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 The Democratic National Committee as *Amicus Curiae* in Support of Petitioner

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INTERESTS OF *AMICUS CURIAE*[1]

The Democratic National Committee (DNC) is the oldest continuing party committee in the United States. Its purposes and functions are to communicate the Democratic Party's position on issues; protect voters' rights; and aid the election of Democratic candidates nationwide, including by organizing citizens to register as Democrats and vote in favor of Democratic candidates. The DNC represents millions of voters, including nearly 250,000 registered Democrats within Mississippi.

The DNC and its members have been directly affected by the decision below. The Fifth Circuit held that a Mississippi statute, Miss. Code § 23-15-637(1)(a), is preempted by federal law, on the theory that federal law requires that every absentee vote be received by an election official by election day. The DNC, which briefed and argued the case before the Fifth Circuit below, has a powerful interest in ensuring that States retain the authority to count ballots completed and mailed by eligible citizens by election day, even if those ballots arrive shortly thereafter. That interest includes the DNC's commitment to ensuring that uniformed military and overseas citizens' votes are counted, including those that reach election officials within state-specific grace periods protecting such voters.

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[1] Pursuant to Supreme Court Rule 37, counsel for *amicus curiae* affirm no part of this brief was authored by any party's counsel, and no person or entity other than *amicus curiae* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mississippi law requires that all mail-in ballots be postmarked on or before the day of the election and received no more than 5 days after the election. Miss. Code § 23-15-637(1)(a). That framework is fully consistent with federal statutes establishing the Tuesday after the first Monday in November—election day—as the date on which the "election" of members of Congress (2 U.S.C. 1, 7) and the "appoint[ment]" of presidential electors (3 U.S.C. 1) occurs. That is because federal law requires only that the *election*—meaning the voters' final collective choice of officeholder—be completed by the close of election day. Mississippi law complies with that requirement by directing that voters must *cast* their ballots by the close of election day.

Every relevant source of interpretive guidance indicates that the federal election-day statutes do not preempt Mississippi law. Throughout this Nation's history—from the Founding, through the Civil War, to the present—the term "election" has been universally understood to refer to the voters' act of *choosing* an officeholder, not to any later administrative acts to determine what choice they made. This understanding is reinforced by related federal statutes that explicitly contemplate and authorize state rules allowing post-election-day ballot-receipt deadlines. Historical practice also confirms that States have long permitted ballots cast by election day to arrive and be counted afterward. Taken together, the statutory text, related federal legislation, and historical practice overwhelmingly confirm that federal law does not preempt Mississippi law.

That should not be surprising. The Constitution expressly confers considerable latitude on the States to determine the "manner" in which federal elections will be conducted, and specifically to make considered policy choices about voting procedures when federal law is silent. See U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."); U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.").

The Fifth Circuit nevertheless held that the federal election-day statutes preempt Mississippi's ballot-receipt deadline because, in that court's view, ballots must be "cast by voters and received by state officials" by election day. Pet. App. 3a (emphasis omitted). The court of appeals made no serious effort to find a textual basis for that preemption ruling. Instead, it purported to read this Court's decision in *Foster* v. *Love*—specifically, a phrase describing an election as the "combined actions of voters and officials," 522 U.S. 67, 71 (1997)—as dictating the conclusion that only absentee ballots in the hands of election officials by election day have been validly cast. But *Foster* says no such thing, and the Fifth Circuit was unable to identify any other persuasive authority to justify its extreme conclusion. Its decision is also, to the best of *amicus curiae*'s knowledge, the first time that *any* court has ever struck down a post-election-day ballot-receipt deadline as inconsistent with federal law. An affirmance of that decision would vitiate the absentee voting rules in 29 States and the District of Columbia, upending longstanding absentee-voting practices that facilitate the exercise of the franchise by many millions of voters. This Court should reverse.

ARGUMENT

The federal election-day statutes require only that the "election"—that is, the "final choice of an officer by the duly qualified electors"—occur by the close of election day. *Newberry* v. *United States*, 256 U.S. 232, 250 (1921); *Foster* v. *Love*, 522 U.S. 67, 71 (1997). Voters make their collective final choice by *casting* their ballots. Federal law is therefore satisfied so long as voters make their choice by casting their ballots by the close of election day. The federal election-day statutes do not speak to what action constitutes *casting* a ballot. That policy judgment is left to the States (consistent with other federal statutes and the Constitution). Along with a majority of States, Mississippi has determined that absentee ballots are cast when they are placed in the mail and postmarked. To count, all such absentee votes must be submitted and postmarked—cast—by the close of election day. Mississippi law thus ensures that the voters' final collective choice is made, and the election concludes, on election day. Miss. Code § 23-15-637(1)(a). Federal law requires nothing more.

The Fifth Circuit overrode Mississippi's reasonable policy choice concerning when ballots are cast. It did so based on a misconceived analysis of the text of the relevant federal election statutes and a serious misreading of this Court's decision in *Foster* v. *Love*, and with no regard for the States' long historical practice of maintaining ballot-receipt deadlines that fall *after* election day.

