

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 NATIONAL SECURITY LEADERS FOR
AMERICA AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

The National Security Leaders for America (“NSL4A”) is a non-partisan network of former military and civilian leaders from across the political spectrum who are uniquely qualified to provide expert insight on U.S. national security and its impact on our democracy and economic stability.

NSL4A has over 1,400 members who were involved in national security issues at a senior level. Over 500 of NSL4A’s members are retired Generals, Admirals, or other senior officers from one of the uniformed services of the United States. Additionally, approximately 200 of its members served as ambassadors of the United States in foreign countries, and many more served in senior diplomatic posts around the world. As a result of their service to our country, many NSL4A members have first-hand experience with the difficulties associated with casting their ballots abroad and having their ballots counted.

NSL4A members know that it is not always possible for ballots from overseas to be received by election day for reasons often beyond their control. Ensuring that ballots count for citizens who are far from home—even if mailed or otherwise sent in a timely fashion—is a matter of significant concern to NSL4A members. Because of their service leading other Americans abroad, NSL4A’s members can provide a meaningful perspective on the critical nature that laws like Mississippi’s play in ensuring that those serving in foreign posts have a fair opportunity to exercise their fundamental

¹ No counsel for a party authored any portion of this brief, and no person or entity other than amici or its counsel made any monetary contribution to its preparation or submission.

right to access the ballot box and have their voices heard.

INTRODUCTION AND SUMMARY OF ARGUMENT

For as long as our Nation has been involved in wars and sent citizens to serve in foreign posts, military members and diplomatic personnel have encountered obstacles to casting their ballots and ensuring their votes count. Service members and diplomats are often far away from home fighting in conflicts or serving in remote posts with unreliable mail service, which makes it extremely difficult to exercise their fundamental right to vote without appropriate accommodations. Whether serving voluntarily or (as in the past) being conscripted into service, U.S. military and diplomatic personnel are abroad under orders from their government. In honor of their service, those citizens should not be deprived of additional accommodations their states provide to ensure their ballots count.

Mississippi makes it moderately easier for military members, diplomatic personnel, and their families to participate meaningfully in elections by counting valid absentee ballots even if they are received five days after election day. Miss. Code Ann. §§ 23-15-637, 23-15-699. In doing so, Mississippi recognized the difficulties our service members face in returning a ballot from the farthest corners of the world. And Mississippi is not alone. Twenty-eight other states plus Washington, D.C., Guam, Puerto Rico, and the Virgin Islands also count overseas ballots received a number of days after election day. See App., *infra*, 2a-3a.

Acting against the principle adopted by a majority of the states and U.S. territories, the Fifth Circuit held that the federal “Election Day statutes” preempt Mississippi’s law.

The decision below is wrong. The “Election Day statutes” set a uniform date by which ballots must be cast but are silent as to when ballots must be received. See 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. Conversely, the Constitution expressly authorizes the states to establish the time, place, and manner for holding elections, which includes setting ballot-receipt deadlines.

Throughout our history, various states have exercised that constitutional authority to adopt protective voting measures for military members, diplomatic personnel, and their families. As early as the War of 1812, and during every major conflict abroad since, states established accommodations that would make it easier for military members away from home to exercise their right to vote. Numerous states specifically permitted counting ballots received after election day.

Although Congress has previously passed legislation expressly preempting state ballot-receipt deadlines, those laws did more harm than good and were promptly repealed to return the control over ballot receipt to the states. Twice, Congress required that overseas ballots be received by the close of polls on election day—first in 1942 under the Soldier Voting Act and then in 1976 under the Overseas Citizens Voting Rights Act. See Pub. L. No. 77-712, § 9, 56 Stat. 753, 756 (Sept. 16, 1942); Pub. L. No. 94-203, § 4(b)(3), 89 Stat. 1142, 1143 (Jan. 2, 1976). Those laws—and their ballot-receipt deadlines, specifically—disfranchised significant numbers of military members. Each time, Congress recognized its mistake, quickly repealed those laws and returned to the states the power to set ballot-receipt deadlines. See Pub. L. No. 78-277, § 311(b)(3), 58 Stat. 136, 136, 146 (Mar. 31, 1944); Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), Pub. L. No. 99-410, § 103(b)(3), 100 Stat. 924, 925 (Aug. 28, 1986). The repeal of those deadlines

returned the power to the states—as authorized by the Constitution—to provide those serving this country abroad with additional time to return their ballots.

