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 PROFESSOR MICHAEL T. MORLEY AND FLORIDA STATE UNIVERSITY ELECTION LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Professor Michael T. Morley is Sheila M. McDevitt Professor of Law at the Florida State University College of Law and Faculty Director of the FSU Election Law Center. He teaches and writes in the areas of federal courts, remedies, and election law, and has an interest in the sound development of these fields. This Court cited his work most recently in *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025).

The FSU Election Law Center was established by the Florida Legislature to "[c]onduct and promote rigorous, objective, nonpartisan, evidence-based research concerning important constitutional, statutory, and regulatory issues relating to election law." Fla. Stat. § 1004.421(2)(a) (2025). It is empowered to "[p]rovide formal or informal assistance . . . to governmental entities or officials at the federal, state, or county levels, concerning elections or election law, including, but not limited to, research, reports, public comments, testimony, or briefs." *Id*. § 1004.421(3)(e). The Election Law Center operates pursuant to academic freedom protections. *Id*. § 1004.421(7). Accordingly, the Center's arguments and positions should not be attributed to Florida State University, the FSU College of Law, or either school's administration.

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

SUMMARY OF ARGUMENT

The statutes establishing a uniform Election Day for U.S. House, U.S. Senate, and Presidential elections, 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1, are vague and underspecified. Federal courts have not applied them literally to require that all voting in such elections occur on a single day. *See, e.g.*, *Foster v. Love*, 522 U.S. 67, 72 (1997). Accordingly, this Court may properly consider their legislative histories and purposes to accurately determine their best textual meanings in the context of this case. *See ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 438-39 (2014); *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989)).

Preventing voter fraud and preserving public faith in the integrity of the electoral process were among Congress's main goals in adopting both the Presidential Election Day Act, *see* Act of Jan. 23, 1845, ch. 1, 5 Stat. 721, and the House Election Day Act, *see* Act of Feb. 2, 1872, ch. 11, §§ 3-4, 17 Stat. 28, 28-29 (which Congress later applied to Senate elections, as well, *see* Act of June 4, 1914, ch. 103, 38 Stat. 384). Accordingly, this Court might apply the federal Election Day statutes in this case in whatever manner it deems will achieve these goals most effectively. Or, having identified the proper standard to apply, this Court might remand this case so that the lower courts may do so in the first instance. *Cf. Spokeo, Inc. v. Robins*, 578 U.S. 330, 342-43 (2016).

ARGUMENT

I. THE FEDERAL ELECTION DAY STATUTES CANNOT BE APPLIED LITERALLY

Three different statutes, enacted decades apart from each other, collectively establish a federal Election Day. For U.S. House elections, federal law provides, "The Tuesday next after the 1st Monday in November, in every even numbered year, is established as ***the day for the election*** . . . of Representatives . . . to the Congress . . . ." 2 U.S.C. § 7 (emphasis added).[2]

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[2] This statute further permits states to pass laws to prescribe the time for holding House elections when vacancies arise, including when "a vacancy is caused by a failure to elect at the time prescribed by law." 2 U.S.C. § 8(a). It appears that Senator Allen G. Thurman of Ohio offered the only explanation for this provision during the legislative debates. He claimed that a "failure to elect" could occur only when a tie occurred or a state required a candidate to receive an absolute majority of votes to win and no one did so. CONG. GLOBE, 42nd Cong., 2d Sess. 677 (Jan. 29, 1872) (statement of Sen. Thurman). Courts have nevertheless suggested that this provision would allow a congressional election to be rescheduled when a natural disaster disrupts or prevents Election Day voting. *See Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 830 (N.D. Ga. 1993), *aff'd per curiam*, 992 F.2d 1548 (11th Cir. 1993) (explaining that the "failure to elect" provisions "permit states to prescribe different times for elections when they experience a legitimate failure to elect due to exigent circumstances after making an honest attempt to do so"); *Busbee v. Smith*, 549 F. Supp. 494, 526 (D.D.C. 1982) (three-judge court) ("Congress did not expressly anticipate that a natural disaster might necessitate a postponement, yet no one would seriously contend that [2 U.S.C. § 7] would prevent a state from rescheduling its congressional elections under such circumstances."), *aff'd*, 459 U.S. 1166 (1983); *see also* Michael T. Morley, *Postponing Federal Elections Due to Election*

U.S. Senate elections piggyback off this provision. A Senator "***shall be elected***" from a state "at the regular election" at which a Representative is to be chosen, which "next preced[es]" the expiration of an incumbent Senator's term. *Id.* § 1 (emphasis added).

