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 DISTRICT OF COLUMBIA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the federal election-day statutes preempt a state law that allows ballots that are cast by federal election day to be received by election officials after that day.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

In devising our system of federalism, the Framers intended that states generally "keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991)). "Unless Congress acts," *Foster v. Love*, 522 U.S. 67, 69 (1997) (quoting *Roundebush v. Hartke*, 405 U.S. 15, 24 (1972)), states remain "primarily" responsible for regulating federal and state elections, *Shelby County*, 570 U.S. at 543 (quoting *Perry v. Perez*, 565 U.S. 388, 392 (2012) (per curiam)). Accordingly, states "are given, and in fact exercise a wide discretion" in adopting policies to ensure that elections are fair and efficient. *United States v. Classic*, 313 U.S. 299, 311 (1941). Exercising that authority, states have enacted "comprehensive, and in many respects complex, election codes regulating" the "time, place, and manner" of "both federal and state elections." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The issue in this case is whether states may count absentee ballots postmarked on or before, but received after, the federal election day. A majority of jurisdictions count at least some timely cast mail-in ballots that arrive after election day. In addition to Mississippi, 13 states and the District of Columbia count all absentee ballots mailed on or before election day that arrive within a certain number of days of the election. An additional 16 states count timely cast absentee ballots that arrive after election day only if cast by certain voters, most often military service members and other overseas voters. The remaining

20 states count absentee ballots only if they arrive by election day. In selecting a policy, states have made their own judgments to balance the interest in counting all timely, lawfully cast ballots against the practical need to certify election results by certain deadlines. *See Election Certification Deadlines*, Nat'l Conf. of State Legislatures (Jan. 20, 2025), tinyurl.com/mpzxc9s3 (surveying state deadlines); 3 U.S.C. §§ 5, 7 (setting federal deadlines). In this area, then, different choices reflect different local conditions, resources, and policy judgments.

As respondents would have it, however, Congress forbade states from making the choice to count timely cast ballots that arrive after election day nearly two centuries ago when it enacted the federal election-day statutes. *See* 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. But reading those statutes to preempt states' ballot-receipt deadlines would flout statutory meaning, constitutional text and tradition, and states' role in our federal system. Accordingly, the District of Columbia, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington file this brief as *amici curiae* in support of petitioner Michael Watson, the Mississippi Secretary of State, to explain why the Court should preserve states' flexibility to enact ballot-receipt deadlines that meet the needs of their citizens and election officials.

As our constitutional tradition and the text of the election-day statutes make clear, states have the authority to make the "policy choice" to "require only

that absentee ballots be *mailed* by election day," not that they also be *received* by that date. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). By contrast, were respondents' startling view correct, states would be left with intolerable burdens in administering elections. It would, in practical terms, force states to change the way they count ballots for their *own* offices to conform to the federal rule, or else bifurcate ballots and election rules for state and federal offices. The former would harm states' sovereignty; the latter would risk debilitating election administration. Worse, disqualifying all timely cast ballots that arrive after election day would jeopardize states' efforts to count the lawful votes of military service members and their families stationed abroad. The election-day statutes do not require that result. The Court should reverse the decision below and confirm that states have the flexibility to count ballots mailed by, but received after, election day.

SUMMARY OF ARGUMENT

1. Exercising their constitutional authority to regulate federal elections, states have adopted a wide range of policies regarding mail-in absentee ballots. Those policies include setting the day by which an absentee ballot must arrive to be counted and deciding which voters—the general public or a subset of military and overseas voters—may take advantage of extended ballot-receipt deadlines. In total, 30 states and the District of Columbia accept and count at least some absentee ballots that are postmarked on or before election day but received thereafter. States'

decisions in this arena reflect their individualized conditions and judgments on how best to administer their elections. Adopting respondents' position would wipe away those choices and impose a one-size-fits-all rule in their stead. Doing so would impinge on states' traditional authority to regulate federal elections, force them to conform *state* elections to the same rule to avoid the confusion inherent in administering two separate balloting systems, and jeopardize the franchise for military overseas voters who benefit from flexible ballot-receipt deadlines.