Here, the federal laws construed by the Fifth Circuit contain no express preemption of state laws setting ballot-receipt deadlines. Compare that with the express language of the Election Day statutes considered in *Foster v. Love*, in which this Court found that 2 U.S.C. § 7 “plainly refer[s]” to actions by voters to select “an officeholder.” 522 U.S. 67, 71 (1997). The plain text of the Election Day statutes does not state or imply Congressional intent to override the express constitutional power granted to the states to control their election procedures. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 (2013) (“[T]he reasonable assumption is that the statutory text accurately communicates the scope of Congress’s pre-emptive intent.”). If Congress intended to preempt Mississippi’s law by imposing a ballot-receipt deadline, it would have done so—as it has done in the past—by using clear language. *Id.* at 15. Given this history and the plain text of the Election Day statutes, the Fifth Circuit’s erroneous decision should be reversed.

ARGUMENT

Article I of the U.S. Constitution provides that the “Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” U.S. Const. art. I, § 4, cl. 1. Exercising that constitutional authority, Mississippi requires that “[a]bsentee ballots and applications received by mail . . . must be postmarked on or before the date of the election and received by the registrar no more than

five (5) business days after the election.” See Miss. Code Ann. § 23-15-637(1)(a).

The Fifth Circuit incorrectly held that the Election Day statutes—which say nothing about the deadline for receiving ballots—require that all ballots must be received by election day and thus preempt Mississippi’s ballot-receipt deadline. Congress knows how to preempt state ballot-receipt deadlines—it has done so twice before—but no reading of the Election Day statutes preempts Mississippi’s law. The Fifth Circuit’s decision below is thus contrary to the text of those statutes, history, and precedent. A decision by this Court affirming the Fifth Circuit will disproportionately disenfranchise those who serve the Nation overseas, including U.S. military personnel, diplomatic personnel, and their families, and undermine state and federal efforts to facilitate the meaningful participation of service members and citizens abroad in our elections.

I. Laws like Mississippi’s are critical to ensuring that military and other national security personnel serving overseas can fully participate in federal elections and have their ballots counted

Mississippi’s choice to count valid absentee ballots received within five days of election day is of particular importance to military and diplomatic personnel abroad. Laws like Mississippi’s are not new. Indeed, at least some states have allowed absentee voting for military members going back to every major conflict since ratification of the Constitution. See Part II, *infra*.

As early as the Civil War, states enacted laws similar to Mississippi’s that counted ballots received after the federal election day, even when their votes were coming from the battlefield. See Part II.A, *infra*. That longstanding link between absentee voting—including

allowances for late receipt of ballots—and military voters underlies the Nation’s commitment to enabling overseas service members to participate in our democracy by protecting their right to vote. *Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307 (N.D. Fla. 2000) (“For our citizens overseas, voting by absentee ballot may be the only practical means to exercise” their right to vote, which “is their last vestige of expression and should be provided no matter what their location.”).

Many states thus extend the ballot-receipt deadline, recognizing the obstacles U.S. citizens abroad might face in returning their ballots by election day, such as mailing their ballots from foreign countries with unpredictable postal services. See Fed. Voting Assistance Program, *2022 Overseas Citizen Population Analysis (OCPA)—Technical Report* 18 (2023), <https://perma.cc/HQ9Q-SJFC> (noting approximately one-fifth of survey respondents “reported that the postal system in their country was somewhat or very unreliable”).

Mississippi is one of fifteen states, plus Guam, Puerto Rico, the U.S. Virgin Islands, and Washington, D.C., that have exercised their constitutional authority to give *all* absentee voters additional days to return their timely cast ballots. Miss. Code Ann. § 23-15-637(1)(a). See App., *infra*, 1a. In passing such legislation, some states recognized the need to ensure that military members, diplomatic personnel, and their families who might be overseas could effectively participate in elections. See, e.g., *Election Procedures; REAA Advisory Boards*, 28th Leg., 1st Sess. (Alaska 2013) (statement of Rep. LeDoux) (explaining that legislator “proposed” amendment to protect “individuals overseas”); Mich. Const. art. II, § 4(1)(b) (granting Michigan citizens “if serving in the military or living

overseas” the right “to have an absent voter ballot . . . deemed timely received if postmarked on or before election day and received by the appropriate election official within six (6) days after such election”).