A different, recently amended, statutory scheme governs presidential electors. "The electors of President and Vice President ***shall be appointed***, in each state, on election day . . . ." 3 U.S.C. § 1 (emphasis added). The term "election day," in turn, is defined as "the Tuesday next after the first Monday in November" in presidential election years. *Id.* § 21(1).[3] Congress adopted this language to address concerns that, at the time of the law's original enactment, South Carolina's presidential electors were appointed by the state legislature rather than chosen through a popular election. *See* CONG. GLOBE, 28th Cong., 2d Sess. 14 (Dec. 9, 1844) (statement of Rep. Elmer).

It does not appear that Congress intended that these statutes be applied literally. Most basically, notwithstanding 3 U.S.C. § 1, presidential electors are

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Emergencies, 77 WASH. & LEE L. REV. ONLINE 179, 209 (2020) ("The 'failure to elect' provisions of the federal Election Day laws allow states to extend or postpone federal elections when necessary to respond to unexpected election emergencies that make it dangerous or impossible to vote on Election Day throughout a substantial part of a congressional district or state.").

[3] The term "Election Day" also includes a "modifie[d] . . . period of voting" which a state authorizes in response to "force majeure events that are extraordinary and catastrophic" pursuant to laws enacted prior to the election. 3 U.S.C. § 21(1).

not, have never been, and cannot be "appointed" on Election Day. As Rep. William Payne of Alabama explained, "After the electors have been chosen by the people, the returns have to be made to the Secretary of State, which would require at least ten days in a State of ordinary size. Moreover, the executive has to issue his proclamation, designating the persons chosen by the people as electors." *Id.* at 29 (Dec. 13, 1844) (statement of Rep. Payne).

The statute governing House elections, 2 U.S.C. § 7, and by extension Senate elections, *id.* § 1, presents more difficult interpretive challenges. On its face, it plainly specifies a singular "day for the election," which is to occur on "[t]he Tuesday next after the 1st Monday in November." *Id.* § 7. In debates over this provision, Senator Allen G. Thurman of Ohio warned that there were "some States in which, by the laws, the election is held open for several days and all the electors in a county vote at the same place." CONG. GLOBE, 42nd Cong., 2d Sess. 676 (Jan. 29, 1872) (statement of Sen. Thurman). Although he noted it "would be impracticable" to require everyone to vote on a single day, *id.* at 676, the Senate declined to accommodate these concerns, *id.* at 677.

This Court has nevertheless declined to "isolat[e] precisely what acts a State must cause to be done on federal election day . . . ." *Foster v. Love*, 522 U.S. 67, 72 (1997). Rather, this Court declared in *Foster*, "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 (subject only to the

possibility of a later run-off)." 522 U.S. at 71. But this holding does not mean that all of the actions by "voters and officials" to "select[] . . . an officeholder" must occur on the designated Election Day. *Id*. To the contrary, *Foster* concluded only that an election may not be "consummated"—completed—before that day. *Id*. at 72 n.4. "[A] contested selection of candidates for a congressional office that is concluded 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 violates § 7." *Id*. at 72.

Lower courts have consistently ruled that voters may cast, and election officials may receive, their ballots prior to Election Day. They have upheld the validity of state laws allowing voters to cast ballots by mail in advance of Election Day, *see Voting Integrity Proj., Inc. v. Keisling*, 259 F.3d 1169, 1176 (9th Cir. 2001), as well as during in-person early voting periods, *see Millsaps v. Thompson*, 259 F.3d 535, 545-46 (6th Cir. 2001) (upholding state's early voting laws because they did not permit a "final selection" of candidates to be made prior to Election Day); *Voting Integrity Proj., Inc. v. Bomer*, 199 F.3d 773, 775-76 (5th Cir. 2000) (holding that the federal Election Day Acts did not prohibit early voting because people could still vote on Election Day). *But see Lamone v. Capozzi*, 912 A.2d 674, 687, 691 (Md. 2006) (holding that in-person early voting violated a state constitutional provision requiring general elections to be held "on the Tuesday next after the first Monday" in November (quoting MD. CONST. art. XV, § 7)). Requiring states to conduct statewide elections exclusively on a single day would render the system particularly vulnerable to natural disasters and other unexpected calamities.