I. The Text of the Federal Election-Day Statutes Does Not Forbid States from Counting Ballots Received After Election Day

Throughout this Nation's history, the term "election" has been universally understood to refer to the voters' act of *choosing* an officeholder—not to the

later administrative acts of receiving or counting ballots. See *United States* v. *Classic*, 313 U.S. 299, 318 (1941) ("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."). The Constitution uses the term "Election" in precisely this sense, consistent with early statements of the Framers identifying election day as the day votes are cast and transmitted, not received or counted. That same understanding is reflected in dictionaries contemporaneous with the enactment of the federal election-day statutes, further confirming that those statutes do not prevent States from counting ballots received after election day.

1. The Elections Clause provides that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed" by the States, and it excludes the "Places of chusing Senators" from Congress's preemptive authority over these regulations, making clear that the "Times * * * of holding Elections" refers to the time of that "chusing." U.S. Const. art. I, § 4, cl. 1. Article I also provides that members of Congress are "chosen" by the relevant electorate,[2] U.S. Const. art. I, § 2, cl. 1; U.S. Const. art. I, § 3, cl. 1, and it relates the time of that "cho[osing]" to the time of each Congressional "election," U.S. Const. art. I, § 2, cl. 2; U.S. Const. art. I, § 3, cl. 3. Article II adopts a parallel formulation for presidential elections, authorizing Congress to set "the Time of chusing the Electors." U.S. Const. art. II, § 1, cl. 4. At no point do any of these provisions reference the time of *receiving* or *counting* ballots. The Constitution thus uses the term "election" to refer to

[2] Senators were originally chosen by state legislatures and now, under the Seventeenth Amendment, by the people.

the voters' act of *choosing* an officeholder, not to any later administrative step.

Precisely the same understanding of "election" is evident in other Founding-era documents. On September 17, 1787—the same day the Founders signed the Constitution—the Constitutional Convention adopted a resolution explaining that "the Day fixed for the Election of the President" is the day on which the electors meet, cast their ballots, and transmit their votes to the seat of government. *A Sept. 17, 1787, Resolution of the Federal Convention Submitting the Constitution to Congress*. But the actual "*receiving*, opening and counting" of those votes was not set to occur until much later, after the new Congress convened. 2 *Records of the Federal Convention of 1787* 665-666 (M. Farrand ed. 1911) (emphasis added). Indeed, the electors "Assemble[d] in their respective States and Vote[d] for a President" on February 4, 1789, 34 *Journals of the Continental Congress* 304 (Roscoe R. Hill ed., 1937), and Congress convened two months later—on April 6, 1789—"for the sole purpose of opening the certificates, and counting the votes of the electors of the several States in the choice of a President and Vice-President of the United States," 1 *Annals of Congress* 16-17 (Joseph Gales ed., 1834). Therefore, as the Framers' own understanding reflects, the "Day fixed for the Election" occurs when the voters make and transmit their choice, not when superintending government officials later receive, open, or count the ballots.

This Founding-era understanding of "election" carried directly into the federal election-day statutes. In 1792, Congress enacted "An Act relative to the Election of a President and Vice President of the United States," which described the time when "electors shall be appointed in each state" as "the time

of choosing electors." 1 Stat. 239. As before, the "Election" was clearly understood to refer to the time of the voters' collective *choice*, not to any post-choice administrative acts to identify the winning candidates. Congress retained that language in the codification of 3 U.S.C. 3. And because Sections 1 and 3 of Title 3 address the same subject, they should be read *in pari materia* to establish a coherent statutory scheme in which "election day" is the day that marks "the time of choosing." See A. Scalia & B. Garner, *Reading Law* 252 (2012).

Congress adopted that same understanding when it established a single federal election day. In 1845, Congress enacted the statute now codified at 3 U.S.C. 1, fixing a uniform "election day" for presidential electors. In doing so, Congress legislated against the settled understanding of an "election" as occurring when voters make their collective choice—not when officials later receive and count ballots. Nothing in the 1845 Act suggests any departure from that established usage. Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (to be codified at 3 U.S.C. 1). Congress should therefore be understood to have employed the term "election day" in its well-understood sense. Congress carried forward that same understanding in 1872 and 1914, when it set a uniform day for electing Representatives and Senators, respectively—again employing the settled understanding of an "election" as occurring when voters make their collective *choice* for a representative.

That meaning finds support in contemporaneous dictionaries. Those dictionaries uniformly define "election" in terms of the voters' collective choice or selection of an officeholder. See N. Webster, An American Dictionary of the English Language 433 (C. Goodrich & N. Porter eds. 1869) ("American Dictionary") ("[t]he act of choosing a person to fill an

office"); Webster's Complete Dictionary of the English Language 433 (C. Goodrich & N. Porter eds. 1882) (same); Universal Dictionary of the English Language 1829 (R. Hunter & C. Morris eds. 1897) ("[t]he act of electing, choosing, or selecting out of a number by vote for appointment to any office"). And this Court has consistently construed the term "election" to have that same meaning. See *Newberry* v. *United States*, 256 U.S. 232, 250 (1921) (The "meaning of election * * * now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors."); *Foster* v. *Love*, 522 U.S. 67, 71 (1997) ("When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder.") (citing American Dictionary at 433).