2. The federal election-day statutes do not preempt states' ballot-receipt deadlines. Beginning with the text, contemporary dictionaries and usages demonstrate that "election" simply means "choice." And voters make their final choice when they *mail* their absentee ballots on or before election day, even if many states *receive* those ballots after election day. That understanding accords with our constitutional text and history, under which states have long received and counted absentee ballots—including those arriving after election day—to protect the franchise of military service members and other voters. Lastly, were there any doubt, Congress has repeatedly legislated in the field of absentee voting without ever imposing a uniform ballot-receipt deadline, opting instead to incorporate existing state practices. Congress's consistent acquiescence in states' varied ballot-receipt practices confirms that receipt deadlines after election day do not violate the federal election-day statutes.

ARGUMENT

I. Respondents' Rule Threatens Ballot-Receipt Laws In A Majority Of States, Undermining States' Sovereignty And Efforts to Ensure Military Service Members May Vote.

A. Most states and the District of Columbia count at least some absentee ballots that are mailed by—but arrive after—election day.

In the decision below, the Fifth Circuit struck down Mississippi's law permitting election officials to count absentee ballots "postmarked on or before the date of the election and received by the registrar no more than five (5) business days after the election." Miss. Code Ann. § 23-15-637(1)(a). If that view were correct, it would invalidate the laws of an additional 29 states and the District of Columbia that allow election administrators to count at least some timely cast absentee ballots that arrive after election day.

States counting ballots that arrive after election day for all voters. Including Mississippi, 14 states and the District of Columbia count absentee ballots mailed on or before election day but received after that date, no matter who cast them. Alaska and the District of Columbia count ballots received up to ten days after election day. Alaska Stat. § 15.20.081(e); D.C. Code § 1-1001.05(a)(10B)(A). In California and Oregon, the deadline is seven days after election day. Cal. Elec. Code § 3020(b); Or. Rev. Stat. § 254.470(6)(e)(B). New Jersey requires receipt "within 144 hours [six days] after the time of the closing of the polls." N.J. Stat. Ann. § 19:63-22(a). New York counts ballots up to seven days after

election day if the ballot is postmarked by election day, or one day after election day if there is no dated postmark. N.Y. Elec. Law § 8-412(1). Similarly, Nevada counts ballots up to four days after election day if postmarked by election day, Nev. Rev. Stat. § 293.269921(1)(b), or three days thereafter if "the date of the postmark cannot be determined," *id.* § 293.269921(2).[1] Massachusetts and Virginia, meanwhile, count ballots received three days after election day. Mass. Gen. Laws ch. 54, § 93; Va. Code Ann. §§ 24.2-702.1(B), -709(B). Maryland grants ten days beyond election day for ballot receipt, so long as the ballot was mailed on or before election day. Md. Code. Ann., Elec. Law § 11-302.. And in Texas, ballots may arrive "not later than 5 p.m. on the day after election day," though they must be "placed for delivery by mail . . . before election day" and postmarked "not later than 7 p.m." on that day. Tex. Elec. Code Ann. § 86.007(a)(2).

Some of these states peg their ballot-receipt deadlines to other election-related dates. For instance, West Virginia counts ballots postmarked by election day if received by the time "the board of canvassers convenes to begin the canvass," W. Va. Code § 3-3-5(g)(2), which occurs five days after

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[1] In 2024, a group of political organizations and voters challenged Nevada's ballot-receipt law, but the district court concluded that the plaintiffs lacked standing. *Republican Nat'l Comm. v. Burgess*, No. 3:24-cv-198, 2024 WL 3445254 (D. Nev. July 17, 2024). The case is now pending before the Ninth Circuit, which has held it in abeyance pending this Court's decision in *Bost v. Ill. State Bd. of Elections*, 145 S. Ct. 2751 (2025) (mem.) (granting certiorari). *See* 9/25/2025 Order, *Republican Nat'l Comm. v. Burgess*, No. 24-5071 (9th Cir. Sept. 25, 2025).

election day, *id.* § 3-6-9(a)(1). Illinois counts ballots postmarked by election day and received "before the close of the period for counting provisional ballots," 10 Ill. Comp. Stat. 5/19-8(c), meaning up to 14 days after election day, *id.* 5/18A-15.[2] And Washington counts ballots postmarked by election day if "receive[d] no later than the day before certification," Wash. Rev. Code § 29A.60.190, which occurs up to 21 days after the election, *id.* § 29A.60.190.