See generally Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545 (2018).

Similarly, *Foster* does not bar election officials from continuing to perform tasks following Election Day to determine a federal election's outcome such as processing, counting, canvassing, and even recounting ballots. *See Roudebush v. Hartke*, 405 U.S. 15, 25-26 (1972) (holding that the Constitution does not preclude states from recounting ballots in congressional elections). Accordingly, the federal Election Day statutes could reasonably be read in at least two different ways. On the one hand, they may bar election officials from providing additional ballots to people or otherwise permitting them to vote after Election Day is over, while allowing those officials to continue to receive and count ballots that voters have already completed and transmitted by that deadline.

On the other hand, the statutes could be read as authorizing election officials to accept and count only ballots that are received by the close of polls on Election Day. *See Republican Nat'l Comm. v. Wetzel*, 120 F.4th 200 (5th Cir. 2024) ("[T]his 'day for the election' is the day by which ballots must be both *cast* by voters and *received* by state officials."). This Court may resolve this ambiguity by adopting an interpretation most consistent with the statutes' legislative history and purpose. *See ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 438-39 (2014) (reading a statute "in light of its purpose" when "the language of the Act alone" did not resolve the issue before the Court); *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) ("[W]e repeatedly have looked to legislative

history and other extrinsic material when required to interpret a statute which is ambiguous." (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989))); *see also Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011) ("[C]lear evidence of congressional intent may illuminate ambiguous text.").

II. A MAJOR PURPOSE OF THE FEDERAL ELECTION DAY STATUTES WAS TO PREVENT BOTH VOTER FRAUD AS WELL AS PUBLIC PERCEPTIONS OF VOTER FRAUD

"Over the course of nearly seventy years, Congress established a uniform Election Day to combat election fraud by preventing double voting, reduce burdens on voters, and prevent results from states with early elections from influencing voters in other jurisdictions." Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 215 (2020) [hereinafter, "Morley, *Postponing Elections*"]. The legislative history of these statutes confirms Congress was concerned not only with preventing actual election fraud, but preserving public confidence in the outcome of elections, as well. *See, e.g.*, CONG. GLOBE, 28th Cong., 1st Sess. 728 (June 14, 1844) (statement of Sen. Atherton).

To the extent the meaning of the federal Election Day statutes is unclear, this Court could interpret and apply them in whatever manner it deems most likely to accomplish these goals. On the one hand, this Court might find that the record offers no reason to believe that ballots which have been mailed and postmarked as of Election Day pose any heightened

risk of irregularity or fraud. On the other hand, it might conclude that, in our hyperpolarized, social-media-driven environment, rules which increase the time it takes for an election's results to be known tend to undermine public confidence in election results. *Cf.* Rick Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, 87 U. CHI. L. REV. ONLINE 45, 50-51 (2020) (urging election officials to consider whether to extend the deadline for receiving absentee ballots due to delivery delays arising from the COVID-19 pandemic, while cautioning that "the longer after Election Day any significant changes in vote totals take place, the greater the risk that the losing side will cry that the election has been stolen"). Or, having determined the proper way to interpret these provisions, this Court might remand this case so that the lower courts may apply the correct standard in the first instance. *Cf. Spokeo, Inc. v. Robins*, 578 U.S. 330, 342-43 (2016) (remanding so that the lower court could apply the Supreme Court's newly clarified explanation of the "concreteness" requirement for standing in the first instance).

A. The Presidential Election Day Act

1. On March 1, 1792, as the nation prepared for the second presidential election, Congress enacted a statute which would govern the timing of presidential elections for the next half-century. *See* An Act Relative to the Election of a President and Vice President of the United States, and Declaring the Officer Who Shall Act as President in Case of Vacancies in the Offices Both of President and Vice President, ch. 8, § 1, 1 Stat. 239, 239 (Mar. 1, 1792). Rather than requiring states to appoint presidential

electors on a single day, this statute required such appointments to occur within a 34-day period. It provided, "[E]lectors shall be appointed in each state for the election of a President and Vice President of the United States, within thirty-four days preceding the first Wednesday in December" in each presidential election year." *Id*.

