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 REPUBLICAN RESPONDENTS

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QUESTION PRESENTED

Over a century ago, Congress designated "the day for the election" for U.S. House, Senate, and President. *See* 2 U.S.C. §§1, 7; 3 U.S.C. §1. This trio of statutes "mandates holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster v. Love*, 522 U.S. 67, 70 (1997). Any state law that "conflicts" with Congress's timing decision is preempted. *Id.* at 74. Mississippi permits receipt of ballots up to five days after the uniform national election day. So long as mail ballots are "postmarked on or before the date of the election and received by the registrar no more than five (5) business days after the election," Mississippi counts them. Miss. Code §23-15-637(1)(a).

The question presented is whether the federal election-day statutes preempt state laws that accept ballots received by election officials after "the day for the election." *See* 2 U.S.C. §§1, 7; 3 U.S.C. §1.

RULE 29.6 DISCLOSURE STATEMENT

I, Gilbert C. Dickey, counsel for the Republican National Committee and the Republican Party of Mississippi, and a member of the Bar of this Court, certify that the Republican National Committee and the Republican Party of Mississippi have no parent corporation, and no publicly held company owns 10% or more of their stock.

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INTRODUCTION

Most Americans remember a time when results came quickly after election day. Each election cycle dims that memory as States experiment with novel ballot-handling rules. One of those experiments is the prolonged receipt of mail ballots—three, five, fourteen, or even more days after election day.

These post-election receipt deadlines invite "the chaos and suspicions of impropriety that can ensue if thousands of absentee ballots flow in after election day and potentially flip the results of an election." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). It's hard to blame Americans for those suspicions when some States produce quick results, while others take days to even know how many ballots need to be counted. When news anchors remind voters, "It's not over yet," they're right under any ordinary understanding. As long as ballots are still coming in, the election isn't over.

Congress addressed this problem over a century ago when it established a uniform day for federal elections. Exercising its powers to set the time of federal elections, Congress instructed that "the day for the election" of congressional representatives is the "Tuesday next after the 1st Monday in November" in "every even numbered year." 2 U.S.C. §7. Congress set the same election day for presidential elections. 3 U.S.C. §1. And after the Seventeenth Amendment's ratification, it scheduled "the regular election" of Senators for that same Tuesday. 2 U.S.C. §1.

When Congress designated a single "day for the election," it set a deadline. If a state law extends the

election after that deadline, "it conflicts with" Congress's timing decision "and to that extent is void." *Foster v. Love*, 522 U.S. 67, 74 (1997). Since "the election concludes when all ballots are received," the Fifth Circuit held that Mississippi's law allowing some late-arriving ballots to be counted is void. App.18a.

"Text, precedent, and historical practice" confirm that conclusion. App.2a-3a. The election-day statutes govern when States must close the ballot box, not when voters must make their selection. That's why contemporary dictionaries define "election" as a public process facilitated by the State, and it's why the statutes regulate States, not voters. That ordinary meaning also accords with the Court's holding in *Foster*, since ballot receipt is the final step in the "combined actions of voters and officials" that constitute the "final selection of an officeholder." 522 U.S. at 71. Historical practice shows that "States understood" that the ballot box had to close on election day "[f]or over a century after Congress established a uniform federal Election Day." App.14a.

Mississippi's Secretary of State and Intervenors disagree. They claim that when Congress established the day for the "election," it set a deadline for voters to make their "choice by casting their ballots." Sec'y Br.22-23; *accord* Interv. Br.10. And they assert that a voter casts a ballot by disposing of it in whatever manner the State says, regardless of when or whether it ends up in the hands of election officials. *See* Sec'y Br.2. Their interpretation conflicts with the text, confusing "[a] voter's *selection* of a candidate" with the public *election* of the candidate, an election that occurs only upon receipt of ballots by the State. App.10a. It conflicts with precedent, reducing the

"combined actions of voters and officials" into the unilateral choice of the voter. *Foster*, 522 U.S. at 71. And it conflicts with historical practice, which uniformly supports requiring ballot receipt by election day.

Their theory suffers from another flaw too: it makes these preemptive statutes preempt nothing. The parties agree that in setting the uniform election day Congress directed when States could conduct federal elections. But under the Secretary's and Intervenors' theory, the "election" is whatever each State says it is. Nothing prevents a State from allowing voters to deliver ballots after the election in whatever manner the States see fit, so long they "make their final 'choice' on or before that day." *Cf.* Interv. Br.10. If the election-day statutes say nothing about *what* must be done on election day, they say nothing at all.

The Fifth Circuit rightly held that the "day for the election" has a fixed meaning. It doesn't mean whatever each State wants it to mean. It means the day by which ballots must be "*received* by state officials." App.3a. The Court should affirm.

STATEMENT

A. Legal Background

Congress has the final word on the timing of federal elections. The Electors Clause gives Congress exclusive power to "determine the Time of chusing the Electors" for the offices of President and Vice President. U.S. Const. art. II, §1. And while the Elections Clause gives States initial authority to set the "Times, Places and Manner of holding Elections for Senators and Representatives," Congress can "at any time by Law make or alter such Regulations." *Id.*, art. I, §4.

Together, the presidential Electors Clause and the congressional Elections Clause are "counterpart[s]" that "regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say." *Foster*, 522 U.S. at 71-72 .

When Congress wields its Elections (and Electors) Clause authority, it "*necessarily* displaces" state law. *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 14 (2013). That's "[b]ecause the power the Elections Clause confers is none other than the power to pre-empt." *Id.* The Court ordinarily presumes that Congress is "reluctant to pre-empt" state laws. *Id.* But that presumption "does not hold when Congress acts under" these clauses, "which empower[] Congress to 'make or alter' state election regulations." *Id.* The upshot is that the "presumption against pre-emption" doesn't apply to federal laws regulating the time, place, or manner of federal elections. *Id.* at 13-14.

The election-day statutes preempt States' timing rules for federal elections. Presidential "electors" must "be appointed, in each State, on election day." 3 U.S.C. §1. Congress recently defined "election day" for presidential elections as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State." *Id.* §21(1). That definition draws from the longstanding statute governing House elections, which in 1872 "established" the "Tuesday next after the 1st Monday in November, in every even numbered year" as the "day for the election … of Representatives and Delegates to the Congress." 2 U.S.C. §7. Senate elections follow suit: Senators are "elected by the people" at "the regular election" that precedes when that Senate seat's term ends. *Id.* §1.

Congress accounted for contingencies like vacancies, run-offs, and force majeure events. For example, when a "vacancy is caused by a failure to elect at the time prescribed by law," States can hold runoff elections after the federal election day. *Id.* §8(a). When a vacancy is caused "by the death, resignation, or incapacity of a person elected," States can hold special elections to fill the vacancy. *Id.* Similarly, when "force majeure events that are extraordinary and catastrophic" require a State to "modif[y] the period of voting," "'election day' shall include the modified period of voting" for States that use a "popular vote" to appoint electors. 3 U.S.C. §21(1). In these limited circumstances, States can hold federal elections on "a day other than the uniform federal election day." *Foster*, 522 U.S. at 72 n.3. Otherwise, the federal election day "necessarily supersedes" conflicting state regulations. *Ex parte Siebold*, 100 U.S. 371, 384 (1879).

B. History of the Federal Election Day

Before Congress designated the uniform election day, national elections were characterized by month-long voting periods. In 1792, Congress required States to appoint presidential electors "within thirty-four days preceding the first Wednesday in December in every fourth year succeeding the last election." Act of Mar. 1, 1792, ch. 8, §1, 1 Stat. 239. That statute governed presidential elections for the better part of a century, leaving "conduct of federal elections to the diversity of state arrangements," which in some States included "the practice of multi-day voting." *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1171-72 (9th Cir. 2001).

By the 1840s, this system no longer worked. States that adopted multi-day voting periods were plagued by fraud, delay, and other issues. Cong. Globe, 28th Cong. 2d Sess. 14-15, 29 (1844). "[B]oth parties [were] charging each other with having committed great frauds, and both professed to be anxious to guard against them in future." *Id.* at 29.

Congress's solution: a uniform election day. In 1845, Congress mandated that in presidential election years "the electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November." Act of Jan. 23, 1845, ch. 1, 5 Stat. 721. The bill aimed to "remov[e] the possibility of introducing fraud to any great extent in these elections." Cong. Globe, 28th Cong. 1st Sess. 679 (1844) (statement of Sen. Atherton). Congress wanted to remove even the "suspicion" of fraud: "for what was of more consequence than that the people should have confidence in their rulers, and in the manner of their election?" *Id.*

At the time, voting "occurred contemporaneously with receipt of votes." App.14a. The early system of elections by voice vote or show of hands had been gradually replaced by handwritten ballots made at home and brought to the polling place on election day. *Burson v. Freeman*, 504 U.S. 191, 200 (1992) (plurality op.).

