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 U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR CENTER FOR ELECTION CONFIDENCE, INC., RESTORING INTEGRITY AND TRUST IN ELECTIONS, INC., HONEST ELECTIONS PROJECT, AND AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Center for Election Confidence, Inc., is a non-profit organization that promotes ethics, integrity, and professionalism in the electoral process. CEC works to ensure that all eligible citizens can vote freely within an election system of reasonable procedures that promote election integrity, prevent vote dilution and disenfranchisement, and instill public confidence in election systems and outcomes. To accomplish these objectives, CEC conducts and publishes analysis regarding the effectiveness of current and proposed election methods. CEC also periodically engages in public-interest litigation to uphold the rule of law and election integrity.*

Restoring Integrity and Trust in Elections, Inc. is a non-profit organization with the mission of protecting the rule of law in the qualifications for, process and administration of, and tabulation of voting throughout the United States. RITE supports laws and policies that promote secure elections and enhance voter confidence in the electoral process. Its expertise and national perspective on voting rights, election law, and election administration will assist the Court in reaching a decision consistent with the Constitution and the rule of law.

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every

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* Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain.

The American Legislative Exchange Council (ALEC) is America's largest non-profit, nonpartisan voluntary membership organization of state legislators, whose members are dedicated to the principles of limited government, free markets, and federalism. With a membership base comprised of nearly one-quarter of all state legislators in the United States, ALEC's interest in this case is to ensure that state legislators have a clear, consistent, and objective standard when fulfilling their election-related responsibilities under the U.S. Constitution.

Because laws like Mississippi's that enable return of ballots after Election Day threaten election integrity and accuracy, *amici* have a significant interest in this case.

SUMMARY OF THE ARGUMENT

The strength of any democratic system depends on voters trusting electoral outcomes. Voter confidence in election integrity is essential to effective democracies, whose legitimacy and ability to govern necessarily depend on voter trust. As this Court has put it, "public confidence in the integrity of the electoral process" "encourages citizen participation in the democratic process," and the "electoral system cannot inspire public confidence" absent "safeguards . . . to deter or detect fraud." *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008).

Recognizing these realities, Congress for nearly two centuries has sought to promote voter trust and consistency by setting a single nationwide Election Day. In Federalist No. 61, Hamilton noted that "uniformity in the time of elections" "may be found by experience to be of great importance to the public welfare." Acting under Article I, § 4, cl. 1 and Article II, § 1, cl. 4, Congress set a single day for federal elections: The "day for the election" for selecting members of the House of Representatives and Senate is the "Tuesday next after the 1st Monday in November" ("Election Day"). 2 U.S.C. § 7; see *id.* § 1. Likewise, electors of the President and Vice President are to "be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day." 3 U.S.C. § 1.

This Court, in turn, has made clear what Congress's single-election-day mandate means. By the close of Election Day, all the "combined actions of voters and officials meant to make a final selection of an officeholder" must occur. *Foster* v. *Love*, 522 U.S.

67, 71 (1997). Under *Foster*, receipt of mail-in ballots is one of the required "final act[s] of selection" to cast a ballot by Election Day. Receipt is the *sine qua non* of a mail-in vote. A vote is not valid until it is received by election officials. A fully completed mail-in ballot sitting on a kitchen table—or handed off to a third party—is not a vote because it has not been received.

But in recent decades, Mississippi and about 13 other States have decided not to abide by Congress's mandate that all requisite actions needed to make a "final act of selection" occur by Election Day. *Id.* at 72. These States count mail-in ballots received after Election Day—sometimes *weeks* after. The lags occasioned by these drawn-out deadlines contribute to the protracted delays in counting ballots that persist in many States, delays that are essentially unknown in any other developed country and were unknown here before the recent marked increase in mail-in voting. And Mississippi's scheme hinges on postmarks that the Postal Service recently emphasized are increasingly inaccurate—and that other third parties allowed to take ballots under Mississippi law, like UPS and FedEx, do not even use. Disenfranchisement and dilution of lawful votes are both highly likely from such schemes. Thus, loose ballot return rules engender all sorts of mischief and problems, not the least of which is sowing mistrust in our election system at a time when citizens already lack confidence in it.