During debates over the law, Representative Theodore Sedgwick of Massachusetts moved to grant states "a longer time to give in their votes for Electors." 3 Annals of Cong. 278 (Dec. 22, 1791) (statement of Rep. Sedgwick). He warned of the "disagreeable consequences which would probably ensue" if the electors should fail to choose a President. *Id*.

Representative Alexander White of Virginia objected that allowing more time for choosing electors would "produce the very mischiefs the gentleman appeared to deprecate." *Id*. (statement of Rep. White). He "thought the time should rather be contracted than extended." *Id*. at 279. White would have ideally preferred for the electors to "meet and give in their votes on the very day of their being chosen." *Id*. at 278. The House rejected Sedgwick's motion. *Id*. at 279.

2. On January 19, 1844, Representative Alexander Duncan of Ohio introduced a bill to establish a uniform Election Day for both Presidential and U.S. House races.[4] H.R. 80, 28th Cong., 1st Sess.

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[4] At the time, state legislatures still directly appointed U.S. Senators. *See* U.S. CONST. art. I, § 3, cl. 1.

(Jan. 19, 1844) (as introduced in House). The bill provided that, starting in 1844, all such "regular stated elections" would be "held on the same day, and on one single day, in all the States of the Union," *id.* § 1, which the bill specified as the first Tuesday in November, *id.* § 2. The House Committee on Elections limited the bill solely to presidential elections, however, and changed the date to the "Tuesday next after the first Monday in November." H.R. 80, 28th Cong., 1st Sess. (Feb. 17, 1844) (as reported by House Elections Comm.).

Duncan explained that he had introduced the bill because "the elective franchise had been violated," and "the ballot box polluted." CONG. GLOBE, 28th Cong., 1st Sess. 357 (Mar. 6, 1844) (statement of Rep. Duncan). Some Representatives had won their seats through "fraud" and "swindling," and misconduct occurred in 1840 to "overthrow the Democratic party and defeat the election of Martin van Buren." *Id.* at 358 (Mar. 6, 1844). "[I]t was to prevent the exercise of such means again, that this bill had been introduced." *Id.* He discussed "the pipe-laying of 1840, and of the importation of voters from one State to another." *Id.* If adopted, his bill would "prevent a recourse" to such election fraud. *Id.*; *see also* CONG. GLOBE, 28th Cong., 2d Sess. 14 (Dec. 9, 1844) (statement of Rep. Duncan) (reiterating that "[t]he object of the bill was to prevent frauds at the ballot box, as in 1840" through means such as "pipelaying").

Representative Hannibal Hamlin of Maine echoed these sentiments, explaining, "The bill was designed to prevent . . . frauds which had heretofore been perpetrated upon the elections." *Id.* at 634 (May 15,

1844) (statement of Rep. Hamlin). Other members likewise recognized the bill's anti-fraud purpose. *See, e.g.*, CONG. GLOBE, 28th Cong., 2d Sess. 28 (Dec. 13, 1844) (statement of Rep. Rhett) (recognizing the bill had been introduced "to prevent the flagitious frauds from the transfer of votes from one State to another"); *id*. at 29 (statement of Rep. Rathbun) ("The object of this bill was to guard against frauds in the elections of President and Vice President, by declaring that they shall all be held on the same day."); *id*. (statement of Rep. Payne) (warning about "the inducement for frauds upon the ballot-box" and explaining that holding elections on the same day throughout the nation would prevent it).

Senate debates likewise centered on both preventing fraud and bolstering public trust in electoral outcomes. Senator Charles G. Atherton of New Hampshire noted that the bill's purpose was to "remov[e] the possibility of introducing fraud to any great extent in these elections." CONG. GLOBE, 28th Cong., 1st Sess. 728 (June 14, 1844) (statement of Sen. Atherton). Echoing Duncan, Atherton explained:

> It was well known . . . that apprehension prevailed to a considerable extent, that frauds had been practiced in elections—that men had been transferred from one part of the Union to another, in order to vote; and that system which had now received the technical name of pipe-laying, had been carried into pretty general, and in some instances, into pretty extensive operation.

Id.

