underscored by the opinions of three Justices who dissented from the denial of certiorari in *Republican Party of Pennsylvania v. Degraffenreid,* 141 S. Ct. 732 (2021) ("*RPP*"). In *RPP,* petitioners had challenged the Pennsylvania Supreme Court's extension of Pennsylvania's mail-in ballot receipt deadlines for both presidential and congressional elections from election day, as a Pennsylvania statute required, to three days later. *Id.* at 733 (Thomas, J., dissenting). Justice Thomas stated there was a "strong argument" that the Pennsylvania Supreme Court had violated the Elections and Electors Clauses by usurping the "state legislature['s] authority to determine the '*Manner*' of federal elections." *Id.* at 732, 733. Justice Alito, joined by Justice Gorsuch, agreed that the Court should have granted certiorari over this issue. *Id.* at 738. None of the Justices mentioned the other question presented by that case's petitioners, *see supra*, at 16, namely, whether the federal election day statutes had been violated.

The election process has many "manner" deadlines that do not constitute the time of the election. For example, no one mistakes registration deadlines as constituting the time of the election—even though in 2024, the deadline in 20 states for registration was election day. *See Same-Day Voter Registration*, NCSL (updated Oct. 25, 2024). Similarly, no one mistakes post-election day

deadlines for counts, recounts, protests, contests, and certification as extending the time of the election.

Moreover, many state legislatures make policy judgments that delay the counting of votes and the announcing of results. These include decisions to use paper ballots for in-person voting rather than voting machines, to count paper ballots by hand rather than use a vote-counting machine, and to delay processing of earlier received mail-in ballots until election day. The election day statutes do not preempt state policy judgments merely because those judgments delay vote counting and announcing.

There is only one federal deadline that sets the time the election consummates: the day by when voters must submit their choices. *See supra*, at 4-24. State statutes that require *mailing* ballots by election day satisfy that deadline, whether a state sets its different "manner" deadline for an official to receive mail-in ballots to occur after, or coincide with, election day.

### *B. This Court Should Not Arrogate The Legislative Power Over Elections.*

*If* problems develop, Congress has the power to set mail-in ballot receipt deadlines for federal elections. First, because mail-in ballot receipt deadlines are an issue of the "manner" of congressional elections, *see supra*, at 24-26, the Elections Clause gives Congress the power to set those deadlines. Congress did *not* regulate "manner" in 2 U.S.C. §§ 1 and 7, however, as reflected in their

section Titles that refer to "Time for election" and "Time of Election."

Second, Congress has the power to set a mail-in ballot receipt deadline in presidential elections, even though Article II gives only the States power over the "manner" of choosing electors. The second half of the Necessary and Proper Clause gives Congress power to enact laws "necessary and proper for carrying into Execution. . . powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This gives Congress power to set a vote-counting deadline in presidential elections to ensure meeting the federal timeline for vesting the powers of the Presidency and Vice Presidency in the elected winners–including the timely voting of presidential electors in mid-December of every presidential election year, counting of electoral votes by Congress on January 6 of the following year, and starting the terms of the elected President and Vice President at noon on January 20 of that following year. *See Burroughs v. United States,* 290 U.S. 534, 545 (1934) (Congress has power over presidential elections derived from its power to enact laws "essential to preserve the departments and institutions of the general government from impairment or destruction").

The ECRA in 2022 exercised power under the Necessary and Proper Clause to set a deadline of six days before the meeting of the electors for the "executive of each state" to "issue a certificate of ascertainment of appointment of electors." 3 U.S.C. § 5(a)(1). In stark contrast, however, although some had complained in 2020 about the mail-in ballot

receipt deadlines of Pennsylvania and Nevada, *see supra* at 16, Congress set no deadline with respect to a state's receipt of mail-in ballots.