In-person voting remained a nearly universal requirement until the Civil War. For the first time, the Union saw widespread absentee voting by soldiers who were away from home. States employed two methods to ensure that soldiers deployed across the nation could still exercise their right to vote. Josiah

Henry Benton, Voting in the Field 15 (1915), perma.cc/QEY2-92FK.

Under the "voting in the field" method, election officials conducted a remote election among the soldiers in field. "Voting in the field" featured all the hallmarks of a self-contained election: Registrars maintained the voter rolls, soldiers deposited their votes in the ballot box, judges resolved challenges, and officials tabulated results, which were sent back to the home State. *Id.* Through this method, the soldier's "connection with his vote ended when he put it in the box, precisely as it would have ended if he had put it into the box in his voting precinct, at home." *Id.*

The second method was known as "proxy voting." "Proxy voting" used an authorized agent who would take the soldier's ballot and cast it into the ballot box back home. *Id.* The soldier's agent would deliver his ballot, "[o]n the day of the election, between the opening and the closing of the polls." *Id.* at 145 (describing New York's procedure). "Under this method it was claimed that the voter's connection with his ballot did not end until it was cast into the box at the home precinct, and therefore that the soldier really did vote, not in the field, but in his precinct." *Id.* at 15.

That soldiers—not election officials—would receive ballots on election day was a frequent source of objection to field-voting. *Id.* at 17. The problem "was avoided by the appointment in the soldiers' voting acts, of officers or soldiers to act in an election as constables, supervisors, etc., as the laws of the State might designate, would act in elections at home." *Id.* In other words, States designated the soldiers to serve as state election officials—including judges, clerks,

registrars, supervisors, and constables—so that they could receive ballots on election day. *E.g.*, *id.* at 17, 49-50, 71-72, 74, 87-89, 106-07, 115-16, 122-26. These soldiers conducted a portion of the election, sending the tabulated results back to their home States.

After the Civil War, Congress extended the uniform election day to the House of Representatives. "The intense 1871-72 debates became even more explicit in addressing multi-day voting." *Keisling*, 259 F.3d at 1173. The congressional law provided that "the Tuesday next after the first Monday in November, in every second year … is … established as the day for the election." Act of Feb. 2, 1872, ch. 11, §3, 17 Stat. 28. Finally, soon after the Seventeenth Amendment was ratified, Congress included Senators in the uniform election day. *See* Act of June 4, 1914, ch. 103, §1, 38 Stat. 384.

When war returned, so did absentee voting. During World War I, States still required election-day receipt. A number of States returned to the Civil War playbook, requiring either field or proxy voting. *See* P. Orman Ray, *Military Absent-Voting Laws*, 12 Am. Pol. Sci. Rev. 461, 461-62 (1918). For the first time, a few States experimented with post-election mail deadlines for American soldiers serving overseas. *E.g.*, Act of Mar. 28, 1918, ch. 78, sec. 1, §223(g), 1918 Md. Laws 130, 130; Act of Mar. 22, 1919, §6, Kan. Rev. Stat. §25-1106. Those laws and other post-election receipt laws were short-lived. By 1977, only two States counted ballots received after election day. *Overseas Absentee Voting: Hearing on S. 703 Before the S. Comm on Rules and Admin*, 95th Cong. 33-34 (1977).

In recent years, States have begun to experiment with expansive post-election receipt rules. Illinois now counts ballots received up to fourteen days after election day, so long as the ballot was postmarked or certified on or before election day. 10 Ill. Comp. Stat. 5/19-8, 5/18A-15(a). Washington doesn't even have a deadline. Mail ballots are counted so long as they are "postmarked no later than the day of the … election," regardless of when they arrive. Wash. Rev. Code §29A.40.110(3). While most of these States require at least a postmark by election day, others will count mail ballots that do "not bear a postmark date" so long as they are received "within 48 hours" after "the closing of the polls." *E.g.*, N.J. Stat. §19:63-22(a).

Many post-election receipt laws are products of the COVID-19 pandemic. Although some States reverted to their election-day deadlines after the pandemic, Mississippi cemented its post-election deadline in state law. *See* 2024 Miss. Laws ch. 536. Mississippi permits receipt of mail ballots up to five business days after the election so long as the ballot is postmarked by election day. Miss. Code §23-15-637(1)(a).

C. Procedural History

In January 2024, the Republican National Committee, the Mississippi Republican Party, Mississippi voter James Perry, and county election commissioner Matthew Lamb sued the state officials responsible for enforcing Mississippi's ballot-receipt deadline. ROA.23-36. The Republican Plaintiffs claim that the federal election-day statutes preempt Mississippi's law accepting ballots that are received after election day. ROA.33-36.

The Libertarian Party of Mississippi filed a similar suit against the same defendants raising the same claims. App.5a. The district court consolidated the cases and allowed Vet Voice Foundation and the Mississippi Alliance for Retired Americans to intervene as defendants. App.5a-6a & n.2.

The district court granted summary judgment for the defendants. App.59a-85a. It found that it had jurisdiction over both cases because Mississippi's ballot deadline injured the political committees' organizational activities. App.62-72a. It thus didn't address the individual Plaintiffs' standing or the political committees' associational standing on behalf of voters and candidates. *Cf. Bost v. Ill. State Bd. of Elections*, 607 U.S. __, 2026 WL 96707, at *2.

On the merits, the district court ruled that Mississippi's law didn't conflict with the federal election-day statutes. App.72a-82a. The district court reasoned that "no 'final selection' is made after the federal election day under Mississippi's law," because "[a]ll that occurs after election day is the delivery and counting of ballots." App.79a (emphasis omitted). The court looked to court-ordered extensions of ballot-receipt deadlines under the Uniformed and Overseas Citizen Absentee Voting Act, and concluded that it must read Mississippi's law "in harmony" with those orders. App.79a-80a. The court declined to consult history and tradition to discern the meaning of "election," instead relying on the "persuasive" reasoning of other district-court opinions. App.78a-82a. The court concluded that Mississippi's post-election receipt rule "is consistent with federal law." App.84a.

A unanimous panel of the Fifth Circuit reversed on the merits. The court held that the "'day for the election' is the day by which ballots must be both cast by voters and received by state officials." App.3a (emphasis omitted). "Text, precedent, and historical practice" each support that conclusion. App.2a-3a.

On text, the court dismissed the Secretary's argument that "election" in the federal statutes refers to each individual voter's choice. App.10a. That definition confused a "voter's *selection* of a candidate" with "the public's *election* of the candidate." App.10a. Both parties relied on dictionary definitions. But the court found that dictionaries weren't very helpful because most didn't mention "deadlines or ballot receipt." App.8a-9a n.5.

On precedent, the Fifth Circuit consulted this Court's decision in *Foster v. Love*. That case didn't require this Court to "isolat[e] precisely what acts a State must cause to be done on federal election day." *Foster*, 522 U.S. at 72. But it established several principles that guided the Fifth Circuit's decision.

First, "*Foster* teaches that elections involve an element of government action." App.9a. The Fifth Circuit observed that the election-day statutes "plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder.'" App.9a (quoting *Foster*, 522 U.S. at 71). The court thus rejected the State's argument that "a ballot can be 'cast' before it is received" by election officials. App.10a. The "combined actions" requirement means that "a ballot is 'cast' when the State takes custody of it." App.10a.

Second, the Fifth Circuit recognized that the "day for the election" requires "finality." App.10a-12a. An "election" is final only "when the final ballots are received and the electorate, not the individual selector, has chosen." App.11a (emphasis omitted). It pointed to several sources that "undermine[d] the State's claim that ballots are 'final' when mailed." App.12a. These sources included Mississippi regulations providing that mail ballots "'shall be final, if accepted by the Resolution Board' after receipt,"App.11a (quoting 01-17 Miss. Code R. §2.3(a)), a Montana Supreme Court case holding that a state law allowing ballots to be received after election day was preempted, App.11a (citing *Maddox v. Bd. of State Canvassers*, 149 P.2d 112 (Mont. 1944)), and federal postal-service rules allowing "senders to recall mail," App.12a (citing U.S. Postal Serv., Mailing Standards of the U.S. Postal Service Domestic Mail Manual, Domestic Mail Manual, §§507.5, 703.8 (July 14, 2024), perma.cc/43FK-H25K).