He emphasized that Congress had a duty to combat not only actual voter fraud, but also the appearance or perception of such fraud. Thus, "it made no difference whether [the public's] apprehension was well founded or not." *Id.* Rather, "it was a matter of very serious importance that this apprehension should be removed, ***whether these facts existed or not***." *Id.* (emphasis added). He elaborated, "If frauds existed, certainly nothing could be more important to a legislative body than to remove, as far as it was in their power, the possibility of their recurrence." *Id.* Conversely, "[i]f frauds did not exist, it was important that the suspicion of them should be removed; for what was of more consequence than that the people should have confidence in their rulers, and in the manner of their election?" *Id.*

Atherton added that combatting perceptions of potential voter fraud was necessary to "produce tranquility" following a hotly contested election. *Id.* "[I]f any party, after an excited contest, believed that they had been defrauded of their rights, what was so apt to produce dissensions between them and their rulers, and the most disastrous consequences to republican government?" *Id.* Thus, elections had to not only be fair and secure, but appear to be fair and secure. "It was important that our institutions should not only be preserved pure, but be preserved from all suspicion." *Id.*

Senator William Allen of Ohio agreed with Atkinson's concerns. He declared that the bill was "purely a measure to prevent frauds." *Id.* at 728; *see also id.* ("The whole object of it was to prevent frauds

in elections."); *id.* ("[I]ts whole and sole object was to prevent fraud . . . ."). "That there were frauds almost without number committed on the ballot-box in [Ohio] in 1840, was a fact which no solitary citizen within the limits of the State was now prepared to deny." *Id.* He explained, "There were frauds committed by the transfer of voters from the adjoining States to the State of Ohio—a fact which was proved before the Senate of the State." *Id.*; *see also id.* at 729 (statement of Sen. Buchanan) ("The prevailing impression everywhere was, that great frauds had been practiced in the presidential election of 1840, for want of such a provision as that now proposed.").

Despite this advocacy, the Senate tabled the bill by a one-vote margin, *id.* at 729, due to concerns about whether legislatures could meet in time to implement the necessary changes prior to the impending election, *see id.* at 728-29 (statement of Sen. Clayton); *id.* at 729 (statement of Sen. Dayton); *id.* (statement of Sen. Berrien); *id.* (statement of Sen. Foster); *id.* (statement of Sen. Clayton).

At the outset of the following session, Representative Duncan introduced a revised version of his bill, limited to presidential elections. H.R. 432, 28th Cong., 2d Sess. (as introduced Dec. 4, 1844); *see* 14 CONG. GLOBE 9 (Dec. 4, 1844) (statement of Rep. Duncan). As the Committee of the Whole debated the measure, he and Representative Elmer agreed to a substitute, *id.* at 21 (Dec. 11, 1844), which the House went on to pass, *see id.* at 31, 35. The chambers reached agreement and the measure was signed into law, Act of Jan. 23, 1845, ch. 1, 5 Stat. 721.

Voter fraud remained a concern in these debates. Representative Jeremiah Haralson of Alabama declared that, since the bill had been first introduced, another presidential election had occurred. CONG. GLOBE, 28th Cong., 2d Sess. 29 (Dec. 13, 1844) (statement of Rep. Haralson). "[B]oth parties are charging each other with having committed great frauds, and both professed to be anxious to guard against them in future." *Id.* He observed that a "majority of the House were for passing some bill that would guard against these election frauds that had been so loudly complained of." *Id.*

B. The House Election Day Act

The provision establishing a uniform Election Day for U.S. House races was adopted as part of the House reapportionment bill following the Census of 1870. Morley, *Postponing Elections*, *supra* at 198 (citing Act of Feb. 2, 1872, ch. 11, §§ 3-4, 17 Stat. 28, 28-29). On several occasions during the apportionment debates, Representative Benjamin Franklin Butler of Massachusetts introduced an amendment to require all state to hold their House elections on the same day. *See, e.g.*, CONG. GLOBE, 42nd Cong., 2d Sess. 112 (Dec. 13, 1871) (statement of Rep. Butler); *see also id.* at 115; *id.* at 141 (Dec. 14, 1871).