The decision below correctly invalidated Mississippi's law permitting late ballot returns as preempted by federal law. Federal law mandates a single Election Day. Returning the ballot to election

officials is a critical part of a person's vote, whether the person is voting in-person or by mail. When a ballot is not returned to the government by Election Day, the vote has not been cast on that day. Later requirements, like counting, can be accomplished by the government, but returning the ballot to the appropriate government officials is something the voter must do by this deadline. Handing it to a third party—often a private entity—for contingent delivery after Election Day is not enough. The text of 3 U.S.C. § 1 confirms this understanding, as it requires that all actions necessary for the presidential electors to be "appointed"—meaning, specifically designated—happen on Election Day. Congress has provided specific exemptions for later "appointment"—none of which helps Mississippi here. Mississippi's theory that ballots can be received after Election Day is impossible to square with 3 U.S.C. § 1 or the other Election Day statutes, 2 U.S.C. §§ 1 and 7. And that theory would enable all sorts of mischief: ballots could be recalled (already possible under Mississippi law), postmarks could be ignored, and private parties could hold on to votes for an indefinite time after Election Day—limited only by what Mississippi calls a State's desire "to explore."

Congress has not left the uniformity of a single federal Election Day to state exploration. Letting these unconstitutional policies remain will exacerbate inconsistencies and delays, lead to disenfranchisement and dilution, and foster mistrust in elections. The Court should affirm *Foster*'s holding that when the relevant election officials receive the ballot after Election Day, the vote has not been cast by Election Day and thus may not be counted absent a permissible

federal exception, such as those contained in the Uniformed and Overseas Citizens Absentee Voting Act.

ARGUMENT

I. Post-Election Day receipt of mail-in ballots risks disenfranchisement and dilution, causes delays, and breeds distrust.

The issue here cuts to the heart of the trust that Americans have in our electoral process. Widespread mail-in voting is a recent phenomenon and the form of voting most susceptible to fraud, mischief, or improper influence. Extended ballot receipt deadlines are an even newer innovation. Apart from the obvious consequence—interminably delayed election results that breed mistrust and opportunities for mischief—these extended deadlines threaten election mechanics and integrity. The hinge of Mississippi's scheme is a postmark, but setting aside any impact of its historical practices, the Postal Service recently announced that postmarks are often not applied and are becoming even more unreliable when they are. And other third parties that Mississippi lets handle ballots do not even use postmarks. Disenfranchisement and dilution of lawful votes are thus both likely. Absent affirmance of the decision below, late ballot schemes will continue to delay results, threaten Congress's ability to convene a full membership or to certify Electoral College results, foster confusion, increase opportunities for fraud, deny the right to vote, and undermine confidence in federal elections.

A. Mail-in voting is a recent innovation with inherent risks.

The widespread mail-in voting that has characterized recent elections is historically unique. As Mississippi correctly notes, "until the 20th century States largely required voting to occur in person." Br. 14. "[B]efore 1913, only two States had general civilian absentee-voting laws." Br. 9 (citing P. Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898, 898 (1938)). In the 1936 election, "only about 2% of 45 million votes were being cast by absentee ballot," and "[b]y 1960, it was estimated that less than 5% of voters had cast absentee ballots in any election."[1] "In the 1980s, California became the first state to allow eligible voters to request absentee ballots for any reason at all, including their convenience."[2] By 2020, 32% of voters cast a mail-in ballot.[3] And in 2022, over 85% of voters in Washington, Oregon, Colorado, Hawaii, and Utah voted by mail."[4]

Mail-in voting carries significantly higher potential for fraud and inaccuracy. As Judge Posner explained, historically "[v]oting fraud [has been] a serious problem in U.S. elections generally,"

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[1] D. Palmer, *Absentee and Mail Ballots in America: Improving the Integrity of the Absentee and Mail Balloting*, at 6, Lawyers Democracy Fund (Jan. 2019), https://perma.cc/VSC4-TF8E. Lawyers Democracy Fund is now *amicus* Center for Election Confidence.

[2] *Voting by Mail and Absentee Voting*, MIT Election Data & Science Lab (Feb. 28, 2024), https://perma.cc/4R83-NMDQ.

[3] *Ibid.*

[4] *Ibid.*

sometimes "facilitated" by mail-in voting. *Griffin* v. *Roupas*, 385 F.3d 1128, 1130–31 (CA7 2004). "[E]ven many scholars who argue that [election] fraud is generally rare agree that fraud with [vote-by-mail] voting seems to be more frequent than with in-person voting."[5] Plus, mail-in voters "are more prone to cast invalid ballots than voters who, being present at the polling place, may be able to get assistance from the election judges if they have a problem with the ballot." *Griffin*, 385 F.3d at 1131. And, as discussed below in detail, ballot curing further prolongs the post-election process.