In analyzing the federal election-day statutes, the Fifth Circuit acknowledged it must "interpret the words [of these statutes] consistent with their ordinary meaning at the time Congress enacted the statute." Pet. App. 8a (quoting *Wisconsin Cent. Ltd.* v. *United States*, 585 U.S. 274, 277 (2018)). The Fifth Circuit purported to find that ordinary meaning inscrutable, however, because federal law "make[s] no mention of deadlines or ballot receipt." Pet. App. 8a n.5. But that is precisely the point. The term "election" in the federal election-day statutes does not, and has never been understood to, require a particular ballot receipt deadline or incorporate particular rules for what voters must do to "cast" a ballot. That dictionaries contemporaneous with the passage of the federal election laws are silent as to such requirements *supports* the view that Mississippi's statute is not preempted by federal law. It is not a basis for

disregarding the primary guides to contemporaneous meaning.

Thus, the election is defined by actions taken by *voters*—namely, their collective choice of a candidate. That choice is made when voters cast their ballots—at that point, each individual voter has made an irrevocable choice, and the collective ballots cast determine the electorate's choice of officeholder. The federal laws establishing a "day for the election," 2 U.S.C. 7, therefore require only that an election be consummated on election day—that all ballots be cast, thus finalizing the choice of officeholder, by the close of that day.

2. At the same time, the federal election-day statutes are silent as to the manner by which votes are cast. As this Court has recognized, "[l]ong before the adoption of the Constitution," the manner of casting votes "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 would never change." *Classic*, 313 U.S. at 318. To the contrary, the Constitution expressly vests States with broad discretion to determine the manner in which elections for federal office will be conducted. See U.S. Const. art. I, § 4, cl. 1 ("The * * * Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."); U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."). States thus possess express constitutional authority to make a "policy choice" to "require only that absentee ballots be *mailed* by election day." *Democratic Nat'l Comm.* v. *Wis. State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring in

denial of application to vacate stay) (emphasis in original).

Mississippi law provides that absentee ballots are cast when they are completed, placed in the mail, and "postmarked." Miss. Code § 23-15-637. To comply with the federal election-day statutes, then, ballots in Mississippi need only be postmarked by the close of election day—exactly what Mississippi law requires.

In effect, Mississippi has established a mailbox rule for absentee ballots: a ballot is "cast," and thus the final choice of officeholder is made, when a citizen completes and mails a ballot. Such rules are widespread across numerous areas of law. Contracts are formed when the offeree's acceptance is "put out of [his] possession, without regard to whether it ever reaches the offeror." Restatement (Second) of Contracts § 63(a) (Am. L. Inst. 1981). Tax returns and payments are "deemed" to be "delivered" on "the date of delivery or the date of payment." 26 U.S.C. 7502(a)(1). Bankruptcy documents are deemed served "upon mailing." Fed. R. Bankr. P. 9006(e). Certain Freedom of Information Act appeals are deemed timely based on the date they are "postmarked" or "transmitted." 6 C.F.R. 5.8(a)(1). And a pro se inmate's notice of appeal is deemed timely "if it is deposited in the institution's internal mail system on or before the last day for filing." Fed. R. App. P. 4(c)(1). Nothing about the federal election-day statutes precludes the States from adopting a similar policy choice for absentee ballots.

That conclusion is reinforced by the fact that post-election-day receipt of ballots cast by election day is entirely consistent with the purposes of the election-day statutes. As this Court has explained, Congress set a uniform federal election day in order to avoid "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," as well as "the burden on citizens" resulting from "two different election days." *Foster*, 522 U.S. at 73. Neither concern is implicated by post-election-day administrative acts—such as receiving and counting ballots—that cannot influence people's votes and do not burden voters.

3. The Fifth Circuit rejected the straightforward conclusion that the federal election-day statutes permit States to define what constitutes casting a ballot based primarily on its view that casting a ballot necessarily involves the "combined actions of voters and officials," *Foster*, 522 U.S. at 71, and the official actions necessary to deem a ballot "cast" are not complete until voting officials receive the ballot, Pet. App. 10a-11a. But federal law says nothing of the sort. To the contrary, federal statutes setting a single election day plainly leave space for officials to examine, validate, and tally ballots *after* election day. For instance, during the Civil War, numerous States counted votes after election day. See pp. 19-20, *infra* (discussing Civil-War-era practice of nine States to receive and count ballots after election day). And that practice has continued through the present. See *Bush* v. *Gore*, 531 U.S. 98, 116 (2000) (Rehnquist, C.J., concurring) ("After the election has taken place, the canvassing boards receive returns from precincts [and] count the votes."); *Harris* v. *Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1325 (N.D. Fla. 2000) ("Routinely, in every election, hundreds of thousands of votes are cast on election day but are not counted until the next day or beyond."). It is therefore clear that the "election" has occurred, for federal law purposes, when all voters have cast their votes—even if additional official actions must occur after election day to ascertain the voters' choice.