Fifteen additional states specifically provide protection for military and diplomatic personnel by extending the dates for receipt of timely cast ballots for *only* overseas voters. See App., *infra*. For example, Alabama requires stateside voters to submit absentee ballots “not later than the close of the last business day next preceding the election.” Ala. Code § 17-11-18(b). But that provision “does not apply in the case of individuals voting absentee pursuant to the federal Uniformed and Overseas Citizens Voting Act (UOCAVA),” who have an additional seven days after the election to return their ballots for them to be counted. *Ibid.* Similarly, Florida counts timely cast “vote-by-mail ballots for absentee uniformed services and overseas voters[”] received within ten days of election day. Fla. Stat. § 101.6952(5). See also Ark. Code Ann. § 7-5-411(a)(1)(A)(ii); Colo. Rev. Stat. § 1-8.3-113(2); Ga. Code § 21-2-386(a)(1)(G); Ind. Code § 3-12-1-17(b); Iowa Code § 53.44; Mich. Comp. Laws § 168.759a(18); Mo. Rev. Stat. § 115.920(1); Mont. Code Ann. §§ 13-21-20, 13-21-226; N.C. Gen. Stat. § 163-258.12; N.D. Cent. Code § 16.1-07-24; 25 Pa. Cons. Stat. § 3511(a); 17 R.I. Gen. Laws § 17-20-16; S.C. Code Ann. § 7-15-700(A). In total, thirty-four jurisdictions extend the absentee ballot-receipt deadline beyond election day.

Because such ballot-receipt statutes exist primarily to protect the franchise for military and national security personnel abroad, it should come as no surprise that states with the largest military installations extend their ballot-receipt deadlines beyond election day. All seven states with military installation populations

totaling over 100,000 (as of 2023) count ballots timely cast by overseas citizens received after election day. U.S. Dep't of Def., *2023 Demographics: Profile of the Military Community* 194–201 (2023) (2023 DOD Demographics) (noting California, Florida, Georgia, North Carolina, Texas, Virginia, and Washington all have military populations exceeding 100,000). For example, Texas, with over 241,000 military personnel, counts valid overseas citizens' ballots received within five days after election day. Tex. Elec. Code Ann. § 86.007(d). Virginia, with over 278,000 military personnel, counts valid overseas voters' ballots received by noon on the third day after the election. Va. Code Ann. § 24.2-709.

Such statutes can make all the difference for military and diplomatic personnel abroad in exercising their right to vote. Even with the 2009 federal requirement that states mail absentee ballots to overseas voters 45 days prior to a federal election, see Part II.C, *infra*, additional time is often necessary for those ballots to be received by election officials and counted. These protections are not illusory. For example, in Michigan's November 2024 election, more than 300 military ballots arrived during its six-day window for accepting ballots after election day. Hayley Harding, *With Trump's Executive Order, Thousands of Military Voters Could See Their Rights Curtailed*, VoteBeat (Apr. 10, 2025 11:08 a.m.), <https://perma.cc/6L6V-8N3W>. Invalidating Mississippi's and the other jurisdictions' decisions to enhance the accommodations for their military and overseas voters could drastically reduce the number of individuals who are able to vote in future elections. See *2023 DOD Demographics* 202 (estimating 319,700 overseas military personnel as of 2023). Those state laws are important to combat the

complexities of voting from abroad. The Fifth Circuit’s decision thus risks effectively disenfranchising those voters and others like them in Mississippi and the other jurisdictions that grant overseas voters more time to have their votes counted.

II. The Election Day statutes do not limit the states’ constitutional authority to establish ballot-receipt deadlines that protect their citizens serving overseas and alleviate obstacles to having their votes counted

Since our Nation’s earliest conflicts, many states have exercised their constitutional authority to establish the time, place, and manner for holding elections in a way that protects military members’ right to vote regardless whether they were serving state-side or abroad. Although these laws have taken many forms, they all permitted service members to vote absentee and often set ballot-receipt deadlines after election day.

Congress has only twice sought to control the deadline for the receipt of military or other absentee ballots—once in 1942 and again in 1976. See Pub. L. No. 77-712, § 9, 56 Stat. 753, 756 (Sept. 16, 1942); Pub. L. No. 94-203, § 4(b)(3), 89 Stat. 1142, 1143 (Jan. 2, 1976). In both instances, Congress required absentee ballots be returned by election day. Both times, the strict ballot-receipt deadline disenfranchised members of the military. As a result, Congress then repealed each law, in 1944 and 1986 respectively, replacing the federally mandated ballot-receipt deadline with an acknowledgement of the states’ responsibility to set that policy. See Pub. L. No. 78-277, § 311(b)(3), 58 Stat. 136, 136, 146 (Mar. 31, 1944); UOCAVA, Pub. L. No. 99-410, § 103(b)(3), 100 Stat. 924, 925 (Aug. 28, 1986).