Mail-in voting also creates more links in the custody chain between a ballot being created and a ballot being cast. This creates more opportunities for honest mistakes *and* political chicanery, and partisan actors of all political stripes have used this increased opportunity to engage in fraud and intimidation to gain an electoral advantage. As the Eighth Circuit recently put it, affirming a conviction based on absentee ballot fraud, "Voter fraud is no myth." *United States* v. *Taylor*, 159 F.4th 1136, 1140 (CA8 2025).

For example, in Bridgeport, Connecticut's largest city, the *New York Times* reported that "ballot manipulation has undermined elections for years."[6] "In interviews and in court testimony, residents of the city's low-income housing complexes described people sweeping through their apartment buildings, often

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[5] *Ibid.*

[6] A. Nierenberg, *Election Fraud Is Rare. Except, Maybe, in Bridgeport, Conn.*, N.Y. Times (Jan. 21, 2024), https://tinyurl.com/2thp46p4.

pressuring them to apply for absentee ballots they were not legally entitled to."[7] And sometimes, "campaigners fill out the applications or return the ballots for them—all of which is illegal."[8] Problems came to a head in 2024, when a judge ordered an election re-do after reviewing "videos showing 'partisans' repeatedly stuffing absentee ballots into drop boxes."[9] In 2018, the city had been "forced to hold three primaries for City Council" because of absentee ballot problems.[10]

In short, mail-in voting lacks a historical pedigree and carries unique risks to the election process. Guardrails around mail-in voting are especially important to minimize these risks. As this Court has recognized, there is "a compelling interest in preserving the integrity of [the] election process," *Purcell* v. *Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), so that "an individual's right to vote is not undermined by fraud in the election process." *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992).

B. Receiving votes after Election Day is a newer development with greater risks.

Allowing mail-in votes to be received after Election Day was largely unknown until recent decades, and these newfound state policies are especially hazardous to fair elections. Late ballot receipt poses many problems for election administration—problems that

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[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*

implicate election integrity and thus citizen confidence in elections.

"During the [COVID] pandemic, with the significant increase in absentee/mail voting, seven states plus D.C. chose to give more time for ballots to be received."[11] Now, about 14 States plus D.C. broadly count mail-in ballots that are received after Election Day—anywhere from 5:00 p.m. the next day to 2 weeks later.[12] About 47% of the voting-age population lives in these places.[13]

Protracted delays and other election administration problems associated with late receipt of mail-in ballots contribute to diminished confidence in elections. First and most obviously, late receipt of mail-in ballots necessarily means that ballot counting and resolution of any disputes will be delayed. A uniform Election Day receipt deadline "avoid[s] the chaos and suspicions of impropriety that can ensue if thousands of [mail-in] ballots flow in after election day and potentially flip the results of an election." *Democratic Nat'l Comm.* v. *Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). As Professor

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[11] *The Evolution of Absentee/Mail Voting Laws, 2020–22*, tbl. 6, National Conference of State Legislatures (Oct. 26, 2023), https://perma.cc/JW72-PBP6; see also *Mail Ballot Deadlines, 2012–2022*, U.S. Election Assistance Commission, https://perma.cc/P6KQ-RG5L.

[12] *Receipt and Postmark Deadlines for Absentee/Mail Ballots*, tbl. 11, National Conference of State Legislatures (Dec. 24, 2025), https://perma.cc/9CSM-C2DH.

[13] *Mail Ballot Receipt Deadlines*, Movement Advancement Project (July 1, 2025), https://perma.cc/Q6QF-A39P.

Pildes explained, "[l]ate-arriving ballots open up one of the greatest risks of what might, in our era of hyperpolarized political parties and existential politics, destabilize the election result. If the apparent winner the morning after the election ends up losing due to late-arriving ballots, charges of a rigged election could explode." *Ibid.* (quoting R. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. Chi. L. Rev. Online (June 26, 2020)).