The Fifth Circuit resisted this conclusion by asserting that a ballot cannot "be 'cast' before it is received." Pet. App. 10a. But the Fifth Circuit cited no federal authority supporting that remarkable assertion—a telling omission given that the court's preemption analysis depends on it.[3] Certainly the federal statutes providing that election day "is established as the day for the election" say nothing of the sort. 2 U.S.C. 7. Nor does this Court's decision in *Foster*. That decision made no mention of how the "act of choosing a person to fill an office," *Foster*, 522 U.S. at 71 (quoting American Dictionary at 433), must occur, or what action renders the act of casting a ballot complete. Nor does any other precedent of which amicus is aware. To the contrary, this Court has recognized that casting and receiving a ballot can be, and often are, separate acts. See *Republican Nat'l Comm.* v. *Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam) ("Extending the date by which ballots may be cast by voters—*not just received* by the municipal clerks *but cast by voters* * * * fundamentally alters the nature of [an] election." (emphasis added)). As a result, the federal-law requirement that ballots

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[3] The Fifth Circuit cited only *Maddox* v. *Board of State Canvassers*, 149 P.2d 112 (Mont. 1944), for the proposition that a ballot cannot be "cast" before state officials receive it. Pet. App. 11a-12a. But *Maddox* rested on a Montana-specific statutory definition of "casting" a ballot—namely, "depositing * * * the ballot in the custody of the election officials." 149 P.2d at 115. The state court confirmed the significance of this distinction: "[S]ince the state law provides for voting by ballots deposited with the election officials, that act must be completed on the day designated by state and federal laws." *Ibid*. In other words, federal law required that all votes be cast by the close of election day, and state law required that for a vote to be cast, it had to be deposited with election officials. If anything, *Maddox* supports the notion that States may decide when each voter has "cast" a ballot for purposes of the federal election-day statutes.

must be cast by the close of election day cannot be understood to implicitly require that they be in the hands of state officials by that time.

The Fifth Circuit's conclusion that Mississippi law holds open the election beyond election day is thus wrong legally and factually. Legally, Mississippi law provides that all votes must be cast by the close of election day—meaning the voters' final collective choice is definitively made on election day. Factually, the postmarking requirement establishes that each individual voter's choice is final as a *practical* matter as of election day: once the ballot is in the mailbox, the voter cannot change the decision and the choice is thus final. Because Mississippi law provides that absentee ballots must be cast by election day, the statutes comply in every particular with the federal election-day requirement.

II. Other Federal Statutes Make Clear that States May Count Ballots Received After Election Day Without Creating Any Conflict with Federal Law

Other provisions of federal election law reinforce that the election-day statutes permit ballots to be received after election day. First, Congress has enacted various statutes demonstrating a "long history of congressional tolerance, despite the federal election day statute," of post-election-day receipt deadlines. *Voting Integrity Project, Inc.* v. *Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001). Second, federal statutes governing elections likewise confirm that election day refers to the day voters make their choice for an officeholder, not the date ballots must be received.

1. "[T]he case for federal pre-emption is particularly weak where," as here, "Congress has indicated its

awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'" *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-167 (1989) (citation omitted).

Congress has long known that States permit post-election-day receipt of ballots. For instance, in the 1942 Soldier Voting Act, Congress created a federal "war ballot" subject to an election-day receipt deadline, while at the same time permitting soldiers to vote "in accordance with" state laws allowing post-election-day ballot receipt. See Act of Sept. 16, 1942, ch. 561, §§ 9, 12, 56 Stat. 753, 755-756. Congress amended the Act in 1944 to provide that federal "war ballots" would receive the benefit of "any extension of time for the receipt of absentee ballots permitted by State laws." Act of Apr. 1, 1944, § 311(b)(3), 58 Stat. 136, 146. In doing so, Congress acted with full awareness that several States had post-election-day ballot-receipt deadlines. See H.R. 3436, 78th Cong. 100, 105-136 (1943) (discussing State post-election-day ballot-receipt deadlines); 90 Cong. Rec. 615 (1944) (recognizing "some States will count absentee ballots 3 or 4 days after they arrive").

Likewise, when Congress enacted Section 202 of the Voting Rights Act in 1970, it recognized that "40 States expressly permit absentee ballots of certain categories of their voters to be returned as late as the day of the election *or even later*." 116 Cong. Rec. 6996 (1970) (emphasis added). Yet Congress has passed legislation preserving States' authority to do so, choosing to work within that longstanding framework rather than replace it with a uniform federal cutoff.

The Uniform and Overseas Citizens Absentee Vot-

ing Act (UOCAVA), for example, unambiguously recognizes that States have leeway to impose post-election-day ballot-receipt deadlines. See Pub. L. No. 99-410, 100 Stat. 924 (as amended, 52 U.S.C. 20301 *et seq*.). In 1986, Congress enacted UOCAVA, which establishes in part that members of the uniformed services and overseas citizens may vote in federal elections, even if a printed ballot fails to arrive before election day. See 52 U.S.C. 20303(a)(1). To implement that guarantee, UOCAVA provides that "a Federal write-in absentee ballot shall be submitted and processed in the manner provided by law for absentee ballots in the State involved," and States must accept and count such a ballot unless a separate "State absentee ballot * * * is received * * * not later than the deadline for receipt of the State absentee ballot under State law." *Id*. § 20303(b)(3). In so doing, Congress expressly recognized that "[t]welve [States] ha[d] extended the deadline for the receipt of voted ballots to a specified number of days after the election." Uniformed and Overseas Citizens Absentee Voting: Hearing Before the H. Subcomm. on Elections on H.R. 4393, at 21, 99th Cong., 2d Sess. (Feb. 6, 1986); see also H.R. Rep. No. 99-765, at 8 (1986) ("[S]everal States accept absentee ballots, particularly those from overseas, for a specified number of days after election day."). Thus, instead of imposing a uniform federal receipt deadline tied to election day, Congress incorporated each State's own ballot-receipt deadline, thereby recognizing state authority to count ballots received after election day.