Current federal law—including the Election Day statutes at issue here—makes no mention of a federal ballot-receipt deadline. Given that Congress has been “unequivocally committed” to “ending the widespread disenfranchisement of military voters stationed overseas,” *United States v. Alabama*, 778 F.3d 926, 929 (11th Cir. 2015), this should come as no surprise. Instead, the Election Day statutes supplement states’ laws by establishing a minimal baseline intended to serve the same goal as the states’ extended ballot-receipt deadlines: Ensure that service personnel and other U.S. citizens overseas can effectively vote. To that end, Congress passed UOCAVA, as amended by the Military and Overseas Voter Empowerment (“MOVE”) Act, 52 U.S.C. § 20301, *et seq.*, which requires states to mail absentee ballots to voters 45 days before election day and provide sufficient information about how to complete and return those ballots. Nothing in UOCAVA, the MOVE Act, the Election Day statutes, or other any other current federal statute, indicates any Congressional intent to preempt the states’ abilities to choose when valid ballots can be received to count. See, *e.g.*, 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1.

A. The States have a long history of protecting the ability of service members to cast their ballots and have their ballots counted

Even our Nation’s earliest conflicts at home brought laws protecting a soldier’s franchise. During the War of 1812 and the Mexican American War, two of the eighteen existing states passed laws protecting soldiers’ right to vote absentee. R. Michael Alvarez et al., *Military Voting and the Law* 11 (Cal Tech/MIT Voting Technology Project, Working Paper No. 53, 2007). Pennsylvania passed a law in 1813 allowing soldiers to

cast their ballots at a place appointed by their commanding officer so long as they were more than two miles from their home precinct. See *Chase v. Miller*, 41 Pa. 403, 416 (1862). And even after the War of 1812, Pennsylvania sought to preserve its soldiers' right to vote and to have their ballots counted if sent to war, reenacting its absentee-voting law in 1839. *Ibid.*

New Jersey's 1814 law similarly granted service members the right to vote absentee. New Jersey, 39th Gen. Assembly, 2d Sitting, Publ. Acts 7, § 1 (1814). New Jersey's law allowed any of its service members to vote "at such place as may be prescribed by the commanding officer . . . as if he were present at the usual places of election." *Ibid.*

Pennsylvania and New Jersey would not be alone for long. When the Civil War broke out in 1861, states recognized that soldiers' lengthy stays away from home would pose difficulties for voting. Because the Constitution allows each state's legislature to determine where votes for federal elections may be cast "until controlled by Congress," "[i]t was therefore possible for every State to pass a law permitting soldiers to vote in the field for presidential electors and members of Congress." Josiah Henry Benton, *Voting in the Field: A Forgotten Chapter of the Civil War* 9 (1915).

By the end of 1861, six Confederate states had granted absentee voting rights for military members. Lynn Heidelbaugh, *Absentee Voting in the Civil War: Ohio Cover*, Smithsonian Nat'l Postal Museum (Nov. 2012), <https://perma.cc/4VUE-RMTJ>. Missouri became the first Union state to grant the same rights in 1862. *Ibid.* With the 1864 presidential election looming, nineteen Union states also enacted procedures for voting on the battlefield to ensure their soldiers could cast

their ballots and have their ballots counted. See Benton, *supra*, at 4. In all, 25 of the 36 states at the time granted soldiers some form of accommodation to exercise the right to vote absentee during the Civil War. And they did so without interference from Congress. The states alone protected the franchise for their soldiers while in battle.

Prior to this Civil War-era legislation—with Pennsylvania and New Jersey as exceptions—most states held elections only at home (the “place”), on the date of the election (the “time”), and by ballots cast in person (the “manner”). The Civil War forced states to change this status quo by allowing soldiers to vote from a different “place” (the battlefield) and in a different “manner” (the varying methods of getting soldiers’ ballots back home for canvassing). See Benton, *supra*, at 15. In doing so, some states also altered the “time” of voting by counting soldiers’ ballots even if received after election day. *Id.* at 317–318.

Two methods of collecting soldiers’ ballots became established. Some states had local election officials bring ballot boxes into the field, requiring soldiers to deposit ballots on election day. Benton, *supra*, at 15. These states would often deputize military officers to serve as election officials to facilitate the electoral process. *Id.* at 17. Others allowed soldiers to vote by a designated proxy who would deposit the soldier’s ballot in the home precinct. *Ibid.*

As for counting the ballots, states that took the proxy-voting approach counted soldiers’ ballots when canvassing all ballots for the election. Benton, *supra*, at 317. However, for the states using absentee ballots, many extended the time to receive and count soldiers’ ballots beyond election day. *Id.* at 317–318.