These threats to voters' confidence are not hypothetical. In the 2020 California election, the State accepted absentee ballots until 17 days after the election. 2020 Cal. Legis. Serv. Ch. 4, § 5 (A.B. 860) (codified at Cal. Elec. Code § 3020(d) (2020)). Unsurprisingly, chaos resulted. In one U.S. House election, the candidate who was winning by 1,287 votes on Election Day saw that lead disappear and reverse "over the next 20 days," with constant fluctuations in the "long, slow process." Though the other candidate declared victory after 17 days, it took another 10 days for the win to become official.[14]

The problems in California continued even after the State pared back its mail-in ballot deadline to seven days after the election. Cal. Elec. Code § 3020(b). In 2024, California again featured a U.S. House race in which ballot-counting was not completed until the first week of December—a month

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[14] J. Bookout, *Mike Garcia Trailed in Every Poll. So How Did He Win Twice in One Year?*, L.A. Magazine (Dec. 3, 2020), https://perma.cc/N7PQ-M68C.

after election day.[15] California's late receipt deadline is a key reason for this continued issue; "in the 2022 midterm elections," half of California's "votes were counted after Election Day."[16]

Nevada accepts mail-in ballots received until the fourth day after Election Day. Nev. Rev. Stat. Ann. § 293.269921(1)(b)(2). As a result, the close 2024 Senate election was plagued by delays, and the Secretary of State laid blame on the "influx" of late-arriving mail-in ballots.[17] The glut of ballots received after Election Day caused bipartisan and needless frustration that could have been prevented through simple compliance with federal law.

Beyond breeding distrust in the election, these delays in certifying results of a federal election to the House or the Senate threaten Congress's ability to convene a full membership and to legislate with that membership. This threat is exactly what the limited Elections Clause fail-safe was designed to prevent: a State's failure "to provide for the election of representatives to the Federal Congress." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). As Hamilton put it in Federalist No. 59, "every government ought to contain in itself the means of its

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[15] B. Bowman & S. Wong, *Democrats Flip Final House Seat of the 2024 Elections, Narrowing Republicans' Majority*, NBC News (Dec. 4, 2024), https://perma.cc/MCE4-22FK.

[16] See A. Zavala, *Why Does California's Vote Count Take So Long? Secretary of State Explains Delay*, KCRA (Nov. 14, 2024), https://perma.cc/488R-R7YW.

[17] *Delays in Nevada Vote Counting Frustrates Both Parties*, KSNV (Nov. 7, 2024), https://tinyurl.com/36kkdsdn.

own preservation," and "an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy." Plus, delays in election certification threaten the appointment of Electors to the Electoral College and thus Congress's ability to certify the President and Vice President.

Late ballot receipt also risks treating voters differently and fostering confusion in the process. "Elections must end sometime, a single deadline supplies clear notice, and requiring ballots be in by election day puts all voters on the same footing." *Democratic Nat'l Comm.*, 141 S. Ct. at 28 (Gorsuch, J., concurring in denial of application to vacate stay). As discussed more below, mail-in voters can recall their ballots after Election Day, unlike other voters. See Pet. 12a.

Further, States with post-Election Day deadlines generally outsource to the Postal Service or other entities procedures for ensuring proof that voters timely mailed their ballots. Mississippi declares that postmarks are "an objective indicator that [a ballot] is cast—and cast timely." Br. 40; Br. 36 (stating that a ballot is "'timely cast' when it is postmarked on or before election day"). But the Postal Service disclaims responsibility for accurate postmarks, and other carriers permitted under Mississippi law do not even provide postmarks.

Postal Service postmarks are increasingly inaccurate—and often missing entirely—and recent changes exacerbate these issues. Even before these changes took effect, a court found "uncontroverted

evidence that thousands of [mail-in] ballots" in one New York primary "were not postmarked" at all. *Gallagher* v. *N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 30 (S.D.N.Y. 2020); see *id.* at 49 (finding "arbitrary postmarking of [mail-in] ballots"). A Postal Service audit report confirmed that this was a widespread problem, but the Postal Service has said that it merely "tries to ensure that every return ballot . . . receives a postmark" and would not change its postmark operations "to accommodate" state voting laws.[18] Between 2022 and 2024, the Postal Service further weakened its postmarking policy, moving from a requirement that "every completed ballot mailed by voters . . . receive a postmark" to a commitment to "try" to do so.[19]

New Postal Service procedures and guidelines compound these problems by formalizing the unreliability of postmarks. The Postal Service's new centralization procedures postpone postmarking until mail reaches processing facilities, "increas[ing] the likelihood that a postmark . . . will contain a date that does not align with the date on which the Postal Service first accepted possession of the mailpiece." 90 Fed. Reg. 52,883, 52,884–85, 52,891 (Nov. 24, 2025). According to the Postal Service, any suggestion that the postmark provides a "reliable indicator of the date on which the Postal Service first accepted possession"

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[18] *Election Mail Readiness for the 2024 General Election, Report Number 24-016-R24*, at 11–12, Office of Inspector General (July 30, 2024), https://perma.cc/RL3L-7T87.