In 2009, Congress reaffirmed that states have latitude to count ballots received after election day when it amended UOCAVA with the Military and Overseas Voter Empowerment (MOVE) Act, which establishes procedures for federal collection and transmittal of

ballots cast by absent overseas uniformed services voters. See Pub. L. No. 111-84, Div. A, Tit. V, Subtit. H, 123 Stat. 2318 (10 U.S.C. 1566a; 52 U.S.C. 20301, 20302-20308, 20311). Under those provisions, a completed absentee ballot must be collected by a federal official by the "seventh day preceding" the "general election" and then transferred to the U.S. Post Office. 52 U.S.C. 20304(b)(3). Then, the ballot must be delivered to appropriate election officials "not later than the date by which an absentee ballot must be *received* in order to be *counted* in the election." *Id.* § 20304(b)(1) (emphases added). Congress could hardly have been clearer about its understanding that the "election" occurs on a particular date, but the date on which a ballot must be "received" to be "counted" may be a different date—one that is determined by *state* law. *Ibid.* In other words, Section 20304(b)(1) recognizes that the "election" does not necessarily include the act of receiving the votes, so the statute expressly provides States leeway to determine a receipt deadline.[4]

2. Other federal statutes governing elections likewise focus on election day as the time of the voters' collective choice and provide States leeway with respect to ballot-receipt deadlines.

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[4] Additionally, Congress has considered legislation that would impose a federal-election-day ballot-receipt deadline. The Restoring Faith in Elections Act would require absentee ballots to "be received by the appropriate election official no later than the time polls close on the date of the election." H.R. 102, 117th Cong. § 304(d)(1)(D) (2021); accord H.R. 156, 118th Cong. (2023-2024); H.R. 160, 119th Cong. (2025-2026). Congress is thus aware that federal law does not require ballots to be received on election day, and that States permit ballots to be received after election day. See *Biden* v. *Nebraska*, 600 U.S. 477, 503 (2023) (recognizing awareness of an issue based on legislation Congress "considered" but "chose[] not to enact").

Several provisions in Titles 2 and 3 confirm this understanding. A number equate the election of an officeholder with the voters' choice. See 2 U.S.C. 1a ("the executive of the State from which any Senator has been chosen to certify his election"), 381 ("election" means "an official general or special election to choose a Representative"). Similarly, Section 21 of Title 3 provides that States may "modif[y] the period of voting" for president based on force majeure events, and when they do, "election day" shall include the "modified period of voting." 3 U.S.C. 21(1). Thus, for federal purposes, "election day" is when "voting" occurs; there is no mention of administrative actions such as receiving or counting ballots. See also 3 U.S.C. 5(a)(2) (reporting the number of votes "given or cast," which suggests choice is the key inquiry).

Section 202 of the Voting Rights Act similarly reinforces that Congress has not imposed a uniform election-day receipt deadline. That provision requires States to adopt absentee voting procedures for presidential elections and requires ballots to be counted if received "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). If the Fifth Circuit were correct about the meaning of the federal election-day statutes, this provision would be surplusage because ballots must necessarily be received before the end of election day. Even more to the point, Section 202(g) confirms that States retain the authority to adopt "less restrictive voting practices," further confirming that States may set rules to receive and count ballots after election day. 52 U.S.C. 10502(g).

Taken together, these provisions show that when Congress has wished to regulate the timing of ballot receipt, it has done so expressly, and always in a manner that preserves state authority to set post-election-

day ballot-receipt deadlines. Congress's consistent focus on the moment of voters' choice as the defining feature of an election, coupled with its repeated recognition that States may count ballots that arrive after election day, confirms that the federal election-day statutes do not impose a receipt cutoff.

III. Historical Practice Confirms States Can Count Ballots Received After Election Day

Throughout our history, States have exercised broad discretion to structure absentee voting, including by adopting post-election-day ballot-receipt deadlines. This longstanding and widespread practice reflects a consistent historical understanding: although the voters' final choice must be made by election day, federal law has never been understood to require that ballots be received by that date.

1. States have permitted forms of absentee balloting throughout most of this Nation's history. See Edward B. Moreton, Jr., *Voting by Mail*, 58 S. Cal. L. Rev. 1261, 1261-1262 (1985); cf. George Frederick Miller, *Absentee Voters and Suffrage Laws* 179-197 (1948) (collecting laws, enacted as early as 1635, addressing indirect voting). All but four States had absentee voting provisions by 1924. P. Orman Ray, *Absent-voting Laws*, 18 Am. Pol. Sci. Rev. 321, 321 (1924). For civilian voting provisions, these States fell into one of "two general types, namely, the Kansas and the North Dakota types." P. Orman Ray, *Absent-voting Laws, 1917*, 12 Am. Pol. Sci. Rev. 251, 251 (1918). States in both camps permitted votes submitted by election day to be *first received* by an election official at a later date.