Third, the Fifth Circuit applied this Court's holding that an election "'may not be consummated prior to federal election day.'" App.12a (quoting *Foster*, 522 U.S. at 72 n.4). Consulting circuit cases that upheld early voting procedures, the court reasoned that "the election is consummated when the last ballot is received and the ballot box is closed." App.12a-13a. Although States count, tabulate, and reconcile ballots after election day, it is the "[r]eceipt of the last ballot" that "constitutes consummation of the election, and it must occur on Election Day." App.13a.

The Fifth Circuit found that history confirmed that election officials must receive ballots by election day. App.14a. "[A]t the time Congress established a

uniform election day in 1845 and 1872, voting and ballot receipt necessarily occurred at the same time." App.14a. Field voting and proxy voting during the Civil War confirm "that official receipt marked the end of voting." App.16a. And the scattered "'late-in-time outliers'" implementing postelection receipt in the 20th century "say nothing about the original public meaning of the Election-Day statutes." App.18a.

The court found the Secretary's counterarguments unpersuasive. The other federal statutes on which they relied, it observed, "are silent on the deadline for ballot receipt," and so have little bearing on the meaning of "election." App.19a-20a (emphasis omitted). As for the few statutes that permitted exceptions, "the fact that Congress authorized a narrow exception for potentially ineligible voters to cast provisional ballots after Election Day does not impliedly repeal all of the other federal laws that impose a singular, uniform Election Day for every other voter in America." App.21a. Because the Elections Clause permits Congress to "alter such Regulations," U.S. Const. art. I, §4, those statutes prove at most that when "Congress wants to make exceptions to the federal Election Day statutes, it has done so," App.23a.

The court also rejected the Secretary's expansive reading of *Republican National Committee v. Democratic National Committee*, 589 U.S. 423 (2020). In that case, this Court reversed a district-court decision that "would allow voters to mail their ballots after election day." *Id.* at 426. The Secretary's argument that *RNC v. DNC* "proves the act of mailing ballots equates to voting" is neither "logical nor necessary." App.24a. The Fifth Circuit thus reversed on the

merits and remanded to the district court for further proceedings. App.24a-25a.

The full court denied Intervenors' petition for rehearing en banc. Judge Graves, joined by four other judges, dissented from the denial of rehearing. Judge Oldham, joined by three other judges, concurred in the denial. App.33a.

The Secretary timely petitioned for a writ of certiorari. The Court granted the writ on November 10, 2025.

SUMMARY OF THE ARGUMENT

Congress has displaced state laws that extend the election beyond "the day for the election." 2 U.S.C. §7. Text, precedent, and history show that the "day for the election" is the final day that ballots may be received by election officials. Mississippi counts ballots that are received up to "five (5) business days after the election." Miss. Code §23-15-637(1)(a). Mississippi's law is thus preempted.

I. The statutory text prohibits counting ballots that are received after "the day for the election." Contemporary dictionaries confirm that "election" as Congress used it refers to the public process of selecting officers. That process culminates with receipt of ballots by the State, not with the voter's choice of a candidate. The election-day statutes tell States when they must conclude the public process—not when voters must make their choices.

The Secretary can't avoid that statutory text and context by reframing the issue around "ballot casting" in whatever way state law chooses. Sec'y Br.25. No preemption statute works that way. To hold that the

meaning of "election" turns on what each State requires would subordinate the federal statutes to state law, draining the statutes of their preemptive effect.

Regardless, Mississippi regulations belie even the Secretary's theory. Mississippi treats mail ballots as final only after "receipt," processing, and deposit into a "secure ballot box." 01-17 Miss. Code R. §2.3(a). There's good reason for that rule. The USPS allows voters to recall mail within a certain time period. Voters can thus rescind their so-called final vote even after election day. All of this undermines the Secretary's notion that a ballot is final when the voter puts it in the mail. And it reiterates the need for a clear articulation of what the federal statutes require: receipt.

II. Historical practice supports that intuitive reading. For decades, States did not count ballots received after election day. It was not a practice at the time Congress enacted the election-day statutes, and it remained unheard of for many decades after. A few instances of post-election receipt popped up in the 20th century, but those rare and mostly short-lived laws do not establish a practice that could overcome the historical consensus.

III. Precedent supports a national receipt deadline. In *Foster v. Love*, the Court held that Louisiana's open-primary system conflicted with the election-day statutes. 522 U.S. at 69. That was true even though the election-day statutes say nothing about open primaries. What mattered was that Louisiana's system consummated the election during the primary, which conflicted with the meaning of "the day for the election." *Id.* Mississippi's post-election consummation

similarly conflicts. Ordinary absentee and early voting do not present the problem of leaving no conclusive action on election day. But post-election receipt of ballots does.

IV. No other federal statute revises the meaning of the "day for the election." Indeed, each time Congress has spoken on the timing of mail ballots, it has confirmed ballot receipt as the definitive election-day act. When Congress has provided for absentee voting in limited contexts, it has never permitted post-election receipt of ballots—either explicitly or implicitly. No federal statute sanctions that practice, and no inference that Congress acquiesced to relatively new state practices can overcome the meaning of the election-day statutes.

ARGUMENT

I. The plain meaning of "election day" is the day that the ballot box closes.

A. The "day for the election" is the day the State must conclude the public selection of officials. It is the final day "the ballots are received and the proverbial ballot box is closed." App.10a. Text, context, and statutory structure confirm that plain meaning.

Contemporary dictionary definitions confirm that Congress used "election" to refer to the public process of selecting officers, which necessarily terminates with receipt of ballots by the State. When Congress established the "day for the election" in 1872, "election" meant "[t]he act or process of choosing a person or persons for office by vote." III William Dwight Whitney & Benjamin E. Smith, The Century Dictionary and Cyclopedia 1866 (1901) (emphasis added).

Elections "to office" meant "the operation of choosing a representative, officer, &c., such as a member of congress or parliament, director, or the like." I Stewart Rapalje & Robert Lawrence, A Dictionary of American and English Law 436 (1883). Or as to timing, "election" meant "[t]he day of a *public* choice of officers." Noah Webster, An American Dictionary of the English Language 288 (1830) (emphasis added).

An "election" is thus the State's public process of selecting officers. The result of that process "is fixed when all of the ballots are received and the proverbial ballot box is closed." App.10a. Until all ballots to be counted in that election are in the State's custody, the election remains ongoing. The election-day statutes reflect "the longstanding general rule that the federal Election Day is the singular day on which the ballot box closes." App.22a.

No doubt "election" can bear many meanings. Just before Congress adopted the first of the election-day statutes, Webster's Dictionary listed nine definitions of "election." They included:

1. the "act of choosing" or "selecting."
2. the "act of choosing a person to fill an office … as by ballot."
3. a "[c]hoice; voluntary preference."

…

7. the "public choice of officers."
8. the "day of a public choice of officers." Webster's Dictionary 288.

A "voter's election" is different from a "candidate's election," which is different from a "State's election."

The word "election" in each of those uses carries a distinct meaning: the "voter's choice," the "candidate's race," and the "State's appointment," respectively. The Court need look no further than its opinion in *Bost*, in which it used the word "election" to refer both to the "electoral process" and to "Congressman Bost's election." 2026 WL 96707, at *3, *5.

But statutory context confirms that Congress referred to the States' closing of the ballot box in the election-day statutes. Recall that Congress adopted the statutes under its Elections Clause and Electors Clause powers. Those clauses grant "authority to issue procedural regulations." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995). Those procedural regulations necessarily "displace[]" state procedures, so no "presumption against pre-emption" applies. *Inter Tribal Council*, 570 U.S. at 13-14. Congress exercised that power to limit when *States* may conduct elections. *See* 2 U.S.C. §7 (setting election day "in each of the States"); *id.* §1 (discussing a "regular election held in any State"); 3 U.S.C. §1 (discussing election "in each State"). This context clarifies that the election at issue is the State's election—the final public choice of an officer made when a State closes the ballot box.

The Secretary ignores this context when defining election. Instead, he selects some of the definitions of "election" to argue that what matters is when the voters have made their choices. Sec'y Br.24. His argument goes like this: A common definition of "election" is the "'choice'" or "'act of choosing a person to fill an office.'" *Id.* (cleaned up). Therefore, "[t]his plain-text understanding means that an election occurs when the voters have cast their ballots." *Id.* at 25.

This logic skips a step: Nowhere does the Secretary argue that Congress *used* his preferred definition, as opposed to other definitions like "[t]he act or process of choosing a person or persons for office by vote." Century Dictionary 1866. Asking what is required for a voter to make a "choice" on a particular day will yield different answers than asking what is required for a State to hold a "day of a public choice of officers." Webster's Dictionary 288.