States counting ballots that arrive after election day for certain voters only. Sixteen states count ballots that arrive after election day for only some voters, usually encompassing military service members, their families, and sometimes other overseas voters.[3] Of these states, Arkansas, Florida, and Indiana have set their ballot-receipt deadlines ten days after election day. Ark. Code. Ann. § 7-5-411(a)(1)(A)(ii); Fla. Stat. § 101.6952(5); Ind. Code § 3-12-1-17(b). Colorado provides eight days, Colo. Rev. Stat. §§ 1-8.3-102(2), -111, -113(2); Alabama, Pennsylvania, and Rhode Island each provide seven days, Ala. Code § 17-11-18(b); 25 Pa. Cons. Stat. § 3511(a); R.I. Gen. Laws §§ 17-20-6.1, -16; Michigan

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[2] In *Bost*, this Court granted certiorari to review a decision of the Seventh Circuit holding that a political candidate lacked standing to challenge Illinois's ballot-receipt law. 145 S. Ct. 2751.

[3] The states that count ballots that arrive after election day for *all* voters sometimes also provide more specifically for military or overseas voters. *See, e.g.*, Mass. Gen. Laws ch. 54, §§ 99, 95 (counting mail-in absentee ballots "received within ten days following a state or city final election and mailed on or before the day of election, from a location outside the United States").

provides six, Mich. Comp. Laws § 168.759a(18); and Georgia and Missouri each provide three, Ga. Code Ann. § 21-2-386(a)(1)(G); Mo. Rev. Stat. § 115.920(1). Iowa and Ohio accept ballots postmarked by the day before the election if received, respectively, "not later than noon on the Monday following the election" in Iowa, Iowa Code § 53.44(2), or "through the fourth day after the election day" in Ohio, Ohio Rev. Code Ann. § 3511.11(B).[4]

In North Carolina and South Carolina, the ballot-receipt deadline is the "end of business on the business day before the [county] canvass"—which is "on the tenth day after [the] election" in North Carolina, N.C. Gen. Stat. §§ 163-258.10, -258.12, -182.5(b), and three days after the election in South Carolina, S.C. Code Ann. §§ 7-15-700(A), 7-17-10. In North Carolina, however, military-overseas absentee ballots must be mailed "not later than 12:01 A.M. . . . on the date of the election." N.C. Gen. Stat. § 163-258.10. Likewise, Utah accepts "military-overseas ballot[s]" if "submitted for mailing . . . not later than 12:01 a.m. . . . on the date of the election," Utah Code Ann. § 20A-16-404, and "delivered by the end of business on the business day before the latest deadline for completing the canvass," *id.* § 20A-16-408(1), which is 14 days after the election, *id.* § 20A-4-301(1)(b). Finally, North Dakota counts military-overseas ballots cast by election day and

[4] On December 19, 2025 the Governor of Ohio signed into law a bill repealing the state's general four-day period for receiving absentee ballots after election day. *See* S.B. 293, § 1, 136th Gen. Assemb., Reg. Sess. (Ohio 2025). However, the bill exempts "a uniformed services or overseas absent voter's ballot." *Id.*; Ohio Rev. Code Ann. § 3511.11(B).

"delivered before the canvassing board meets to canvas the returns," N.D. Cent. Code §§ 16.1-07-24, -26(1), which occurs 13 days after the election, *id.* § 16.1-15-17.

All told, 30 states and the District of Columbia have extended the receipt deadline for some mail-in absentee ballots past election day. To be sure, those states have adopted a wide range of deadlines and chosen to accommodate different groups of voters. Other states have designated election day as their ballot-receipt deadline. But until the Fifth Circuit's decision, each state has been free to make its own judgment about counting valid ballots that are mailed before, but arrive after, election day.

B. Reading the federal election-day statutes to preempt state ballot-receipt deadlines would subvert state sovereignty and imperil the franchise of military service members stationed abroad.

Respondents' view of the federal election-day statutes threatens states' sovereign power to control their own elections, as well as their interest in counting the timely cast votes of military service members and their families overseas.

1. To begin, although respondents' theory would technically preempt post-election-day ballot-receipt deadlines only in *federal* elections, it would have spillover effects for *state* and *local* elections. Specifically, their theory would present states with a Hobson's choice: bifurcate the balloting process in otherwise overlapping federal and state elections, or amend the ballot-receipt deadline even for their own elections. The former would lead to chaos. Currently,

states usually conduct elections for state and federal officials "at the same time, on the same ballots, by the same voters." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 21 (2013) (Kennedy, J., concurring in part and concurring in the judgment); *see, e.g.*, Minn. Stat. Ann. § 204D.11, subdiv. 1 (providing for "a single ballot" for federal and state offices). Indeed, states and localities often have little alternative, given the billions of dollars they must spend to administer elections. *See* Charles Stewart III, *The Cost of Conducting Elections* 3, MIT Election Data + Science Lab (2022), perma.cc/Y3VE-32QS (estimating that the 2020 election cost states $10 billion).