Several southern states specified how many days after election day soldiers' ballots could be received to be counted in the 1864 presidential election. In North Carolina, soldiers who cast their ballots in the battlefield had twenty days for their ballots to be returned. N.C. State Convention, No. 14, § 1 (1861–1862). Alabama counted soldiers' ballots on November 26th, weeks after election day. Acts of 1861, Ala. Gen. Assembly, 2d Called Sess., No. 94, § 3 (1861). Georgia required soldiers' ballots to be counted within fifteen days of the election. Acts of 1861, Ga. Gen. Assembly, No. 23, § II (1861). South Carolina counted soldiers' ballots on the first Saturday after election day. Acts of 1861, S.C. Gen. Assembly, No. 4572, § III (1861). Florida counted those ballots on "the twentieth day after the election." Act of Nov. 17, 1862, Fla. Gen. Assembly, ch. 1, 379, § 4 (1862).

Northern states also counted soldiers' ballots received after election day. And they did so under a regime with a congressionally mandated "election day" for the President and Vice President. Act of Jan. 23, 1845, ch. I, 5 Stat. 721. Because that law said nothing about a deadline for ballot receipt—like the current Election Day statutes—it left that judgment to the states. Maryland's new constitution, for example, required the canvassing officer to "wait for fifteen days after the date on which the State vote is taken, so as to allow the returns of the soldiers' vote to be made." Md. Const. of 1864, art. 12, § 14. Similarly, Nevada (in its new constitution) and Rhode Island (by amendment) each established a constitutional right for soldiers to submit their ballots to commanding officers on election day, while empowering the legislature to set a deadline for the commanding officers to return the ballots for counting. See Benton, *supra*, at 171–173 (citing

Nev. Const. of 1864, art. 2., § 3); *id.* at 186–187 (citing 1864 R.I. Acts and Resolves May Session). In other words, both states assumed soldiers’ ballots would be received and counted after election day.

Embracing the maxim that “a man should not be deprived of this privilege because he leaves his state to defend the homes of those who remain,” states enacted legislation to protect the voting rights of their service members. See *id.* at 184 (citing James Y. Smith, Governor, R.I., Governor’s Annual Message (Jan. 1864)). In doing so, the states ensured that their service members could cast their ballots *effectively* by creating procedures for getting ballots home and providing enough time for the ballots to be counted, even after election day. No state or federal official at the time demonstrated concern that federal law was an obstacle to creating this absentee-voting infrastructure, which included counting ballots received after the federal election day.

B. Congress twice expressly established a ballot-receipt deadline but repealed those deadlines in both instances because they disenfranchised millions of voters

Modern warfare required service members not only to leave home but to leave the country. Thus, in the wake of World War I, more states added laws that required counting service members’ ballots even when received after election day. See, *e.g.*, Cal. Political Code § 1360 (James H. Deering ed. 1924); Kan. Rev. Stat. § 25-1106 (Chester I. Long, et al., eds. 1923); P. Orman Ray, *Military Absent-Voting Laws*, 12 Am. Pol. Sci. Rev. 461, 464, 468–469 (1918) (discussing New York and Minnesota’s similar statutes).

By 1942, with a federal election looming in the middle of World War II, Congress stepped in for the first time and attempted to standardize aspects of service member absentee-voting procedures at the federal level. The Soldier Voting Act (“SVA”) of 1942 targeted absentee voting for service members stationed away from home but still in the United States. Pub. L. No. 77-712, § 1, 56 Stat. 753, 753 (Sept. 16, 1942). Specifically, it ordered states to create and (upon mailed-in request) distribute a “war ballot[]” for eligible service members. *Id.* §§ 4–5, 56 Stat. at 754. A service member could then use the ballot to vote by returning it with an oath affirming his eligibility under the SVA. *Id.* §§ 6–8, 56 Stat. at 755–756. But the SVA did not require states to extend these protections to their overseas citizens, effectively disenfranchising our Nation’s service members fighting abroad.

Significantly, the SVA contained the first ever express Congressional deadline for receipt of an absentee ballot. War ballots were not valid if received “after the hour of the closing of the polls on the date of the holding of the election.” Pub. L. No. 77-712, § 9, 56 Stat. at 756. Thus, Congress explicitly preempted contrary state ballot-receipt deadlines—but only as to statutorily mandated war-ballots. Nonetheless, this deadline worked to disenfranchise even service members covered by the Act, which is why it was quickly repealed to return the power for setting ballot-receipt deadlines to the states.