For example, statutes in the first (Kansas) camp allowed for post-election-day ballot receipt. P. Orman Ray, *Absent Voters*, 8 Am. Pol. Sci. Rev. 442, 442-443 (1914); see Joseph P. Harris, *Election Administration*

in the United States 287-288 (1934). Those statutes required absentee voters to appear at a polling place on election day, swear they were qualified voters, and complete ballots. See Ray, *Absent Voters*, 8 Am. Pol. Sci. Rev. at 443. Then, the votes would be "sent by mail to the proper official" before "the result of the official canvass [wa]s declared." *Ibid.* This process inevitably took several days—indeed, ballots were not even required to be mailed until "the day *following* [election day]." Kan. Gen. Stat. § 4325 (R.E. McIntosh ed. 1922) (emphasis added).

While statutes in the second (North Dakota) camp generally required absentee ballots to be received by election day, that was not a uniform practice. See Ray, *Absent-voting Laws, 1917*, 12 Am. Pol. Sci. Rev. at 254, 258-259. In many States, absentee voters were required to complete their ballots before "any officer" authorized to administer oaths (not necessarily an election official) and then mail the ballots to their polling place to be opened on election day. *Id*. at 257-258. But there were exceptions. California and Pennsylvania deferred the "counting of absent[ ]voters' ballots" until "the official canvass." Ray, *Absent-Voting Laws*, 18 Am. Pol. Sci. Rev. at 322. The California and Pennsylvania laws thus more "closely conform[ed] to the Kansas (1911) statute." *Ibid*. And the California statute *required* voters to mail their own ballots, which would be received by an official for the first time *after* election day. See Cal. Political Code § 1359(b)-(c), 1360 (James H. Derring ed. 1924), https://bit.ly/4cYwCTp.

2. Many States also passed statutes designed to allow "qualified voters in military service to vote outside their home precincts." See P. Orman Ray, *Military Absent-Voting Laws*, 12 Am. Pol. Sci. Rev. 461, 461 (1918). During the Civil War, several States enacted laws ensuring that soldiers could vote outside their States.

See *generally* J.H. Benton, *Voting in the Field: A Forgotten Chapter of the Civil War* (1915). A common model authorized "t[aking] the ballot box to the soldier in the field and permitt[ing] him to cast his ballot into it." *Id.* at 15. Under this system, "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. As a result, States routinely authorized post-election-day receipt windows: North Carolina accepted ballots received within "twenty days" after election day; Alabama "two or three weeks after the election," Georgia "within fifteen days after the election," South Carolina on "the first Saturday next ensuing" after the election, Florida on "the twentieth day after the election," and Maryland "fifteen days after the election." *Id.* at 317-318.

In a similar vein, Nevada, Rhode Island, and Pennsylvania authorized soldiers to cast their votes on election day, with their ballots then transported to their home States and counted even though they were not received until days later. Benton, *Voting in the Field* at 171-172 (Nevada), 186-187 (Rhode Island), 189-190 (Pennsylvania). And contrary to the Fifth Circuit's assumption, these votes were received and transported by military personnel—not election officials—thus refuting the Fifth Circuit's mistaken conclusion that "official receipt marked the end of voting." Pet. App. 16a.

3. All told, States have been enacting post-election-day ballot-receipt deadlines for over a century. See V.O. Key, Jr., *Politics Parties and Pressure Groups* 672 (1947); cf. Helen M. Rocca, *A Brief Digest of the Laws Relating to Absentee Voting and Registration* (1928). After the Civil War, ballots often could be received after election day:

- In California, a voter could appear before "any notary public" to complete his ballot, which was then "to be by him returned by registered mail" to election officials. Cal. Political Code § 1359(b-c) (James H. Derring ed. 1924), https://bit.ly/4cYwCTp. The completed ballot had to be received "within fourteen days after the date of the election." *Id.* § 1360.

- In Kansas, a voter could cast his vote in the presence of "any officer" authorized to administer oaths in "Kansas or * * * the United States." Kans. Rev. Stat. § 25-1106 (Chester I. Long, et al., ed. 1923), https://bit.ly/4ecZRTl. Then, the vote must have been "mailed in sufficient season that it shall reach" election officials "before the tenth day following such election." *Ibid.*

- In Maryland, military voters had to complete their ballot in the presence of a "witness," and "then mail" the ballot to the Secretary of State. Md. Code Ann., Pub. Gen. L., art. 33, § 229 (George P. Bagby, ed. 1924), https://bit.ly/4cY3Ty2. The ballot had 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." *Ibid.*

- In Missouri, a voter must complete an affidavit and ballot before "an officer authorized by law to administer oaths." Mo. Rev. Stat. § 11474 (1939), https://bit.ly/

3ZdylRk. Then, the ballot could be "sent by mail" "by such voter," or "*if more convenient*," hand delivered to election officials. *Ibid.* (emphasis added). "[I]n any event," the ballot had to be received by election officials "not later than 6 o'clock p. m. the day next succeeding the day of such election." *Ibid.*

- In Rhode Island, a voter could vote absentee "on * * * election day" before "some officer" authorized to administer oaths. R.I. Session L. ch. 1863 § 6 (1932), https://bit.ly/4cYBzvn. Then, the voter had to "mail" the completed ballot "on * * * election day" so that it could be received by "midnight of the Monday following said election." *Ibid*.