In respondents' view, federal law forbids states from counting timely cast ballots for *federal* offices received after election day. But states would still be required by their own laws to count such ballots for *state* offices under the ballot-receipt deadlines currently on the books. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 819 (2015) (explaining that the Elections Clause does not affect states' regulation of state elections). To duly administer state and federal elections with different ballot-receipt rules, states could thus be forced to print, distribute, and count two sets of ballots and overhaul their outreach to voters and their training of election officials concerning these two different rules.

The costs of a bifurcated election would be profound. Between printing and distributing balloting materials, purchasing ballot scanners, conducting voter outreach, and hiring and training

workers, states could incur further millions—if not billions—of dollars in election administration costs. *See* Stewart, *supra*, at 6. The expense of balloting materials alone has become acute for states in recent years due to the shift to paper ballots after 2016, widespread paper mill closures during the pandemic, supply-chain disruptions, inflation, and redistricting. Grace Panetta, *Surging Paper Costs and Supply Chain Issues Could Lead to Ballot Shortages Ahead of the 2022 Midterms*, Business Insider, Mar. 18, 2022, perma.cc/46ZA-9LFP; Rachel Orey, Grace Gordon & Christopher Thomas, *Preparing for Ballot Paper Shortages in 2022 and 2024*, Bipartisan Pol'y Ctr. (June 6, 2022), perma.cc/8QM4-ARSR. In Louisiana, for instance, the recent move to a party-primary system with separate ballots for each party is expected to cost as much as $20 million in 2026, with "ballots, election supplies, and registrar staffing driving much of the expense." Nolan McKendry, *La. Shift to Party-Primary Elections Will Cost $47M*, The Daily Iberian, Dec. 7, 2025, perma.cc/5LAY-RLFU (citation modified).

Moreover, even if states had the resources to conduct two separate election processes in parallel with distinct ballots and rules, doing so may well be logistically impossible. "Ballots and elections do not magically materialize. They require planning, preparation, and studious attention to detail if the fairness and integrity of the electoral process is to be observed." *Perry v. Judd*, 471 F. App'x 219, 226 (4th Cir. 2012) (opinion of Wilkinson, Agee, & Diaz, JJ.). On that score, states' own laws require them to finalize sample ballots, applications for absentee ballots, and ballots themselves far in advance of

election day. *See, e.g.*, Mich. Comp. Laws § 168.714; Mo. Rev. Stat. §§ 115.281, -.391; Va. Code Ann. § 24.2-612. What is already a Herculean task in ordinary election conditions would become nearly impossible amid the confusion and delay of a bifurcated election.

Given these dramatic consequences, most states would likely feel forced to repeal their ballot-receipt deadlines for their own elections as well.[5] That, however, would only exacerbate the harm respondents' rule would cause to states' sovereignty. The Court has long recognized states' "sovereign 'power to prescribe the qualifications of their own officers' and 'the manner of their election . . . free from external interference.'" *Trump v. Anderson*, 601 U.S. 100, 110-11 (2024) (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900)). "Such power inheres in the State by virtue of its obligation . . . 'to preserve the basic conception of a political community.'" *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)). Yet respondents call for exactly that "external interference" into states' sovereignty. The upshot would be to coerce states into abandoning their duly enacted absentee ballot laws, swapping

[5] Indeed, Ohio has already done so. Joined by the Ohio House Speaker at a press conference, Governor DeWine explained that he "reluctantly" signed into law a bill repealing the state's "reasonable" ballot-receipt deadline because, "if the [Supreme] Court in late June upholds the Fifth Circuit case," having "[t]wo sets of rules or even two separate ballots . . . certainly would confuse voters" and result in a "chaotic" election. *Governor Mike DeWine - 12-19-2025 - Bill Signing*, at 20:10 to 22:30 (The Ohio Channel, Dec. 19, 2025), www.ohiochannel.org/video/governor-mike-dewine-12-19-2025-bill-signing.

those locally tailored policies for a one-size-fits-all approach even for state elections over which Congress should have no control.