The SVA’s passage in September 1942, two months before the general election, left almost no time to prepare and distribute war ballots. Tyler Bamford, *The Soldier Voting Act and Absentee Ballots in World War II*, Nat’l WWII Museum (Oct. 19, 2020), <https://perma.cc/CS4E-W3CY>. At the time, the United

States had almost four million service members in service, with about three million conscripted into service. Molly Guptil Manning, *Fighting to Lose the Vote: How the Soldier Voting Acts of 1942 and 1944 Disenfranchised America's Armed Forces*, 19 J. Legis. & Pub. Policy 335, 341 (2016); *Induction Statistics*, Selective Serv. Sys., <https://perma.cc/R8UH-LAN2>.² Of the ballots successfully distributed to service members, many were returned too late to be counted under the SVA. *Ibid.* In the end, only 28,000 out of the approximately 1.2 million servicemen and women serving stateside successfully voted in the 1942 election, a failure many attribute, at least in part, to the SVA. *Research Starters: US Military by the Numbers*, Nat'l WWII Museum, <https://perma.cc/5DTS-EA7P>.

Because the SVA did not achieve Congress's goal of ensuring that service members could effectively vote, Congress completely overhauled the Act before the 1944 election, keeping the official war ballot and continuing to limit its availability to stateside service members, but removing any federally mandated deadline for its receipt and repealing nearly every section of the original statute. Pub. L. No. 78-277, ch. 150, 58 Stat. at 136 (amending SVA "by striking out sections 3 to 15"). Congress thus deferred to state law to determine the validity and timeliness of the war ballots, including "any extension of time for the receipt of absentee ballots permitted by State laws." *Id.* ch. 150, tit. III, § 311(b)(3), 58 Stat. at 146. Put simply, Congress

² By the war's end, almost eighteen million Americans had served, eleven million of them after being drafted. *Research Starters: US Military by the Numbers*, Nat'l WWII Museum, <https://perma.cc/5DTS-EA7P>.

recognized the failures of the SVA deadline and returned power to set ballot-receipt deadlines to the states.

That power remained with the states throughout the next three decades, with Congress leaving state ballot-receipt deadlines untouched in both the Federal Voting Assistance Act (“FVAA”), Pub. L. No. 84-296, 69 Stat. 584 (Aug. 9, 1955), and its subsequent amendments, Pub. L. No. 90-343, 82 Stat. 180, 181 (June 18, 1968). The FVAA’s amendments finally extended absentee-ballot voting protections to citizens abroad. Indeed, that legislation saw Congress become even more deferential to state practices, couching its guidance for the states as mere “recommendations”—none of which dealt with any cut-off time for ballot receipt. See Pub. L. No. 84-296, § 101, 69 Stat. at 584–585.

In 1976, Congress passed the Overseas Citizens Voting Rights Act (“OCVRA”). Pub. L. No. 94-203, 89 Stat. 1142 (Jan. 2, 1976). That law required the states to “provide by law for the casting of absentee ballots for Federal elections by all [qualified] citizens residing outside of the United States.” *Id.* § 4(b), 89 Stat. at 1143. But again, Congress required that these ballots—like the SVA war ballots—would count only if returned “not later than the time of closing of the polls in such State on the day of such election.” *Id.* § 4(b)(3), 89 Stat. at 1143. Like the SVA, Section 4(b) of the OCVRA was an explicit preemption of state laws setting ballot-receipt deadlines after election day.

But again, this plan did not work well, as the measures designed to expand voting rights restricted them. Predictably, the OCVRA did not leave voters with enough time to receive absentee ballots, cast their choice, and return the ballots by the time the polls closed on election day. See H.R. Rep. No. 99-765, at

2012–2014 (1986) (noting the inadequacy of existing statutory regime under the OCVRA).

Congress responded with the UOCAVA, Pub. L. No. 99-410, § 103(b)(3), 100 Stat. 924, 925 (Aug. 28, 1986), which repealed the OCVRA’s ballot-receipt deadline and returned authority to the states just as it had done with the SVA. This again let states exercise their authority to protect overseas voters’ rights by “accept[ing] absentee ballots, particularly those from overseas, for a *specified number of days after election day.*” *Id.* at 2012 (emphasis added).

In any event, each time that Congress specified a deadline for receipt of absentee ballots, it used explicit language. It has wisely since removed itself from the regulation of ballot-receipt deadlines, returning that constitutional authority to the states. Nothing in the current Election Day statutes explicitly establishes otherwise.