Congress regulated the States' selection of representatives. When Congress "established" that Tuesday in November "as the day for the election," 2 U.S.C. §7, it restricted when States must conclude elections, not how or when voters make their "choice[s]" before that point, *cf.* Webster's Dictionary 288. So, too, a "regular election held in any State" describes the public process, 2 U.S.C. §1, not individual voters' selections. And it makes far less sense to read the statute like the Secretary: that Senators are chosen at "the regular ~~election~~ [voters' choices] held in any State." *Id.* §1. Tellingly, in *Bost*, not once did the Court use the word "election" to refer to the voters' choices. 2026 WL 96707, at *5.

Congress's focus on the State's selection is confirmed by related provisions. For example, 2 U.S.C. §8 "provides that a State may hold a congressional election on a day other than the uniform federal election day" in certain narrow circumstances. *Foster*, 522 U.S. at 71 n.3. So a State can hold runoff elections after the uniform federal election day when a "vacancy is caused by a failure to elect at the time prescribed by law." 2 U.S.C. §8(a). A "failure to elect" cannot mean a failure of each voter to make his or her "choice." Rather, a "failure to elect" refers to "'exigent'

circumstances warranting state rescheduling," such as a "tie vote," a "plurality outcome," "natural disasters," or "state common law fraud." *Pub. Citizen, Inc. v. Miller*, 813 F. Supp. 821, 830 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993). Those circumstances have nothing to do with when individual voters make their choices. Each voter has made his or her choice even if, for example, those collective choices result in a tie. The "failure to elect" thus refers to disruptions (or corruptions) of the State's process in appointing a public officer. *Accord* 3 U.S.C. §21(1) (allowing for similar contingencies and referring to the "election" as the "period of voting"). This understanding is confirmed by an earlier version of the presidential statute, which—before a broadening of the exceptions language—provided for a later appointment "when any *State* … shall fail to make a choice" on election day. 5 Stat. at 721 (emphasis added).

Congress didn't need to carve out exceptions for post-election acts such as counting ballots or certifying results because those acts occur after the "election." But runoffs and vacancies renew the opportunity for a "final choice … by the duly qualified electors," *Newberry v. United States*, 256 U.S. 232, 250 (1921), which is why "section 8 creates an exception to section 7's absolute rule in [that] limited class of cases," *Busbee v. Smith*, 549 F. Supp. 494, 526 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983). Congress's careful exceptions quash the Secretary's fear that the "day for the election" includes back-end administrative processes to canvass, tally, and certify. *See* Sec'y Br.25. Rather, the "election" refers to the receipt of new ballots that have not been included in the total. *See* 2

U.S.C. §8(a). Unless an exception applies, that act must be completed by election day.

Nor did Congress need to carve out pre-election steps like sending an absentee ballot. Since "election" refers to the final public choice of a candidate, a voter's earlier selection doesn't conflict with the election-day deadline. The mailing of a ballot isn't "the combined actions of voters and officials meant to make a final selection of an officeholder." *Foster*, 522 U.S. at 71. So a State complies with the election-day statutes when it closes the ballot box on election day.

The Secretary can't rely on congressional silence either. He argues that because the statutes are "spare" and don't mention ballot receipt, "the federal election-day statutes do not set a ballot-receipt deadline." Sec'y Br.25-26. But that magic-words test proves too much. The statutes also don't mention when voters must fill out or relinquish custody of their ballots, but the Secretary's approach would demand those words to support his "voters' choices" reading. Instead of magic words, this case "turns on the answer to the question: 'What is an election?'" *Millsaps v. Thompson*, 259 F.3d 535, 543 (6th Cir. 2001). The Secretary offers an assumption as his answer.

B. Even if Congress had used "election" to mean the voters' final choices, the Secretary arbitrarily defines when that moment is. "Voters make [their] choice," he insists, "when they cast their ballots—mark and submit them to election officials." Sec'y Br.23. But he never supports this *ipse dixit*.

To start, the phrase "ballot casting" gets the Secretary nowhere. Hidden in that term is an assumption

that a ballot is final when a voter relinquishes custody over the ballot, rather than when election officials receive the ballot. The Secretary doesn't justify that assumption anywhere. It's not in his dictionary definitions. It's not in the statutory context or structure. And it's not in the caselaw. Nor could it be: As the Secretary acknowledges (at 31-32), "at the time Congress established a uniform election day in 1845 and 1872, voting and ballot receipt necessarily occurred at the same time." App.14a. The Montana Supreme Court thus observed that "[n]othing short of the delivery of the ballot to the election officials for deposit in the ballot box constitute[d] casting the ballot." *Maddox*, 149 P.2d at 115. That was the ordinary meaning of "cast" for decades after Congress enacted the election-day statutes, and even long after absentee voting had become ubiquitous. *See Cast*, Black's Law Dictionary (4th rev. ed. 1968) (citing *Maddox*, 149 P.2d at 115). And it is consistent with the ordinary understanding that the public act of choosing a person to fill an office requires closing the ballot box. The Secretary offers no support for his understanding that the "election" turns only on when the voter gives up a ballot.

The Secretary's answer to this problem is to deprive the election-day statutes of any meaningful preemptive effect. The voter must mark and submit her ballot "as state law requires." Sec'y Br.25. But that limitation just collapses the meaning of "election" into whatever state law says it means. A State could say that a ballot is timely cast once the voter hands it over to a family member or a party operative to deliver to the polling place. Or the State could simply require an affidavit that says, "I filled out this ballot on or before Tuesday, November 3." All that Congress

did—according to the Secretary—was require ballot casting on election day. And ballot casting is whatever a State decides it is. *E.g.*, *id.* ("[A]n election occurs when the voters have cast their ballots … as state law requires."); Interv. Br.26 ("*Maddox* thus holds that *state law* determines when ballots must be received."). That limitless rule empties the federal statutes of meaningful preemptive effect.

C. Even if States could define for themselves what it means to conduct an "election," Mississippi's definition favors Respondents. The Secretary's own regulations state that "an absentee ballot is the final vote of a voter when, during absentee ballot processing by the Resolution Board, the ballot is marked accepted." 01-17 Miss. Code R. §2.1. Mail ballots are "final, if accepted by the Resolution Board" only after "receipt," processing, and deposit into a "secure ballot box." *Id.* at §2.3(a).

Intervenors shrug off those rules as mere "regulation[s]," which they claim cannot "determine timeliness under Mississippi law." Interv. Br.28. The Secretary doesn't endorse that neutering of state regulations. Instead, he claims those regulations mesh with the State's use of "affidavit ballots" (sometimes called provisional ballots), by which voters can vote in person even after mailing an absentee ballot. Sec'y Br.41. He argues that because an "affidavit ballot will be accepted and counted only if the voter's 'absentee ballot has not been received within five (5) business days after the election,'" a "mail-in absentee ballot is final when mailed." *Id.* Yet, in reality, the regulations compel the opposite conclusion: If a ballot is "final" when the voter puts it in the mail, the affidavit ballot allows

two "final" ballots—one on mailing, and the other on the day the voter casts the affidavit ballot in person.

The State's measure of finality is also at odds with U.S. Postal Service regulations. USPS allows voters to recall various types of mail. *See* USPS Manual §507.5; 39 C.F.R. §§111.1, 211.2. The Secretary responds that "Mississippi law does not allow voters to recall a mailed ballot." Sec'y Br.41. But that's just a concession that the State's measure of finality is at odds with how USPS treats mail, not to mention other common carriers voters can use under Mississippi's law. *See* Miss. Code §23-15-637(1)(a). Intervenors give up half the game by arguing that Mississippi's regime comports with the election-day statutes because "[n]o absentee voter can make their choice after election day." Interv. Br.19. But a withdrawn ballot changes the voter's choice—and the tally of votes—no less than any other change. Whether "a mail-in ballot has ever been" recalled is beside the point. *Contra* Sec'y Br.41. Withdrawal is "theoretically possible." App.45a n.4. Mississippi can no more allow for the possibility of recalling mail votes after election day (even if no voter recalls them), than it could reopen the polls on the Wednesday following election day (even if no voter shows up).

At bottom, the Secretary continues to confuse the "voter's *selection* of a candidate" for "the public's *election* of the candidate." App.10a. That confusion leads to his illogical conclusion that "ballot receipt is not part of an election." Sec'y Br.27. Although ballot receipt might not be part of the individual voter's "selection," it has always been a central part of the State's conduct of an election. And the election-day statutes restrict when that public process must end,

not when voters make selections. Until the State receives all the ballots and closes the ballot box, the State's "election" is ongoing. The Fifth Circuit thus properly held that "the election concludes when the final ballots are received and the *electorate*, not the individual *selector*, has chosen." App.11a.