2. Worse, respondents' rule would most heavily burden military service members and their families stationed abroad. While absentee ballots and flexible ballot-receipt deadlines protect the franchise of many voters, including those with disabilities or who live in rural or remote communities, *see generally* Lisa Schur et al., *Ensuring Voting Access Across the Electorate*, 3 J. Election Admin. Rsch. & Prac. (Special Issue) 3 (2025), they are especially important for the million-plus Americans serving in the military overseas. For them and their families, in-person voting is usually not an option. *See Voting for Military & Overseas Voters*, Nat'l Conf. of State Legislatures (Aug. 16, 2024), tinyurl.com/usd38zpc.

To meet ballot-receipt deadlines, then, members of the military often must request mail-in absentee ballots well in advance of the election and "vote earlier than their civilian counterparts due to long [international] mailing timelines." Joseph Clark, *Researchers Set Out to Tackle Voting Challenges of Military Members*, U.S. Dep't of Def. News, Feb. 12, 2024, tinyurl.com/yck9dzv5. Unsurprisingly, those logistical obstacles result in "lower turnout by military members when compared with civilian voters." *Id.* (noting 27% lower turnout by military voters than similarly situated civilians in 2020). Thus, the choice of 30 states and the District of Columbia to count timely mailed ballots received after election day from these voters makes eminent sense: it makes voting more accessible for service members,

facilitating their participation in our democracy. Reading the election-day statutes to preempt state ballot-receipt deadlines would make it all the more difficult for service members to exercise the franchise.

Contrary to the Fifth Circuit's suggestion, the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") would not save states' flexible ballot-receipt deadlines for military service members. *See* Pet. App. 22a. Certainly, UOCAVA provides some protection for the ability of military service members abroad to vote. For example, UOCAVA mandates that overseas military voters receive their ballots 45 days before election day in most circumstances. *See* 52 U.S.C. § 20302. But UOCAVA sets no uniform ballot-receipt deadline for all eligible overseas voters. Instead, it provides for military overseas ballots to be "processed in the manner provided by law for absentee ballots in the State involved," incorporating states' wide-ranging ballot-receipt deadlines. *Id.* § 20303(b). Other language in UOCAVA is similarly agnostic about the deadlines that states set for ballot receipt. *See id.* §§ 20302(a)(10), 20304(b)(1) (requiring that states abide by federal regulations for delivery, processing, and acceptance of absentee ballots of overseas service members "not later than the date by which an absentee ballot must be received in order to be counted in the election"). In other words, while UOCAVA eliminates some of the obstacles military service members abroad face in meeting state ballot-receipt deadlines, it takes those deadlines as a given and says nothing about which precise day they must be.

UOCAVA therefore does "not solve[] the most critical problem facing overseas voters: the need for more time to request, receive, vote, and return an absentee ballot before the state deadlines." Steven F. Huefner, *Lessons from Improvements in Military and Overseas Voting*, 47 U. Rich. L. Rev. 833, 843 (2013). Indeed, "the principal reason" that ballots cast under UOCAVA are rejected is "missing the state deadline." Donald S. Inbody, *Voting by Overseas and Military Personnel*, 14 Election L. J. 54, 55-56 (2015). Because UOCAVA does not prescribe any particular ballot-receipt deadline, it cannot save the state ballot-receipt deadlines for service members that respondents' theory would destroy.

II. The Federal Election-Day Statutes Do Not Preempt State Ballot-Receipt Deadlines.

The federal election-day statutes do not preempt Mississippi's ballot-receipt deadline. Rather, like the post-election-day deadlines in most other states, Mississippi's ballot-receipt law fits securely within the flexibility afforded by federal election-law statutes and our constitutional tradition.

A. Nothing in the text of the federal election-day statutes preempts state ballot-receipt deadlines.

The election-day statutes set the Tuesday after the first Monday in November in certain years as the "election" day for federal offices. 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. As the Court explained in *Foster*, Congress enacted the original versions of these statutes to address two concerns: "the results of an early federal election in one State influenc[ing] later voting in other States" and citizens having to vote "on

two different election days" for the presidency and Congress. 522 U.S. at 73-74. Nothing in the text of the statutes, however, suggests that Congress additionally sought to forbid states from receiving and counting ballots that are properly mailed by election day.