*If* a federal statute would set a deadline for receipt of mail-in ballots in *presidential* elections, it too would have to rely on the Necessary and Proper Clause. Any assertion that such a deadline already exists in presidential election statutes therefore must satisfy the clear statement rule that applies when deciding whether a necessary-and-proper statute has preempted state law or significantly changed the federal-state balance. *See Bond v. United States*, 572 U.S. 844, 857-60 & n. 2 (2014). Indeed, "whenever [Congress] has assumed to regulate such elections it has done so by positive and clear statutes." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). For example, from § 4 of the 1792 Election Time Statute through current 3 U.S.C. §§ 12-13, Congress has specified a day by which electoral votes should be "received" by the President of the Senate. 1 Stat. 240; *see supra*, at 10-11, 13-14, 17-18. Likewise, from 1942 to 2009, Congress enacted popular voting statutes that *expressly* addressed "receipt" of certain absentee ballots in particular contexts, and always preserved state-law options that they be "received" or "returned" after election day. Vet Voice Br. 38-46 (quoting statutes).

In contrast, 3 U.S.C. § 1 and 2 U.S.C. §§ 1 and 7 do not address, much less expressly, a day for any mail-in ballots to be "received" by a state election official in a presidential election. Rather, the deadline in the pertinent constitutional and statutory provisions is for *choosing*--thus confirming

that these federal election day statutes have never set any receipt deadline. *See supra*, at 4-24.

The Fifth Circuit resorted to policy arguments that, at best, provide a reason why *Congress* might amend the federal statutes. However, "policy concerns cannot trump the best interpretation of the statutory text." *Patel v. Garland*, 596 U.S. 328, 346 (2022). Nonetheless, the Fifth Circuit hypothesized a receipt deadline 100 days after election day. Pet. App. 26a. That argument amounts to "fear mongering on the basis of extreme hypotheticals," *Trump v. United States*, 603 U.S. 593, 640 (2024). There is no reported instance of the post-election day receipt of a mail-in ballot causing a state to miss any of its own post-election deadlines for counts, recounts, protests, contests, certification, etc. Much less that any mail-in ballot receipt deadline caused a congressional seat to be empty on January 3 of the following year, or the casting of a presidential electoral vote to be late. States want more representation in Congress and more electoral votes, not less.

Respondents complain that a few states allow additional means of proving that an unpostmarked ballot was mailed by election day, such as a declaration or certification that arrives with the ballot, or a presumption. *See* Opp. at 8-9. Through no fault of citizens, some mail does not receive a postmark. *See* 90 Fed. Reg. 52891 (Nov. 24, 2025). The constitution and federal election statutes leave to the state legislatures to make reasonable choices regarding what method proves that an unpostmarked ballot was mailed by election day.

State legislatures "'provide a complete code for congressional [and presidential] elections,' including regulations 'relat[ing] to . . . supervision of voting . . . [and] prevention of fraud and corrupt practices.'" *Moore v. Harper*, 600 U.S. 1, 29 (2023) (quoting *Smiley*, 285 U.S. at 366; first and third brackets added; second brackets in *Moore*). Surely, states may legislate methods that Congress also has used to prove a fact, such as a declaration or certification, *see, e.g.,* 28 U.S.C. § 1746, or a presumption. *See, e.g., United States Post Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983).

Nor have respondents cited any instance of a mail-in ballot fraudulently sent after the mailing deadline set by a state statute. Speculation that post-election day receipt statutes cause fraud is counter-intuitive. If someone takes the trouble and risk of engaging in the surpassingly rare crime of mail-in ballot fraud, that person is likely to send the ballot in early–to guarantee counting and avoid scrutiny. The likely postmark on any belatedly-mailed envelope will nullify the vote and identify a potential fraudster.

The federal courts should not arrogate to themselves the policy judgment whether mail-in voters must send their choices sufficiently *before* election day so that their ballots are received by election day by an election official. The Constitution and the federal election day statutes have left such policy judgments to each state legislature. *See Crawford*, 533 U.S. at 208 (Scalia, J. concurring). Thus, it is for each state, not the federal courts, to make the policy judgment on whether a state's

election officials must receive mail-in votes by election day or may receive ballots mailed by election day by a later deadline.

## CONCLUSION

The Court should reverse.

Dated: January 9, 2026 Respectfully Submitted,


Nancy A. Temple
Ellie Buchanan
Katten & Temple, LLP
209 S. LaSalle Street,
Suite 950
Chicago, IL 60604

Richard Bernstein
*Counsel of Record*
1875 K Street
Washington, D.C. 20006
(301) 775-2064
Rbernsteinlaw@gmail.com

Brendan Haskin
2950 Van Ness St, NW
Apt. 607
Washington, D.C. 20008

*Counsel for Amicus Curiae*