II. History proves that States understood "election day" as the day ballots are received by election officials.

A. Historical practice removes any doubt that "election" means the time when election officials receive the ballots. The "longstanding 'practice of the government'" provides good evidence of "'what the law is.'" *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014). Words in statutes are interpreted "as taking their ordinary meaning at the time Congress enacted the statute," *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019) (cleaned up), and practices "roughly contemporaneous[] with enactment" bear on that original understanding, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386 (2024). Here, the unbroken, uniform, "contemporaneous … practice[]" by the States of ending ballot receipt on election day is strong evidence that the practice was part and parcel of conducting an election. *See McGirt v. Oklahoma*, 591 U.S. 894, 914 (2020).

When Congress passed the first election-day statute in 1845, the uniform practice in the States was for voting to occur in person at a polling place. *See* George Frederick Miller, Absentee Voters and Suffrage Laws 31-32 (1948). The two States that experimented with absentee voting prior to 1845—New Jersey and Pennsylvania—had early field-voting laws that allowed

soldiers to vote on election day at a polling place in the field. *Id.*; Act of Feb. 16, 1815, 1815 N.J. Laws 16; Act of Mar. 29, 1813, ch. 171, 1813 Pa. Laws 213.

When widespread absentee voting first appeared during the Civil War, States employed methods that required receipt of ballots by election day. To ensure the ability of soldiers deployed across the nation to vote, States adopted one of two methods of voting: proxy voting and field voting. Both methods required election-day ballot receipt. Proxy voting required proxies to drop soldiers' ballots in the ballot box of their home precinct "[o]n the day of such election, and between the opening and close of the polls." *E.g.*, Act of Apr. 21, 1864, ch. 253 §5, 1864 N.Y. Laws 549, 550.

Field-voting laws provided highly specific rules for conducting an election wherever the unit happened to be, as though a precinct was opened in the field. *E.g.*, Act of Feb. 22, 1864, ch. 572 §1, 1864 Ky. Acts 121 (providing voting in the field "as fully as if such voters were present at the several precincts in this State"). Statutory schemes for field voting provided for the appointment of election judges or commissioners from the ranks, requiring them to take oaths to perform election duties and uphold election integrity.[1] States also provided set times for the opening and closing of the polls in the field.[2] Many States

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[1] *E.g.*, Act of Sept. 11, 1862, ch. 29 §§9-11, 1862 Iowa Acts 28, 29-30 (oath to "prevent fraud, deceit and abuse in conducting the" election); Act of Aug. 25, 1864, ch. 871 §§4-5, 1864 Pa. Laws 990, 990 (providing that "judges and clerks shall each take an oath").
[2] *E.g.*, 1862 Iowa Acts at 30 (polls "shall be opened at 9 A.M., or sooner, if necessary" and may be kept "open till 6 o'clock, P.M."); Nev. Const. Election Ordinance §§9-10 (1864) ("Between the hours of nine o'clock A.M, and three o'clock P.M., … a ballot-box

even required the judges in the field to open the ballot box at the close of the polls and tabulate the votes.[3]

With both field voting and proxy voting, the election was concluded when all ballots were received on election day. The Secretary concedes this, agreeing that for almost all of the Nation's first hundred years "States generally received ballots by election day." Sec'y Br.14. That "cotemporaneous" practice by "those who were called upon to act under" the first election-day statute provides good evidence of its meaning. *See Edward's Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827). That States went to the trouble of ensuring that ballots were received by election day "reveals a consensus" that such effort was required. *Cf. N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 53-54 (2022).

After the Civil War, historical practice becomes less relevant to the original public meaning of "election." *See id.* at 35 ("[W]e must also guard against giving postenactment history more weight than it can rightly bear."). But even when absentee voting first cropped back up in the early 1910s, election officials received the ballots on election day. *See* P. Orman Ray, *Absent Voters*, 8 Am. Pol. Sci. Rev. 442 (Aug. 1914), perma.cc/3YW9-849Q. In some States, this was done by "intra-state" voting, *id.* at 443, where a voter could deliver their ballot to election officials at any

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… shall be opened"); 1864 Pa. Laws at 990 (polls may be kept "open until seven o'clock in the afternoon of said day").

[3] *E.g.*, 1862 Iowa Acts at 32 ("When the poll is closed, the Judges shall immediately proceed to canvass and ascertain the result."); Act of Mar. 25, 1864, ch. 278, §6, 1864 Me. Laws 209, 210 (similar).

polling place in the State on election day, and the election officials would send the ballots to the voter's home precinct for counting, *see, e.g.*, Act of Feb. 23, 1911, ch. 181, Laws of Kan. 310.

In other States, ballots could be marked, sealed in their envelopes, and mailed to state officials, but still had to arrive by election day. These laws required ballots to arrive in time for election officials to deposit them in the ballot box "between the opening and closing of the polls on such election day." *See, e.g.*, Act of Apr. 14, 1915, ch. 157 §9, 1915 Iowa Acts 203, 206.[4] Most States didn't explicitly say what happened to late-arriving ballots. The States that did provided that they would be "destroyed" or "burned" without opening. *See* 1917 Ill. Laws at 438; Act of Mar. 26, 1918, ch. 37 §12, 1918 Ky. Acts 106, 119; Act of Mar. 21, 1921, ch. 38 §144, 1921 Me. Acts 38, 44.

Deviations from the election-day receipt rule were few and fleeting even in the early 20th century. Not until 1918 did any State explicitly allow later receipt.

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[4] *See also* Act of June 22, 1917, 1917 Ill. Laws 434, 437; Act of Mar. 7, 1917, ch. 100 §7, 1917 Ind. Acts 317, 322; 1918 Ky. Acts at 119; Act of May 17, 1915, ch. 270 §8, 1915 Mich. Pub. Acts 475, 478; Act of Mar. 14, 1917, ch. 341 §9, 1916 Minn. Laws 137, 147; Act of Apr. 9, 1917, 1917 Mo. Laws 276, 278; Act of Feb. 7, 1917, ch. 23 §5, 1917 N.C. Sess. Laws 78, 79; Act of Mar. 12, 1913, ch. 155 §10, 1913 N.D. Laws 206, 209; Act of Mar. 7, 1917, 1917 Ohio Acts 52, 55-56; Act of Mar. 4, 1919, ch. 361 §5, 1919 Or. Laws 637, 639; Act of Mar. 14, 1913, ch. 200 §3, 1913 S.D. Sess. Laws 271, 273; Act of Jan. 18, 1917, ch. 8 §13, 1917 Tenn. Pub. Acts 12, 19; Act of May 13, 1919, ch. 42 §10, 1919 Utah Laws 102, 105; Act of Mar. 20, 1916, ch. 369 §§13-14, 1916 Va. Acts 633, 636-37; Act of May 23, 1917, ch. 13 §§10-11, 1917 W. Va. Acts 54, 58; Act of July 29, 1915, ch. 461 §44m-9, 1915 Wis. Sess. Laws 588, 591.

Even then, only a few States allowed military ballots to be counted if received after election day. Maryland, for example, allowed military ballots to be counted if received within seven days following the election. 1918 Md. Laws at 130. Montana allowed them to be counted until December. Act of Feb. 22, 1918, ch. 18 §12, 1918 Mont. Laws 35, 40. But Montana's law was subsequently "rejected on constitutional grounds" by the state supreme court, which is "probative evidence" that post-election receipt is unlawful. *Bruen*, 597 U.S. at 27; *see Maddox*, 149 P.2d at 115.

The widespread practice of requiring ballot receipt by election day continued through most of the 20th century. "By 1977, only two of the 48 states permitting absentee voting counted ballots received after Election Day." App.17a. The "few late-in-time outliers" that came and went during the 20th century are far removed from the enactment of the first election-day statute and thus have little bearing on its original meaning. *Bruen*, 597 U.S. at 70.

B. The Secretary dismisses this history because "there was little or no reason for another practice" when voting was done in person. Sec'y Br.43. But that argument highlights the implausibility of the Secretary's reading of the election-day statutes. An ordinary person would not have understood "election" to require ballot marking but not official receipt when elections were conducted in a way that made that distinction impossible. That no one separated the two acts at the time shows that no one would have understood that "election" meant marking rather than receipt. Mississippi isn't excused from complying with the "historically fixed meaning" just because its

election practices deviate in other ways from the historical practice. *Cf. Bruen*, 597 U.S. at 27-31.

Lacking history showing post-election receipt, the Secretary tries to zoom out. Sec'y Br.31. He says that Civil War-era state supreme court decisions support his assertion that ballot receipt is not required. Those decisions, the Secretary claims, show that "an election was not confined to particular practices." *Id.* at 29. And he points generally to state changes to "whether, when, and by whom to allow absentee voting; on the manner in which absentee voting would occur; on how balloting itself occurred; and more." *Id.* at 31. He claims that these too show that "particular electoral practices" are not required. *Id.*; *see also* Sec'y Br.29.