Statutory interpretation begins with ascertaining the words' "ordinary meaning . . . at the time Congress enacted the statute." *Wisc. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018). Here, the key word in the federal election-day statutes is "election." 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1; *see* Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (enactment of the presidential election-day statute). As Mississippi explains, contemporary dictionaries in 1845 defined "election" as the act of *choosing* a public official. Pet'r's Br. 24; *see, e.g.*, Noah Webster, *An American Dictionary of the English Language* 288 (1841) ("The act of choosing a person to fill an office or employment, by any manifestation of preference, as by ballot, uplifted hands, or *viva voce*."); *see also id.* (similarly defining "elect" as "[t]o pick out" or "[t]o choose").

Contemporary usages of the word "election" illustrate that meaning. In President Polk's 1845 Annual Message to Congress (a forerunner to today's State of the Union Address), he used "elect" and "election" interchangeably to refer to the act of choosing. In one passage, he commented that his predecessor President Tyler had "elected" to send a proposal for annexation to the Republic of Texas, and that he approved of President Tyler's "election" to do so. H.R. J., 29th Cong., 1st Sess., at 15 (Dec. 2, 1845) (written communication of James K. Polk, U.S.

President). President Polk then described the upcoming "election" in Texas, on which day public officials would "be chosen by the people." *Id.* Contemporary newspapers also used the words "election" and "elect" to mean choosing, including voters' choice of officials. *See, e.g.*, *The Spring Election*, N.Y. Herald, Jan. 14, 1845, perma.cc/RW5P-76KK (describing "the ensuing spring election, when the people of this city elect their Mayor and Common Council for the ensuing year"); *In Council, April 19, 1847*, Alexandria Gazette, Apr. 21, 1847, https://perma.cc/SK5S-T32T ("Upon balloting for officers, the following elections were duly made[.]").

This Court's precedents, too, have long deemed "election" to mean the act of choosing a public official. Over a century ago, the Court stated that "the word 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." *Newberry v. United States*, 256 U.S. 232, 250 (1921). Since then, the Court has repeatedly reaffirmed that understanding. *See Classic*, 313 U.S. at 318 ("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 Court applied that definition in *Foster* when it interpreted the federal election-day statutes. There, the Court began by explaining that the term "election" in the election-day statutes "refer[s] to the combined actions of voters and officials meant to make a final *selection* of an officeholder." *Foster*, 522 U.S. at 71 (emphasis added). The Court thus held

that a Louisiana law that allowed "a contested selection of candidates for a congressional office" to "conclude[] as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violate[d] [2 U.S.C.] § 7." *Id.* at 72. As the Court reasoned, the election-day statutes require "only that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 71-72 & n.4.

Nothing in *Foster*'s holding requires that the receipt of timely cast votes occur by election day. Under Mississippi's law, voters must still "make a final selection of an officeholder" by election day, *id.* at 71, even if election administrators receive and tabulate those choices over the following days. *See* Pet'r's Br. 37.

The understanding that "election" means "the act of choosing a public official" resolves the question presented. In our system of government, of course, it is the voters who choose leaders to represent them. *See, e.g.*, U.S. Const. art. I, § 2, cl. 1 (providing that Representatives are "chosen . . . by the People"); *id.* amend. XVII (providing that Senators are "elected by the people"). No one would say that state election administrators "elect" or "choose" our Senators and Representatives. And although Americans vote indirectly for the President, the Electoral College system only confirms this meaning of "election." In each state, electors "meet and give their votes on the first Tuesday after the second Wednesday in December," then "immediately transmit" those votes to the President of the Senate, with a receipt deadline of "the fourth Wednesday in December." 3 U.S.C.

§§ 7, 11-12. In this process, it is the electors who "do indeed elect a President"—not the President of the Senate who receives the electoral votes up to eight days later. *Chiafalo v. Washington*, 591 U.S. 578, 592 (2020).

In short, receiving and counting timely cast ballots after election day does not alter the day when voters elect a public official to represent them. After all, absentee voters cast their votes by mailing their ballots no later than election day—at which point they are stuck with their choice, just like someone who drops their ballot in a box or pulls a lever in a booth. Simply put, when an absentee voter mails his ballot, his choice becomes final even if received after election day. That is entirely consistent with the election-day statutes.