He explained that one of the main goals of his proposal was to combat voter fraud:

> [O]n account of the facility for colonization and repeating among the large central States, New York holding its election in November, and

> Ohio, Pennsylvania, and Indiana holding their elections in October, the privilege is allowed the border States, if any man is so disposed, of throwing voters across from one into the other. I think it will be fair for everybody that on the day when one votes all should vote . . . .

Id. at 112 (Dec. 13, 1871). He further argued that allowing some states to hold their elections earlier allowed them to improperly influence electoral outcomes in jurisdictions which voter later in the year. *Id*. at 141 (Dec. 14, 1871). The House ultimately passed a variation of Representative Butler's amendment as proposed by Representative John W. Killinger of Pennsylvania. *Id*.; *see also id*. at 142, 144-46.

In the Senate, Senator Allen G. Thurman of Ohio echoed the need for a uniform Election Day:

> Whenever you provide that elections shall take place upon the same day, you do interpose a not inconsiderable check to frauds in elections, to double voting, to the transmission of voters from one State to another, and you do allow the people to vote for their Representatives undisturbed by considerations which they ought not to take at all into account.

Id. at 618 (Jan. 26, 1872) (statement of Sen. Thurman). The Senate ultimately approved the measure and it was signed into law. Act of Feb. 2, 1872, ch. 11, §§ 3-4, 17 Stat. 28, 28-29.

After the states ratified the Seventeenth Amendment, establishing popular election of U.S. Senators, U.S. CONST. amend. XVII, Congress passed another law which, in relevant part, required elections to occur at the same time as House elections. *See* Act of June 4, 1914, ch. 103, 38 Stat. 384; *see also* Morley, *Postponing Elections*, *supra* at 203-08 (discussing the bill in greater detail).

Thus, among the main goals of both the Presidential Election Day Act as well as the House Election Day Act (which applies to Senate races, as well, *see* 2 U.S.C. § 1) were combating election fraud and preserving public confidence in the integrity of the electoral process. This Court should interpret and apply those laws in this case in whatever manner it deems will best promote these important purposes.

III. FEDERALISM CONCERNS DO NOT REQUIRE THIS COURT TO CONSTRUE THE FEDERAL ELECTION DAY STATUTES NARROWLY

> Judge Graves's dissent from the Fifth Circuit's denial of the motion to rehear this case en banc contends that the lower court opinion "conflicts with . . . federalism . . . which vests states with substantial discretion to regulate the intricacies of federal elections." *Republican Nat'l Comm. v. Wetzel*, 132 F.4th 775, 779 (5th Cir. 2025) (en banc) (Graves, J., dissenting).

This Court, however, has held that "federalism concerns . . . are somewhat weaker" with regard to legislation under the Elections Clause, U.S. CONST.

art. I, § 4, cl. 1, than in other contexts, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 (2013). For states, the election of representatives to the national government was a "new right, arising from the Constitution itself," rather than a component of their inherent sovereign authority or police power. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). "[P]owers over the election of federal officers had to be delegated to, rather than reserved by, the States." *Id.* at 804. Accordingly, "the States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it 'terminates according to federal law.'" *Inter Tribal Council*, 570 U.S. at 15 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)).

For this reason, this Court has never applied a presumption against preemption to statutes that Congress enacts under the Elections Clause to regulate congressional elections. *Inter Tribal Council*, 570 U.S. at 14. "[T]he power the Elections Clause confers is none other than the power to pre-empt." *Id.* Federal laws enacted under that provision "***necessarily*** displace[] some element of a pre-existing legal regime erected by State," *id.* (emphasis in original), because the Elections Clause gives Congress "the power to do exactly (and only) that," *id.* at 14 n.6.

In *Foster*, for example, this Court held the House Election Day Act, 2 U.S.C. § 7, neither implicates concerns about state sovereignty, nor "goes beyond the ample limits" of Congress's power under the Elections Clause. It explained that the Elections

Clause gives Congress "'comprehensive' authority to regulate the details of elections." *Foster*, 522 U.S. at 71 n.2 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). "By establishing a particular day as 'the day' on which these actions must take place, the statutes simply regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say." *Id*. at 71-72. Accordingly, federalism-related concerns should not impact how this Court construes the federal Election Day statutes.

CONCLUSION

For these reasons, this Court should resolve vagueness and ambiguity in the Federal Election Day Acts in a manner that best effectuates their statutory purposes.

Respectfully Submitted,

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