C. UOCAVA and modern improvements protect the right to vote for citizens overseas

With its passage of UOCAVA, Congress not only returned the ballot-receipt issue to the states but also broadened the right to vote by aiming to assist citizens “when, through no fault of their own, they fail to *receive* their regular absentee ballots in time.” 132 Cong. Rec. E1438-03 (1986) (statement of Rep. Swift) (emphasis added). The statute’s various tools uniformly focus on getting ballots *to* voters, not getting them *back* by any specified time to be counted. See, *e.g.*, Pub. L. No. 99-410, § 101(b), 100 Stat. at 924 (providing a federal write-in ballot to be distributed to soldiers who did not receive their state ballot on time); *id.* § 104(1), 100 Stat. at 926 (recommending that the states use an “official post card form” to allow for “simultaneous voter registration . . . and absentee ballot application”); *id.*

§ 104(3), 100 Stat. at 926 (recommending that states waive voter registration requirements in certain circumstances); *id.* § 104(7), 100 Stat. at 927 (recommending that states “assure that absentee ballots are mailed . . . at the earliest opportunity”).

UOCAVA explicitly embraced state ballot-receipt deadlines. For example, Section 103 created a right to a federal write-in absentee ballot, which counts for overseas voters who do not receive their state ballot in time. But the statute deferred responsibility for counting those ballots to the states, providing that these federal ballots cannot be used when state ballot procedures are satisfied, including when “a State absentee ballot . . . is received . . . not later than the deadline for receipt of the State absentee ballot *under State law*.” Pub. L. No. 99-410, § 103(b)(3), 100 Stat. at 925 (emphasis added); see also *id.* § 103(e)(2), 100 Stat. at 926 (disallowing use of federal write-in absentee ballot when state ballot is made available at least 60 days before “the deadline for receipt of the State ballot *under State law*” (emphasis added)).

Congress was aware that some states counted absentee ballots received after election day. See, *e.g.*, Uniformed and Overseas Citizens Absentee Voting: Hearing on H.R. 4393, 99 Cong. 21 (Feb. 6, 1986) (Statement of Henry Valentino, Director, FVAP) (noting that, by the mid-1980s, twelve states “had extended the deadline for the receipt of voted ballots to a specific number of days after the election”). Thus, for states whose “deadline for receipt . . . under State law” falls after election day, Pub. L. No. 99-410, § 103(e)(2), 100 Stat. at 926, Congress explicitly contemplated the counting of *those* votes.

Congress did nothing to alter this arrangement when it amended UOCAVA through the MOVE Act in 2009. 52 U.S.C. § 20301, *et seq.* Still unsatisfied with overseas voter turnout and still concerned that states did not give voters enough time to cast their ballots, Congress again zeroed in on the *distribution* problem—this time standardizing the timeline for distributing absentee ballots by requiring states to transmit ballots for federal elections at least 45 days before an election. 52 U.S.C. § 20303(a)(8)(A).

Again, Congress chose not to impose an express deadline for ballot receipt and left that determination to the states. In fact, the MOVE Act allowed the Department of Justice to continue its practice of enforcing violations of UOCAVA by *requiring* states to accept ballots received after election day. The DOJ used this enforcement mechanism as early as 1988. See *United States v. Cunningham*, No. 08cv709, 2009 WL 3350028, at *10 n.3 (E.D. Va. Oct. 15, 2009). Where states violate the MOVE Act by failing to mail absentee ballots to voters 45 days before election day, the DOJ regularly requires states to extend the ballot-receipt deadline by the same number of days that the state was tardy in mailing the ballots—i.e., if a state mailed the ballots 40 days before election day, DOJ will extend the state’s ballot-receipt deadline by 5 days. See *Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act*, Dep’t of Just., <https://perma.cc/78KY-3479>.

Congress enacted the MOVE Act to “correct[] many of the flaws that riddle the absentee balloting process for overseas voters.” 155 Cong. Rec. S10663-02 (2009) (statement of Sen. Schumer). But it left for the states the power to decide when those ballots must be returned to be counted. See 52 U.S.C. § 20303(b)(3),

(e)(2). Congress has twice before taken that power from the states, but in both instances Congress gave that power back. No current federal law explicitly sets a ballot-receipt deadline that would preempt state law. Therefore, Mississippi Code § 23-15-637(1)(a) exercises the constitutional authority granted to the states and follows the long history of states dictating when ballots for federal elections must be received to qualify for the canvass.

* * *

“Voting is a right, not a privilege, and a sacred element of the democratic process. For our citizens overseas, voting by absentee ballot may be the only practical means to exercise that right.” *Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d at 1305. As our Nation’s history shows, states have created the infrastructure to accommodate soldiers voting from afar. That is why Congress has largely remained silent on when ballots must be received, allowing states to count ballots received after election day.