B. Constitutional text and tradition empower states to set deadlines for receipt of absentee ballots.

Interpreting the federal election-day statutes not to preempt state absentee ballot-receipt deadlines accords with constitutional text and tradition. "[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County*, 570 U.S. at 543 (quoting *Gregory*, 501 U.S. at 461-62). That is because "the Framers recognized that state power and identity were essential parts of the federal balance." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring). As such, states retain "broad power" to regulate the "Times, Places and Manner" of congressional elections unless Congress has

countermanded that authority by statute. *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (internal quotation marks omitted); U.S. Const. art. I, § 4, cl. 1.

States also establish the "Manner" of choosing presidential electors, U.S. Const. art. II, § 1, cl. 2, while Congress "determine[s] the Time of chusing the Electors, and the Day on which they shall give their Votes," *id.* art. II, § 1, cl. 4. Among the "Manner[s]" left for the states to decide is how to conduct the "counting of votes." *Cook*, 531 U.S. at 524 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). Indeed, "from the foundation of the government to" the early twentieth century, Congress left the regulation of congressional elections "almost entirely to the states." *United States v. Gradwell*, 243 U.S. 476, 482-84 (1917).

Respondents characterize state absentee voting laws as "deviations" from our history and tradition. RNC BIO 22-26; *see* Br. for Ctr. for Election Confidence, Inc., et al. as *Amici Curiae* in Supp. of Granting Cert. 6-13. But history tells us just the opposite: absentee voting laws—including extended ballot-receipt deadlines—carry forward our nation's long tradition of providing flexibility to ensure that military service members and other Americans can vote despite being far from polling places.

Proxy voting was "a common practice in the founding era." *Chiafalo*, 591 U.S. at 591. As early as 1636, the Massachusetts Bay Colony established a "proxy-voting" system for frontier towns, permitting them to seal and send votes to Boston to be counted. Edward M. Hartwell, Edward W. McGlenen, & Edward O. Skelton, *Boston and Its Story, 1630-1915*,

at 87 (1909). Every New England colony soon did the same. Charles Seymour, *How the World Votes: The Story of Democratic Development in Elections* 220-21 (1918). Some communities, meanwhile, permitted absentee voting only for service members. *See, e.g.*, Samuel T. Worcester, *Hollis, New-Hampshire, In the War of the Revolution*, *in* 30 New-Eng. Hist. & Genealogical Reg. 288, 293 (1876), perma.cc/G2BC-XB6J (discussing 1775 absentee ballot policy of the Town of Hollis, New Hampshire).

Later, during the Civil War, states overwhelmingly adopted voting by mail or proxy. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 498-500 (2003). With over one million eligible voters serving in the Union army, in some states, over seven percent of votes cast in the 1864 presidential election were absentee ballots. Josiah H. Benton, *Voting in the Field : A Forgotten Chapter of the Civil War* 311-14 (1915). To implement absentee voting despite poor infrastructure for ballot delivery, states like Alabama, Florida, Georgia, North Carolina, South Carolina, Tennessee, and Virginia set their ballot-receipt deadlines up to 20 days after the election. *Id.* at 317-18. In the North, too, every state except Maryland allowed for "a sufficient period [to] 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" days later, "to enable the votes to reach them." *Id.* at 318.

To be sure, mail-in voting and extended ballot-receipt deadlines did not proliferate until after the

election-day statutes passed. But in the context of our nation's history, that fact should come as little surprise. Through the mid-nineteenth century, widespread illiteracy and inadequate infrastructure made mail-in ballots unappealing. Richard Franklin Bensel, *The American Ballot Box in the Mid-Nineteenth Century* 40-41 (2004); Benton, *supra*, at 316-18; Louis Melius, *The American Postal Service: History of the Postal Service from the Earliest Times* 48-49 (1917). Mail-in ballots were also less necessary at the time, given limited popular participation in federal elections. In many states, the legislature directly selected Senators and presidential electors. *See* Benton, *supra*, at 9-11; U.S. Const. amend. XVII (providing for popular election of Senators from 1913 onward). As for House elections, many states adhered to *viva voce* (i.e., voice voting) due to small populations, poll taxes, and property qualifications keeping the number of votes manageable. Bensel, *supra*, at 42-43, 54-56.

That there may have been less logistical need for mail-in absentee voting when the election-day statutes were adopted, however, is of no legal moment. The legitimacy of absentee voting laws like Mississippi's does not somehow depend on finding a historical match for them, especially in an era when they would have the least reason to exist. *See Classic*, 313 U.S. at 324 (holding that 18 U.S.C. § 241 applies to tampering with primary elections, finding it "not significant that the primary, like the voting machine, was unknown when [the statute] was adopted").