The historical record thus makes clear that States have uncontroversially employed post-election-day ballot-receipt deadlines for most of this Nation's history—and Congress has been well aware of that practice. That these post-election-day ballot-receipt deadlines have existed for so long, without any suggestion they were inconsistent with federal law, is compelling evidence that federal law has never been understood to require that ballots be received by election day.

IV. The Fifth Circuit's Reasoning Is Irreconcilable with This Court's Precedents and Federal Law

The Fifth Circuit's reasoning cannot be reconciled with the federal election-day statutes or this Court's decisions interpreting them. Indeed, the Fifth Circuit

placed heavy reliance on this Court's decision in *Foster* in precisely the manner *Foster* cautioned against; concocted an atextual distinction between ballots received before and after election day; and drew an unfounded line between receiving ballots postmarked by election day and the various administrative actions that States have always performed after election day ends. Under the Fifth Circuit's approach, States would be forced to abandon longstanding absentee-voting rules, and upend settled expectations about how federal elections have functioned for more than a century. Nothing in this Court's decisions, or in the federal election-day statutes themselves, remotely justifies such a perverse outcome.

1. Though the Fifth Circuit purported to be "guid[ed]" by this Court's decision in *Foster*, the three "definitional elements" it divined from *Foster* cannot be found in this Court's opinion. Pet. App. 8a-9a. That is because they were plucked out of thin air. Even worse, the purpose for which the Fifth Circuit deployed those "definitional elements" disregards the caution that accompanied *Foster*'s carefully circumscribed holding. *Foster* held only that the federal election-day statutes preempted a Louisiana voting system in which the election was completed *before* election day. This Court disclaimed any effort 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." 522 U.S. at 72; see also *ibid.* (noting it did not need to "par[e] the term 'election' * * * down to the definitional bone" to resolve the case before it).

Foster therefore cannot bear the weight the Fifth Circuit placed upon it, particularly given the wealth of textual and historical evidence cutting against the Fifth Circuit's understanding of *Foster*'s "definitional

elements." See *Millsaps* v. *Thompson,* 259 F.3d 535, 546 (6th Cir. 2001) (rejecting attempt to "finely parse *Foster's* language" in light of the "Court's express" instruction not to).

2. Statutes should be interpreted to reach "'a sensible construction' that avoids attributing to [Congress] either 'an unjust or an absurd conclusion.'" *United States* v. *Granderson*, 511 U.S. 39, 56 (1994) (citation omitted). The Fifth Circuit's construction violates that principle.

First, the Fifth Circuit offered no principled, textually-grounded basis for treating ballots received *before* election day differently from ballots received *after* it. If, as the Fifth Circuit posited, "the election is ongoing" throughout the duration in which "election officials are still receiving ballots," Pet. App. 10a, it would necessarily follow that counting ballots received *before* election day would expand the "election" to encompass a period before the congressionally prescribed day. But every court to address that issue has held that the federal election-day statutes do not preempt state laws permitting ballots to be received before election day. See *Voting Integrity Project, Inc.* v. *Bomer*, 199 F.3d 773, 777 (5th Cir. 2000) (Texas law); *Millsaps* v. *Thompson*, 259 F.3d 535, 549 (6th Cir. 2001) (Tennessee law); *Voting Integrity Project, Inc.* v. *Keisling*, 259 F.3d 1169, 1176 (9th Cir. 2001) (Oregon law). For good reason. Otherwise, absentee ballots could be counted only if they fortuitously arrived in the mail *on* election day—a nonsensical result that would disenfranchise countless voters.

The Fifth Circuit tried to work its way around that glaring problem by suggesting the "election" must be *final* as of election day but can begin earlier. See Pet. App. 10a-11a. But that distinction lacks any basis in

the statutory text. Title 2, Section 7 provides that election day is "*the* day for the election." 2 U.S.C. 7 (emphasis added). That text cannot plausibly be read to proscribe counting ballots received after election day but allow counting ballots received before it. And nothing in *Foster*, which addressed only a statute concluding the election *before* election day, suggests any such distinction. 522 U.S. at 72.

Second, as noted above, nothing in the federal election-day statutes forbids state elections officials from taking actions necessary to determine the voters' choice—canvassing, examining, and tallying ballots—after election day. Cf. 52 U.S.C. 21082(a)(3)-(4) (requiring ballot validity determinations after election day). But the Fifth Circuit's decision lacks any meaningful distinction between *counting* ballots and *receiving* them. The court of appeals recognized—as it must—that "[not] all the ballots must be counted on Election Day." Pet. App. 10a. The necessary premise of this concession is that the federal designation of election day as "the day for the election," 2 U.S.C. 7, does not speak to official actions like counting, canvassing, and certifying votes and therefore does not limit when they may occur. But if that is true of back-end official actions that are necessary to determine election results, there is no reason why receipt of ballots by mail would be any different. Certainly nothing in the statutory text distinguishes ballot receipt from ballot counting or canvassing.