[19] USPS, *Postal Bulletin 22596*, at 5 (Apr. 21, 2022); USPS, *Postal Bulletin 22642*, at 6 (Jan. 25, 2024).

"does not reflect the realities of postal operations." *Id.* at 52,885.

The Postal Service acknowledged that "numerous election jurisdictions . . . utilize the postmark to accept certain completed ballots as timely where they are sent by mail but are received after Election Day," admonishing that "policymakers" in those jurisdictions should be more "aware" "that the postmark date may not align with the date on which the Postal Service first accepted possession." *Id.* at 52,886. In short, USPS generally has "no visibility into the date . . . when a mailpiece first entered postal possession." *Id.* at 52,889. Plus, as noted above, "the Postal Service does not postmark all mail in the ordinary course of operations." *Id.* at 52,891.

Voting officials in States with laws like Mississippi's are already emphasizing that "if election officials can't rely on postmarks to reflect accurate dates, a number of mail-in ballots that were mailed prior to Election Day may not be counted."[20] Combined with the fact that ballots "will no longer be automatically considered priority mail" and thus take longer to deliver, these developments "could change the outcome of a race," according to these officials.[21] And the controversies will most likely arise "during

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[20] J. Schweikert & N. Hytrek, *Recent Postal Service Changes Could Disrupt Mail-in Voting, County Clerks Warn*, Capitol News Illinois (Jan. 15, 2026), https://perma.cc/56QB-LHTK.
[21] *Ibid.*

the recount process, when candidates are 'scrambling'" and public distrust is heightened.[22]

Putting aside the Postal Service, Mississippi's law also allows ballots to be delivered by "common carrier[s]" like "United Parcel Service or FedEx Corporation" after Election Day, with the only apparent prerequisite being a "postmark" by the election. Miss. Code Ann. § 23-15-637(1)(a). But those common carriers do not provide "postmarks" on the mailing itself. And there is no requirement that the ship date listed on their labels be the actual ship date. For instance, a voter could print a FedEx label and "have two weeks to use it"[23]—even if the ship date is listed as the day it was printed. So a voter in Mississippi could print the common carrier shipping label on Election Day, and fill out and mail the ballot two days later—and the ballot would presumably appear to be facially timely under Mississippi law.

The point is that postmarks are unreliable and often non-existent; in no sense are they "an objective indicator" of a ballot "cast timely." Mississippi Br. 40. Yet they are the hinge of Mississippi's law and similar laws elsewhere. Because the Postal Service is moving away from postmarking mail when initially received—if it postmarks at all—many voters in States like Mississippi could be disenfranchised. And this postmarking development will make it more likely that States like Mississippi will continue to expand their ballot receipt deadlines, on the theory that even

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[22] *Ibid.*

[23] FedEx, *How to Create, Print, and Manage Shipping Labels*, https://perma.cc/Z3MP-NEWX.

ballots with later (or no) postmarks *could* have been mailed by Election Day. That would increase the likelihood of vote dilution through acceptance of unlawful, untimely ballots. And all this heightens the risk for disputes about whether a mail-in ballot received after Election Day was properly cast. Thus, disenfranchisement, dilution, and distrust are real threats of the scheme used by Mississippi.

Along the same lines, eliminating the postmark requirement—as Illinois has done in some cases, 10 Ill. Comp. Stat. Ann. 5/19-8(c)—raises the risk of voting occurring after Election Day. The Pennsylvania Supreme Court infamously mandated that some ballots received after Election Day without any postmark be presumed to be timely cast unless "a preponderance of the evidence demonstrates that it was mailed after Election Day." *Pa. Democratic Party* v. *Boockvar*, 238 A.3d 345, 371–72 n.26 (Pa. 2020). Combine that holding with Mississippi's theory and the potential risks of election disruption are manifest.