C. Congress repeatedly acquiescing in state ballot-receipt deadlines further reinforces their validity.

Finally, even if the text of the federal election-day statutes were ambiguous, Congress's longstanding acquiescence in states' absentee ballot laws and ballot-receipt deadlines reinforces that Congress did not intend to preempt them.

The Court has often considered longstanding Congressional "silence on [an] issue, coupled with its certain awareness of" the consequence of that silence, persuasive evidence of statutory meaning. *Wyeth v. Levine*, 555 U.S. 555, 575 (2009); *see, e.g.*, *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 326 (1994); *Ziglar v. Abbasi*, 582 U.S. 120, 143 (2017). Here, it is significant that Congress has taken no action on ballot-receipt deadlines for decades, despite being aware of state laws and contemplating federal legislation on the matter.

In 1977, Congress considered amendments to various aspects of federal election law, with several witnesses proposing that ballot-receipt deadlines be uniformly extended for overseas voters to a date after election day. *See, e.g.*, *Overseas Absentee Voting: Hearing on The Overseas Citizens Voting Rights Act of 1975, The Federal Voting Assistance Act of 1955 & S. 703 Before the S. Comm. on Rules & Admin.*, 95th Cong. 17, 67, 74 (1977). As Congress was no doubt aware from the record before it, two states at the time had laws providing for the counting of overseas ballots that arrived after election day. *Id.* at 33-34 (Nebraska and Washington). Yet Congress did not enact a federal ballot-receipt deadline, leaving intact

states' flexibility to enact such provisions to accommodate local conditions and the needs of their voters. *See Kimbrough v. United States*, 552 U.S. 85, 106 (2007) (noting Congress's "tacit acceptance" when it "failed to act on a proposed amendment").

Then in 1986, Congress passed UOCAVA, again leaving state ballot-receipt deadlines untouched. As explained above, though UOCAVA requires states to provide certain overseas voters with absentee ballots, it does not set a uniform deadline for receiving those ballots. If anything, its text expressly contemplates a range of state ballot-receipt deadlines, instructing the appropriate agency only to "implement procedures that facilitate the delivery of marked absentee ballots . . . not later than the date by which an absentee ballot must be received in order to be counted in the election." 52 U.S.C. § 20304(b)(1). Elsewhere, 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*." *Id.* § 20303(b) (emphasis added). Thus, while Congress implicitly acknowledged states' differing ballot-receipt deadlines when it enacted UOCAVA, it did not set a nationwide deadline, let alone establish that deadline as election day.

Most recently, Congress enacted the Electoral Count Reform Act of 2022, amending 3 U.S.C. § 1 to use the words "election day," defined as the Tuesday after the first Monday in November. Consolidated Appropriations Act of 2023, Pub. L. 117-328, div. P, § 102, 136 Stat. 4459, 5233-34 (2022) (codified as amended at 3 U.S.C. §§ 1, 21(1)). By this point, Congress was surely aware that the majority of states

counted some timely cast mail-in ballots received after election day. Yet, once again, it saw no reason to interfere with state ballot-receipt deadlines.

To be sure, "the significance of subsequent congressional action or inaction necessarily varies with the circumstances." *United States v. Wells*, 519 U.S. 482, 495 (1997). But there is hardly any subject of which members of Congress would be more aware than the state regulations governing their own elections. If those ballot-receipt deadlines indeed flout federal law, as respondents insist, it would be surprising that Congress has done nothing to redress that problem. *See Johnson v. Transp. Agency*, 480 U.S. 616, 629 n.7 (1987) (deeming "congressional inaction" significant where "legislative inattention . . . is not a plausible explanation"); *Abbasi*, 582 U.S. at 144 (similar).

* * *

Preemption "represents 'a serious intrusion into state sovereignty.'" *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 773 (2019) (plurality opinion) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996) (plurality opinion)). "And to order preemption based not on the strength of a clear congressional command" but based on—at best—equivocal statutory language also "represent[s] a significant judicial intrusion into Congress's authority to delimit the preemptive effect of its laws." *Id.* Caution is doubly warranted here, given that respondents' rule jeopardizes states' control over their *own* elections as well. Faced with this, the single word "election" in the federal election-day statutes is much too thin a reed to support respondents' position and the "deeply serious

consequences" it entails. *Bond v. United States*, 572 U.S. 844, 860 (2014).

CONCLUSION

The Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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