But none of the Secretary's examples show experimentation on whether to close the ballot box on election day. The Civil War decisions all address *where* an election can take place, not *when*. *See State ex rel. Chandler v. Main*, 16 Wis. 398, 418 (1863) (explaining legislature's discretion to decide "*where* the right of suffrage might be exercised" (emphasis added)); *Morrison v. Springer*, 15 Iowa 304, 345-46 (1863) (same); *Lehman v. McBride*, 15 Ohio St. 573, 599 (1863); *Chase v. Miller*, 41 Pa. 403, 419 (1862) (declaring that the Pennsylvania Constitution set the "place" of suffrage). None of these cases suggest that States had "leeway over ballot-receipt deadlines." *Contra* Sec'y Br.30. To the contrary, each of these States had field-voting laws that required soldiers to place their ballots in the ballot box on election day. *See* Act of Sept. 25, 1862, ch. 11 §6, 1862 Wis. Sess. Laws 16, 17; Act of Sept. 11, 1862, ch. 29 §4, 1862 Iowa Acts 28, 28; Act of Apr. 13, 1863, 1863 Ohio Laws 80; 1864 Pa. Laws at 990. And none of the "innovation" the Secretary

points to, Sec'y Br.14, allowed post-election receipt. State experimentation with everything but the ballot-receipt deadline only reinforces the necessity of election-day receipt.

In any event, not even the Secretary disputes that the election-day statutes mandate "particular electoral practices." *Id.* at 31. The dispute is *which* electoral practices are required. The Secretary's answer to that question—whatever a State calls "ballot casting"—not only deprives the statutes of any meaningful preemptive effect, but also draws a line that Congress could not have imagined in an era when ballots were "immediately received." *Id.* at 32.

The Secretary next claims the historical examples don't matter because the purpose of the Civil War-era absentee voting regimes was different. According to the Secretary, States used voting in the field only "to ensure fair and honest elections." *Id.* at 33. If timeliness alone was the goal, the Secretary claims, States could have "dispatched a functionary to just gather up ballots" without conducting a full election in the field. *Id.*

The argument has two flaws. *First*, some States with proxy voting systems did "dispatch a functionary." Connecticut, for example, dispatched commissioners to distribute and collect ballots "forty days prior to the day of the election." Act of July 7, 1864, ch. 37, 1864 Conn. Pub. Acts 51. And Minnesota sent commissioners to administer oaths and collect ballots without all the trappings of a full election. Act of Sept. 27, 1862, ch. 1, 1862 Minn. Laws 13. But in both States, the commissioners delivered the ballots for deposit in the ballot box on "the day of the election."

1864 Conn. Pub. Acts at 53; 1862 Minn. Laws at 14 (providing for deposit at "the opening of the polls").

Second, the Secretary's argument assumes that timeliness and integrity were mutually exclusive goals. Of course, fair and honest elections were a goal, and field-voting schemes included fraud-prevention measures like elector oaths and procedures to challenge qualifications. But those measures could have been implemented without holding an election on one single day. Without fail, every field-voting statute also held the elections *on* election day. They cared about timeliness too.

Finally, the Secretary resorts to a parade of horribles. Respondents' historical reading of the election-day statutes, the Secretary claims, would "preempt legions of absentee voting laws," and even the secret ballot, because neither existed during the Nation's first 100 years. Sec'y Br.34-35. But that misunderstands what history proves here. None of the Secretary's examples—secret ballots, no-excuse absentee voting—have to do with *when* an election is held. Respondents don't argue that history freezes all election practices in 1845. *Contra id.* at 34. Instead, historical practice evinces the public's contemporaneous understanding of the election-day statutes. *See, e.g.*, *Edward's Lessee*, 25 U.S. at 210 (looking to "cotemporaneous construction" to determine the meaning of a statute). In those statutes, Congress set a uniform *time* for the election. It said nothing about the *manner* or the *place*.

The Secretary's assertion that resort to history "would preempt" absentee voting schemes misses the mark for another reason. Sec'y Br.34. As explained,

that reading conflicts with the text (and precedent) because the closing of the ballot box—not a voter sending a ballot—marks the final public selection of a candidate. *Supra* pp.21-22. Far from "preempt[ing] every state law that allowed Union soldiers to vote," Sec'y Br.33, this understanding fits perfectly with the way that these schemes worked: Voters sometimes completed their selections early, but the ballot box closed on election day. *Supra* pp.25-27.

C. For their part, Intervenors point to a few historical examples, but none supports their position.

First, Intervenors conflate receipt and counting, arguing that Civil War-era statutes support post-election receipt deadlines because ballots were "conveyed back to voters' home States to be counted and canvassed by local election officials after election day." Interv. Br.33. But Respondents are not challenging when ballots can be "canvassed" or "counted," which has historically occurred after election day. Respondents are challenging when ballots must be *received*. Field-voting regimes required returns (either the ballots themselves or tabulated results of an in-field canvass) to be sent back to the State or county to be added to the official tally. Those returns necessarily reached the required officials after election day, no different than results sent from in-state precincts to those officials. But those steps took place after the ballots were *received* by election officers in the field.[5]

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[5] Intervenors aren't even right on their own terms. Except for Minnesota (which did not have field voting), each State that Intervenors mention in footnote 8 required the appointed judges or inspectors in the field to canvass the votes, usually "immediately" at the close of polls. *See* 1862 Iowa Acts at 32; Missouri

Second, Intervenors' claim that three States—Pennsylvania, Nevada, and Rhode Island—did not "deputiz[e]" military officials as election officers misses the mark. *Id.* at 35. Nevada charged "three of the highest officers in command" with keeping the ballot box, verifying the elector's eligibility to vote, and counting the votes in the field at the close of polls. Nev. Const. Election Ordinance §§9-10; Act of Mar. 9, 1866, ch. 107 §§25-27, 1866 Nev. Stat. 210, 215. Pennsylvania's 1839 law provided that officers should take oaths and then "shall have the like powers" to conduct the election. Act of July 2, 1839, ch. 192 §§43-50, 1839 Pa. Laws 528. And Pennsylvania's 1864 iteration provided that soldiers would choose from among themselves three "judges" and two "clerks" who took oaths to "perform the duties … of said election, according to the law," verify the electors' eligibility, and count the ballots. 1864 Pa. Laws at 991.

State Convention Ordinances 15 (1862), perma.cc/4CHR-358J; 1862 Wis. Sess. Laws at 18; 1863 Ohio Laws at 80, 81; Act of Nov. 11, 1863, ch. 5 §11, 1863 Vt. Acts & Resolves 7, 10; Act of Feb. 5, 1864, ch. 21 §18, 1864 Mich. Pub. Acts 40, 45; Act of Apr. 27, 1865, ch. 570 §9, 1865 N.Y. Laws 1151, 1155; Act of Aug. 31, 1864, ch. 4030 §6, 1864 N.H. Laws 3061, 3063; Md. Const. art. XII, §§13, 14 (1864); Act of Dec. 24, 1862, ch. 17 §8, 1862 Conn. Acts 15, 18. Maryland, for example, provided that "after the polls are closed, the tickets shall be counted" and then sent to the Governor. Md. Const. art. XII, §§13, 14 (1864). While returns were sent back to the States to be added to the tallies, they all required counting to begin in the field. Minnesota had a form of proxy voting that required soldiers to give ballots to a commissioner, who would send them back to their districts to be dropped in the ballot box on election day and counted with all the other ballots. *See* 1862 Minn. Laws at 13.

Rather than show a contrary historical practice, Intervenors' examples prove the Fifth Circuit right. Like the other field-voting laws, both Pennsylvania's and Nevada's detailed regimes "involved soldiers directly placing their ballots into official custody with no carrier or intermediary." App.15a. Far from "the same as the Postal Service's role today," Interv. Br.35, these officials were imbued with the State's authority to conduct elections in the field, complete with ballot boxes, hours for the opening and closing of the polls, and processes to verify each elector's eligibility to vote. And although a Rhode Island constitutional amendment permitted soldiers' ballots to be handed in by commanding officers "to the Secretary of State within the time prescribed by law for counting the votes in such elections," R.I. Const. art. IV (1864), the legislature "did not undertake for many years to pass any act under" the amendment, Benton 187-88.