Last, a prompt receipt of ballots enables States to give voters "an adequate opportunity to cure any inadvertent defects, such as failing to sign the ballot envelope." Pildes, *supra*. "The earlier the ballots are [received and] processed, the more time there is for voters to do so." *Ibid.* Unsurprisingly, 35 states currently require ballot receipt by Election Day as defined by 2 U.S.C. § 7—requirements that have

achieved "model legislation" status by state legislators throughout the United States.[24]

Ballot receipt after Election Day is thus a serious—and new—problem facing American elections. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. Millions of Americans lack trust in our election system. It is thus essential for both the courts and the elected branches to foster trust in what our election officials are doing. Late mail-in ballot receipt rules do the opposite. This threat to voter confidence is not only dangerous, but as explained next, it also violates federal law.

II. The decision below is correct.

This Court should affirm the Fifth Circuit's decision because federal law generally precludes counting mail-in ballots that arrive after Election Day. Only that understanding gives effect to Congress's desire for a uniform Election Day that would avoid fraud and other mischiefs. Mississippi's theory, by contrast, would allow ballots to be received at any time after Election Day without limitation. The Court should reject that extreme theory.

A. The default federal rule is that ballots must be received by Election Day.

The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators

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[24] See Ballotpedia, *Absentee/Mail-in Voting*, https://perma.cc/KH76-6WSY; ALEC, *Deadline for Return and Receipt of All Ballots Act*, https://perma.cc/LEX5-8NQ5.

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. This Clause operates as "a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster*, 522 U.S. at 69 (citation omitted). And, as discussed above, despite the Clause's strong presumption in favor of State authority over federal elections, this sort of protection for Congress's ability to convene and to legislate with a full membership falls within the proper ambit of congressional exercise of authority. The propriety of congressional action concerning a uniform Election Day is also evident under the Electors Clause, which allows Congress to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II, § 1, cl. 4.

Thus, any "assumption that Congress is reluctant to pre-empt does not hold when Congress acts under" these clauses. *Inter Tribal Council*, 570 U.S. at 14. As this Court has said, "[b]ecause the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Ibid.*

The statutory text sets a specific "day for the election" for federal elections. 2 U.S.C. § 7; see *id.* § 1; 3 U.S.C. § 1 ("election day"). As described by this Court, these statutes set a "uniform federal election day." *Foster*, 522 U.S. at 72 n.3. And the Court has

held what must occur under federal law by the end of Election Day for votes to be valid: the completion of the "combined actions of voters and officials meant to make a final selection of an officeholder." *Id.* at 71; see *id.* at 72 (Election Day is when "the final act of selection" must take place); cf. *Voting Integrity Project, Inc.* v. *Keisling*, 259 F.3d 1169, 1175 (CA9 2001) (noting that this Court in *Foster* held "that the word 'election' means a 'consummation' of the process of selecting an official").

Congress considered and rejected an amendment to 2 U.S.C. § 7 that would have permitted States to continue voting after Election Day. See *id.* at 1173 & n.42 (citing Cong. Globe, 42nd Cong., 2d Sess. 676 (1872)). Other voting statutes, like the Uniformed And Overseas Citizens Absentee Voting Act, "show that Congress knew how to authorize post-Election Day voting when it wanted to." Pet. 20a. And statutes in other contexts "show[] that Congress knows how to embrace a mailbox rule when it wants to do so." Pet. 23a. The default federal election rule, however, is that the consummation of votes must be finished by the end of the first Tuesday after the first Monday in November.

But States like Mississippi push the deadline to finalize the necessary steps for selecting a candidate until as late as two weeks after Election Day. That is unlawful under *Foster*. Because ballot receipt is one of the official actions required for a voter to make their selection, if it occurs after Election Day then the vote is untimely and invalid.

Receipt is not some administrative post-vote action like tabulation. Receipt is part of the vote itself—

whether for in-person votes or mail-in votes. Receipt is therefore different from tabulation and certification, which may permissibly take place after Election Day. Those are ministerial acts of the government to ascertain the intent of the voter, not the voter's actual selection of a candidate. "The election is . . . consummated because officials know there are X ballots to count, and they know there are X ballots to count because the proverbial ballot box is closed. In short, *counting* ballots is one of the various post-election 'administrative actions' that can and do occur after Election Day." Pet. 13a.