The Fifth Circuit attempted to avoid this conclusion by reasoning that "the proverbial ballot box" remains open "while election officials are still receiving ballots," but "the result is fixed when all of the ballots are received" because "[t]he selections are done and final." Pet. App. 10a. But once a state has provided that a vote is cast by placing the ballot in the mail, as here,

the voters' final selection is "done and final" upon mailing of the absentee ballots—and checking the incoming mail for those already-cast ballots is just as administrative as tallying them.

The court of appeals also thought it necessary to forbid the counting of ballots arriving after election day in order to prevent voters from recalling ballots that were mailed but not yet delivered by election day. That farfetched concern—which respondents raised below only in passing in their reply brief—cannot be attributed to state law. Instead, it relies on how USPS, a *federal* agency, applies its package-interception procedures to election mail. See Pet. App. 12a. Even if USPS's procedures somehow undermined the "finality" of Mississippi's election process, the only proper remedy would be to change those procedures to exempt election mail. In any event, no one has presented *any* evidence in this case (or as far as amicus knows in any other) that an absentee voter has ever recalled a mailed ballot in this manner—or even, as a practical matter, that one could. And even if a random individual were somehow able to pull off the feat of recalling an absentee ballot in this manner, that *de minimis* change would not alter the fact that the electorate's final collective choice was still made on election day. That the Fifth Circuit would feel the need to rely on such fanciful hypothetical risks says a great deal about the soundness of its reasoning.

Petitioner's construction avoids each of the serious anomalies that necessarily follow from the Fifth Circuit's reading. The simple fact is that federal election-day statutes say nothing about when ballots must be received. There is therefore no need to jury-rig the construction of federal law to justify counting ballots received *before* election day and not ballots received *after* election day. Nor is there any need to

distinguish between receipt and counting after election day. Rather, the election-day statutes merely require the voting system that has been in place for more than a century: all votes must be cast by election day.

V. Affirming the Fifth Circuit's Ruling Would Have Disastrous Consequences

Today, at least 29 States and the District of Columbia count mailed ballots that arrive after election day. See Nat'l Conference of State Legislatures, *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots* (last updated Dec. 24, 2025), https://bit.ly/3z9SAVs.[5] And as discussed above, States have been enacting such post-election-day ballot-receipt deadlines for more than a century. See pp. 18-22, *supra*. States and voters have therefore developed a settled expectation that a timely ballot will be counted, even if it arrives shortly after election day. Election officials design mailing schedules, voter-education materials, and processing timelines on that understanding, and countless voters plan when and how to vote in reliance on these well-established rules and practices.

This established practice reflects the realities of modern elections. Millions of Americans—including military voters stationed away from home, overseas citizens, rural voters, elderly and disabled voters, and voters lacking reliable transportation—rely on absentee voting. And several States conduct all elections by mail.[6] Indeed, in the November 2024

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[5] Fifteen of those States provide this accommodation only to uniformed military and overseas voters. See *id.*

[6] See Cal. Elec. Code § 3000.5; Colo. Rev. Stat. § 1-5-401; D.C. Code § 1-1001.05; Haw. Rev. Stat. § 11-101; Nev. Rev. Stat.

election, approximately 29 percent of all voters voted by mail. U.S. Census Bureau, *Voting and Registration in the Election of November 2024* Table 14, https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-587.html (last visited Jan. 8, 2026). And among non-voters surveyed by the United States Census Bureau, 42.5 percent cited barriers that absentee voting is specifically designed to ameliorate—such as transportation difficulties, inconvenient polling places, bad weather, illness or disability, being out of town, or having busy schedules. *Id.* at Table 10. Allowing States to count ballots that are timely cast but later delivered is therefore essential to preserving these citizens' ability to participate on equal terms in federal elections. It also promotes electoral integrity by ensuring that election outcomes reflect the choices actually made by eligible voters, and it enables States to administer elections in a manner responsive to local conditions and voters' practical needs.

Affirming the Fifth Circuit's ruling would upend the considered policy judgment of numerous States about how best to administer elections.[7] Those States have determined—based on longstanding experience

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§ 293.269911; Or. Rev. Stat. § 254.465; Utah Code Ann. § 20A-3a-202; Vt. Stat. Ann. tit. 17, § 2537a; Wash. Rev. Code § 29A.40.010.

[7] At the same time, affirming the Fifth Circuit's decision would not meaningfully speed the announcement of election results. Delays in reporting final results are largely driven by routine administrative processes, such as verifying signatures on absentee ballots, resolving provisional ballots, addressing voter-eligibility issues, and tabulating large volumes of ballots. See *Election Results, Canvass, and Certification*, United States Election Assistance Commission (Dec. 23, 2025), https://www.eac.gov/election-officials/election-results-canvass-and-certification (discussing post-election-day administrative processes).

with absentee voting, the needs of their constituents, and the practical uncertainties inherent in mail delivery—that their electorates are best served by allowing the timely casting of ballots by election day, coupled with short post-election-day receipt windows. Nothing in the federal election-day statutes compels States to abandon those judgments and impose an election-day receipt deadline. The Court should reject the Fifth Circuit's unprecedented interpretation and reaffirm what has long been understood: federal law does not require that ballots be received by election day.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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