Third, Intervenors point to early 20th century intra-state voting. As explained, that method allowed voters to vote at any precinct in the State. *Supra*, pp.27-28. Washington, for example, provided that a voter absent from his precinct but still in Washington could vote by "present[ing] himself at any polling place within the state during the hours of voting." Act of Mar. 23, 1915, ch. 189, 1915 Wash. Sess. Laws 691. Quite unlike Mississippi's law, after swearing his eligibility to vote and marking his ballot, the voter would "hand it to one of the judges or inspector of election" at a polling place. *Id*. These laws that allowed voters to vote on election day in any precinct in the State are inapposite to Mississippi's law, which allows ballots to be received after election day.

Finally, Intervenors point to the smattering of post-WWI examples of receipt after election day. This sort of "freewheeling reliance on historical practice" far removed from the enactment of the first election-day statute says little about its meaning. *See Bruen*, 597 U.S. at 83 (Barrett, J., concurring). Beyond that, none of Intervenors' examples disproves that even "during the height of" World War I, "a ballot could be counted only if *received* by Election Day." App.16a. As explained, experimentation with deadlines after election day did not start until 1918, and most examples disappeared as quickly as they emerged. By 1942, Intervenors can point to only eight States that allowed post-election receipt, three of which were repealed in short order. Maryland's seven-day extension beyond election day for military ballots was removed by 1944, as were Kansas's and New York's post-election receipt deadlines. *See* Act of Mar. 10, 1944, ch. 1 §312, 1944 Md. Laws 16; Act of Mar. 22, 1943, ch. 160 §9, 1943 Kan. Sess. Laws 285, 287; Act of Mar. 18, 1944, ch. 183, 1944 N.Y. Laws 516; Act of Oct. 30, 1944, ch. 798, 1944 N.Y. Laws 1762. By 1977, only two States had post-election receipt deadlines. *See Hearing on S. 703*, 95th Cong. at 33-34.

These "few late-in-time outliers" do not shed light on the original meaning of the election-day statutes. *Bruen*, 597 U.S. at 70. Instead, the uniform practice at the time of enactment, requiring ballot receipt on election day, "weights heavily" against Mississippi's newfound interpretation. *See Ray v. Blair*, 343 U.S. 214, 230 (1952).

III. Precedent confirms that the "election" ends when the ballot box closes.

In addition to text and history, precedent supports Respondents' interpretation of the election-day statutes. "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." *Foster*, 522 U.S. at 71 (emphasis added). That combined final selection has been made when officials have received all votes from the voters and closed the ballot box.

Foster held that the election-day statutes preempted Louisiana's "open primary" law. *Id.* at 69-70. Louisiana's system provided for no additional voting in the general election if a candidate received a straight majority in the open primary. *Id.* By closing the election before election day, that system violated the election-day statutes "establishing a particular day as 'the day' on which these actions must take place, … a matter on which the Constitution explicitly gives Congress the final say." *Id.* at 71.

Foster does not define "precisely what acts a State must cause to be done on federal election day," *id.* at 72, but it is instructive on the meaning of "election." As the Secretary agrees (at 27), *Foster* stands for the proposition that the election must be "concluded" and "consummated" on election day through a "final selection," 522 U.S. at 71-72 & n.4. That "final selection" is accomplished through "the *combined actions* of voters and officials." *Id.* at 71 (emphasis added). That combined action can occur only when the "voters" submit and the "officials" receive the ballots. *Id.*

The Secretary's definition doesn't comport with *Foster*. Without explanation, the Secretary asserts that the election is consummated "when the voters have marked and submitted their ballots to election officials as state law requires." Sec'y Br.27. At that point, according to the Secretary, "voters have made their final choice." *Id*. But that's not what *Foster* says. When the Court spoke of the "final selection of an officeholder" it referred to the "contested selection of candidates," not the individual voter's selection on her ballot. *Foster*, 522 U.S. at 71-72. "Final selection" means the public selection of the electorate as a whole, not of the individual electors.

The Secretary's reading accounts for half of "final selection." *Foster* requires actions by both "voters" *and* "officials." *Id.* at 71. Without receipt by officials, there are no "combined actions" rendering a "final selection." *Id*. The Secretary claims that officials' only role is to "offe[r] a ballot and a method to cast it." Sec'y Br.40. But sending ballots to voters is an act taken in preparation for the election, not "actions … *meant to make a final selection*." *Foster*, 522 U.S. at 71 (emphasis added). The Secretary's unilateral "ballot casting" view is at odds with *Foster*. Voters' delivery is only half of the "combined actio[n] of voters and officials." *Id*. Election officials' receipt is the other half. *Foster* requires both.

Intervenors confuse final selection, too, by blurring the line between receipt and canvass. In their view, once the voter "places their ballot in the mail," their "role is over," and so final selection has happened. Interv. Br.22. Of course, they concede, "officials must" receive and count the ballots after that,

but they see no reason canvassing should be treated differently than receipt. *Id.* at 23.

But final public selection has not occurred until "the proverbial ballot box is closed." App.10a. "The result is not yet fixed" until all ballots have been received. App.10a. The processes of counting, certifying, and announcing a winner have always extended after election day. *See Millsaps*, 259 F.3d at 546 n.5 ("[O]fficial action to confirm or verify the results of the election extends well beyond federal election day…."). Receipt has not, since it marks the point when "the result is fixed," even if officials don't yet know the result. *Id.*[6]

The Montana Supreme Court highlighted the need for official receipt in *Maddox v. Board of State Canvassers*, holding Montana's post-election receipt deadline was preempted. 149 P.2d at 115. It explained that "[i]t is not the marking but the depositing of the ballot in the custody of the election officials which constitutes casting the ballot or vote." *Id.* A ballot "is still of no effect until it is deposited with the election officials, by whom the will of the voters must be ascertained and made effective." *Id.* Thus, to the extent Montana law allowed ballot receipt after election day

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[6] Intervenors' reliance on *Harris v. Florida Elections Canvassing Commission* fails to address the issue here for a similar reason. Interv. Br.23-24 (citing 122 F. Supp. 2d 1317 (N.D. Fla. 2000)). There, the court understood plaintiffs to argue "that every vote must be made by a voter and *counted* by election officials by midnight on" election day. *Harris*, 122 F. Supp. 2d at 1324 (emphasis added). And it rejected that argument since "[r]outinely, in every election, hundreds of thousands of votes are cast on election day, but are not *counted* until the next day or beyond." *Id.* at 1325 (emphasis added).

"it is in conflict with the constitutional congressional Act which requires the electing to be done on election day." *Id*.

The Secretary and Intervenors wrongly discount *Maddox* as interpreting only state law. Sec'y Br.28; Interv. Br.26. The court's analysis rested on the ordinary public meaning of "casting" a ballot. *See Maddox*, 149 P.2d at 115. The Montana Supreme Court held that Montana's "unusual provisions" permitting a "seven weeks delay after the statutory election day for the depositing of military ballots with election officials" were "in conflict with the constitutional congressional Act which requires the electing to be done on election day." *Id*. at 114-15. If the case turned only on how state law said to vote, the court would not have declared its own state law "unconstitutional" and preempted by the election-day statutes. *Id*. at 115.

Finally, the Secretary and Intervenors insist that this Court's decision in *Republican National Committee v. Democratic National Committee*, 589 U.S. 423 (2020), supports them. The election-day statutes were not even implicated in that case, which concerned Wisconsin's presidential primary. *Id*. at 423. Even if the election-day statutes applied to primaries, the receipt deadline was "not challenged" in that case. *Id*. Rather, the RNC challenged the "extraordinary relief" of allowing voters "to mail their ballots after election day." *Id*. at 426. The case didn't interpret the election-day statutes, didn't apply *Foster*, and didn't confront the history and arguments made here. Opinions are to be read "with a careful eye to context," not "parsed as though we are dealing with the language of a statute.'" *Nat'l Pork Producers Council v. Ross*, 598 U.S.

356, 373-74 (2023). In any event, *Foster*'s conclusion that mailing ballots after election day constitutes voting after election day is consistent with the holding below: "If voters can mail their ballots after Election Day, those ballots are necessarily received after Election Day, too." App.24a.

IV. Congress has not acquiesced to the States' recent attempts to keep the ballot box open beyond election day.

Congress has never adopted, incorporated, or approved of post-election deadlines. Intervenors nevertheless infer from scattered 20th century laws that Congress "was aware of" or even "incorporated" the few post-election deadlines in existence during that period. Interv. Br.38-51. The inference collapses for at least three reasons.

First, this case cannot be decided on "'legislative acquiescence.'" *Contra id.* at 50. That term generally refers to the idea that "Congress has acquiesced to an agency or judicial interpretation," not to *state practice* that contradicts federal law. *See Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1196 (11th Cir. 2019). To hold otherwise would put a statute of limitations on the Supremacy Clause, requiring Congress to pass new legislation each time a State enforced a preempted law.