When Congress did set deadlines for absentee ballot receipt, it did so explicitly. The Election Day statutes are silent in that respect, and the plain text does not impose a ballot-receipt deadline or discuss which ballots may be counted. Reading between the lines to alter two centuries of complementary state and federal practice when it comes to absentee voting would not only upset the Constitution’s design but ignore Congress’s preference for states to allow their service members and other overseas and absent voters’ ballots to count.

Affirming the Fifth Circuit’s decision would create another barrier for overseas voters to cast their ballots and have those ballots count. The long history of state

determination of the ballot-receipt deadline confirms that the Election Day statutes do not, *sub silentio*, vacate the nearly two centuries of work done by both state and federal governments to effectuate the voting rights of military service personnel, diplomatic personnel, and their families. Like UOCAVA, Mississippi's law makes it easier for service members and other overseas voters to have their votes counted. If Congress intended to impose a federal ballot receipt deadline, it would have done so explicitly.

CONCLUSION

The Court should reverse the decision below and hold that the federal Election Day statutes do not preempt state laws, like Mississippi's, that allow ballots cast by election day to be received and counted after that day.

Respectfully submitted,

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APPENDIX

Fifteen states, Washington, D.C., and several territories accept a mailed ballot from any voter that is received within a certain time after election day.

- Alaska Stat. § 15.20.081(e).
- Cal. Elec. Code § 3020(b).
- 10 Ill. Comp. Stat. § 5/19-8(c).
- Md. Code Ann., Elec. Law § 11-302(c)(1).
- Mass. Gen. Laws ch. 54, § 93.
- Miss. Code Ann. § 23-15-637.
- Nev. Rev. Stat. § 293.269921(1)(b).
- N.J. Rev. Stat. § 19:63-22(a).
- N.Y. Elec. Law § 8-412(1).
- Ohio Rev. Code Ann. § 3509.05(D)(2)(a).
- Or. Rev. Stat. § 253.070(3)(b).
- Tex. Elec. Code Ann. § 86.007(a).
- Va. Code Ann. § 24.2-709(B).
- Wash. Rev. Code § 29A.60.190.
- W. Va. Code § 3-3-5(g)(2).
- D.C. Code § 1-1001.05(10A).
- 3 Guam Code Ann. § 10114.
- P.R. Laws Ann. tit. 16, § 4736.
- V.I. Code Ann. tit. 18, § 665.

(1a)

Twenty-nine states, Washington, D.C., and several territories have adopted specific ballot-receipt laws applicable to overseas voters.

- Ala. Code § 17-11-18(b).
- Alaska Stat. § 15.20.081(h).
- Ark. Code Ann. § 7-5-411(a)(1)(A)(ii).
- Cal. Elec. Code § 3020(b).
- Colo. Rev. Stat. § 1-8.3-113(2).
- Fla. Stat. § 101.6952(5).
- Ga. Code § 21-2-386(a)(1)(G).
- 10 Ill. Comp. Stat. §§ 5/20-2, 5/20-2.1.
- Ind. Code § 3-12-1-17(b).
- Iowa Code § 53.44.
- Md. Code Ann. Elec. Law § 11-302(c)(1).
- Mass. Gen. Laws Ann. ch. 54, §§ 93, 95.
- Mich. Comp. Laws § 168.759a(18).
- Miss. Code Ann. §§ 23-15-637, 23-15-699.
- Mo. Rev. Stat. § 115.920(1).
- Mont. Code Ann. §§ 13-21-20, 13-21-226
- N.J. Rev. Stat. §§ 19:59-11, 19:63-22(a).
- N.Y. Elec. Law § 10-114(1).
- N.C. Gen. Stat. § 163-258.12.
- N.D. Cent. Code § 16.1-07-24.
- Ohio Rev. Code Ann. § 3511.11(B).
- Or. Rev. Stat. § 253.585(3)(b).
- 25 Pa. Cons. Stat. § 3511(a).

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- 17 R.I. Gen. Laws § 17-20-16.
- S.C. Code Ann. § 7-15-700(A).
- Tex. Elec. Code Ann. §§ 86.007(d).
- Va. Code Ann. § 24.2-709(C).
- Wash. Rev. Code § 29A.60.190.
- W. Va. Code § 3-3-5(g)(2).
- D.C. Code Ann. § 1-1061.10.
- 3 Guam Code Ann. § 10114.
- P.R. Laws Ann. tit. 16, § 4736.
- V.I. Code Ann. tit. 18, § 665.