Even if the inference applied, Intervenors ignore the Court's "oft-expressed skepticism toward reading the tea leaves of congressional inaction." *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (plurality op.). There's good reason for that skepticism: Courts "have no idea" whether Congress's silence is merely its "failure to express any opinion." *Id.* at 750. In any event,

Intervenors haven't shown "abundant evidence that Congress both contemplated and authorized" deviations from the federal election day. *CFTC v. Schor*, 478 U.S. 833, 847 (1986). Intervenors cite nothing like Congress "affirmatively manifest[ing] its acquiescence" in the IRS's interpretation of §501(c)(3) by incorporating it in other parts of the tax code. *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983).

Second, even if the inference of acquiescence were permissible here, it's weak. Intervenors begin with a World War II law that provided a "special method of voting in time of war" for voters "serving in the land or naval forces of the United States." Act of Sept. 16, 1942, ch. 561 §1, 56 Stat. 753, 753. They argue that this statute "explicitly specified election day as the receipt deadline for federal war ballots." Interv. Br.40. But a specific deadline for federal war ballots that displaces any competing (including earlier) deadlines doesn't undermine election-day receipt. If anything, the deadline selected by Congress—"the hour of the closing of the polls on the date of the holding of the election"—reinforces the expectation of election-day receipt. 1942 Act, §9, 56 Stat. at 756.

General invocations of state procedures don't help Intervenors either. The act also permitted soldiers to vote "in accordance with the law of the State of his residence" instead of the "special method" created by Congress. *Id.* §12. The 1970 Voting Rights Act amendments contained a similar close-of-polls deadline, and provided that the law didn't prevent States from "adopting less restrictive voting practices." 52 U.S.C. §10502(g). But those rules of construction mean what they say: When applying those acts, courts shouldn't construe them to limit other "voting practices" under

State law. Those other "voting practices" more sensibly mean the oath, attestation, and other "manner" requirements created under those laws. *E.g.*, 1942 Act, §§6, 8, 56 Stat. at 755-56. Those acts say nothing about deadlines or the "day for the election" under federal law and thus cannot be construed to implicitly repeal that deadline (or endorse any State's deviations from it).

That few States allowed post-election receipt for soldiers during this period further weakens the inference that Congress implicitly approved universal post-election deadlines in its war-time laws. Only "nine States then allowed post-election day receipt of military absentee ballots." Interv. Br.41. At most, those laws show that Congress didn't interfere with more liberal deadlines for soldiers serving overseas during wartime. That's many logical leaps removed from Intervenors' inference that Congress approved universal post-election receipt deadlines for voters at home. Nor do more recent outliers help Intervenors. "After World War II," Intervenors jump from "Missouri in 1958" to "Alaska in 1978." *Id.* at 43. These scattered examples show that Intervenors lack "abundant evidence that Congress both contemplated and authorized" deviations from the federal election day. *Schor*, 478 U.S. at 847.

Later statutes haven't repealed Congress's timing decision either. The Uniformed and Overseas Citizens Absentee Voting Act of 1986 required States to ensure absentee ballots were mailed to overseas voters in a timely manner. Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, §§102, 104, 100 Stat. 924, 925-26. The MOVE Act of 2009 amended UOCAVA to require military officials to collect and

deliver overseas ballots "to the appropriate election officials" "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), which could be before election day, *e.g.*, Act of Apr. 16, 1986, ch. 495 §206, 1986 Miss. Laws 773, 832. The federal official must collect the ballots from overseas voters no later than the "seventh day preceding the date of the regularly scheduled general election for Federal office." 52 U.S.C. §20304(b)(3)(A). UOCAVA and the MOVE Act thus echo the Civil War procedures. They do not change the default date by which ballots must be received.

Fallback provisions of these laws say even less about Congress's default timing rules. UOCAVA, for example, permits a voter who does not receive a timely state absentee ballot to return a "Federal write-in absentee ballot." *Id.* §20303(b). But States cannot count that federal write-in ballot if the voter's state absentee ballot is "received by the appropriate State election official not later than the deadline for receipt of the State absentee ballot under State law." *Id.* §20303(b)(3). The Help America Vote Act similarly provides insurance for provisional voters, requiring States to count provisional ballots "in accordance with State law" once the voter's eligibility is confirmed. *Id.* §21082(a)(4). Those fallback rules don't alter what makes a ballot timely under normal circumstances. And no provision in *any* of these federal laws "incorporated" state post-election receipt deadlines. *Contra* Interv. Br.50. Congress's references to "state law" in those statutes is merely an efficient method of dealing with the diversity of state voting arrangements—not

an implicit, universal repeal of the words "the day for the election."

The Secretary distances himself from Intervenors' implicit-incorporation argument. He admits that UOCAVA and HAVA are "silent on ballot-receipt deadlines." Sec'y Br.43-44. He instead argues that because the Department of Justice has secured court orders allowing for post-election ballot receipt in response to UOCAVA violations, this Court must acknowledge universal post-election receipt under the election-day statutes. *Id.* at 44-45. But those recent judicial remedies have no bearing on the original meaning of the election-day statutes. Court orders under a recent law hardly show Congress's acquiescence, let alone a "longstanding practice" that informs the original meaning of the election-day statutes. *Noel Canning*, 573 U.S. at 525.

Third, Congress's creation of exceptions to its timing laws doesn't impliedly repeal those laws. Even if Congress had explicitly allowed post-election receipt in limited circumstances, those exceptions wouldn't nullify the general rule that ballots are received by the "day for the election." Congress has power to "determine the Time of chusing the Electors" for the offices of President and Vice President. U.S. Const. art. II, §1. And Congress can "make" regulations or "alter" state laws affecting the timing of congressional elections. *Id.*, art. I, §4. Congress can thus set different timing rules for different circumstances, including soldiers and overseas voters. Thus, even crediting Intervenors' argument—that Congress has incorporated post-election deadlines—gets them nowhere.

Even under Intervenors' interpretation of UOCAVA, Congress didn't impose a federal post-election deadline. Instead, it facilitated military and overseas voting by requiring States to deliver ballots to voters in a timely manner. 52 U.S.C. §20302(a)(8). Nearly half the States require overseas voters to deliver ballots to election officials by election day. *Ballot Receipt Deadlines for Military and Overseas Voters*, Nat'l Conf. of State Legislatures (Dec. 24, 2025), bit.ly/4tpJGuu.

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The "day for the election" means the day that election officials close the ballot box. The recent smattering of state laws allowing for post-election receipt of ballots says nothing about the meaning of the much older federal laws. No party cites any precedent allowing States to override a congressional command simply because Congress didn't double down on that command in later years.

"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). Recent laws renew those very ills, prolonging the "election" by days,[7]

[7] Miss. Code §23-15-637(1)(a) (five "business days after the election").

weeks,[8] and indefinitely[9] after the appointed day. These are not deadlines. They're vague presumptions untethered from the uniform day Congress "established as the day for the election." 2 U.S.C. §7. And in the eyes of many, they have hampered the efficiency and integrity of elections.

When it enacted the election-day statutes, Congress aimed to "remov[e] the possibility of introducing fraud to any great extent in those elections." Cong. Globe, 28th Cong. 1st Sess. 679 (statement of Sen. Atherton). Supporters likewise recognized the importance of promoting voter confidence in elections: Even "[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.* Over 150 year later, these concerns persist: "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). "[P]ublic confidence" in election integrity "is closely related to the State's interest in preventing voter fraud," and it "has independent significance, because it encourages citizen participation in the democratic process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (plurality op.).

Election-day receipt promotes election integrity and voter confidence as much today as it did when Congress passed that law. There are "important

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[8] 10 Ill. Comp. Stat. 5/19-8, 5/18A-15(a) (fourteen "calendar days" after the election).

[9] Wash. Rev. Code §29A.40.110(3) (no deadline if the ballot is "postmarked no later than the day of the primary or election").

reasons" to "require absentee ballots to be *received* by election day, not just *mailed* by election day." *DNC*, 141 S. Ct. at 33 (Kavanaugh, J., concurral). Election-day receipt helps "avoid the chaos and suspicions of impropriety that can ensue if thousands of absentee ballots flow in after election day and potentially flip the results of an election." *Id.* A "single deadline" for the receipt of ballots "supplies clear notice, and requiring ballots be in by election day puts all voters on the same footing." *Id*. at 28 (Gorsuch, J., concurral).

Congress advanced these policy goals when it enacted the election-day statutes. The Court need only recognize what Congress has already achieved. It should thus affirm the holding below that Congress established the final day for ballot receipt in federal elections.

CONCLUSION

The Court should affirm the judgment of the Fifth Circuit.

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