Thus, the Election Day statutes preempt contrary state law and require consummation of the voting process before the end of Election Day. State laws like Mississippi's that seek to extend the date of consummation (*i.e.*, receipt) are unlawful. And allowing those state laws to remain in force contradicts the uniformity that the Elections Clause, the Electors Clause, and these federal statutes are designed to ensure. As explained above, the absence of uniformity in this area may lead to "election fraud, delay, and other problems." Pet. 3a (citing Cong. Globe, 28th Cong., 2d Sess. 14–15, 29 (Dec. 9, 13, 1844)).

B. The text of 3 U.S.C. § 1 confirms this reading.

The presidential elector statute, 3 U.S.C. § 1, significantly supports this understanding of "election day" under federal law. Mississippi tries to find refuge in historical ambiguity about the meaning of "election," conceding that "for much of our history States generally received ballots by election day" but

contesting whether that was "mandate[d]" by federal law. Br. 43. But 3 U.S.C. § 1 tells us something else that must happen "on election day": "The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day."

This statute reveals a simple fact: everything voters must do for the State to "appoint" electors needs to be done on Election Day. That includes delivering ballots to the State. Otherwise, electors could not be "appointed" "on election day." This statute dates to 1792, and the evidence shows that "appointment" has always meant just what it sounds like: the designation of electors, not the abstract process of choosing. Mississippi's theory, however, would make the designation of electors on Election Day impossible, as its theory eliminates any requirement for *any* ballots to be received by Election Day. That inconsistency with federal law triggers preemption.

Begin with the history of 3 U.S.C. § 1. In 1792, Congress passed "An Act relative to the Election of a President and Vice President of the United States," which provided that "electors shall be appointed in each state for the election of a President and Vice President of the United States" within a certain timeframe. 1 Stat. 239. The statute describes this appointment time as "the time of choosing electors." *Ibid.*

At the time, the word "appointment" meant a "[d]irection" or "order." S. Johnson, *Dictionary of the English Language* (6th ed. 1785) (also "Decree; establishment"); see N. Bailey, *An Universal Etymological English Dictionary* (26th ed. 1789)

(defining "to appoint" as "to constitute or ordain"); T. Sheridan, *A Complete Dictionary of the English Language* (4th ed. 1797) (defining "to appoint" as "[t]o fix any thing; to establish any thing").

The 1792 statute's other references to "appoint" likewise suggest an actual designation. For instance, § 2 provided that the electors in each State had to "appoint a person" to deliver certificates of the electors' votes. 1 Stat. 240. And the statute provided for punishment "if any person appointed to deliver the votes" failed to do so. *Ibid.*

This statute is tied to the Constitution's elector provision, which provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2. Again, this usage and related usages of "appoint" in the Constitution suggest a designation. See *Chiafalo* v. *Washington*, 591 U.S. 578, 589 (2020) (emphasizing the Article II "power to appoint an elector"); U.S. Const. art. II, § 2, cl. 2 (President "shall appoint Ambassadors"); *id.* art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office . . .").

In 1845, Congress passed "An Act to establish a uniform time for holding elections for electors of President and Vice President in all the States of the Union." 5 Stat. 721. The Act said that "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 of the year in which they

are to be appointed." *Ibid.* This Act provided an exception, significant for the meaning of the word "appoint": "when any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide." *Ibid.*

This statute provides strong evidence that appointment requires "choosing" to be done and designation of electors to be possible *on election day*. The exception distinguishes between electors being "appointed" and the process of "choosing" them. In Congress's view, a State's failure "to make a choice" on election day requires an exception for electors to "be appointed on a subsequent day." The default rule is thus that the "choice" *and* the "appoint[ment]" must be done on election day.[25] This interpretation is bolstered by the fact that "appoint" continued to mean "[t]o constitute, ordain, or fix by decree, order or decision," and "assign or designate." N. Webster, *An American Dictionary of the English Language* (3d ed. 1830).

Next, Congress in 1948 separated the default rule and its exception into two statutory provisions, without apparent substantive change in the meaning. Act of June 25, 1948, Pub. L. No. 771, §§ 1–2, 62 Stat.

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[25] Respondents supporting Mississippi claim that this statute "used the term 'appointment' rather than 'election' because it was describing presidential electors." Vet Voice Br. 18 n.5. That seems dubious, given that the statute referred to *both* "an election for the purpose of choosing electors" and the electors being "appointed"—suggesting that the two were not the same.

672. This Act also gave the executive of each State the duty to communicate to the U.S. Secretary of State the "ascertainment of the electors appointed." *Id.* § 6, 62 Stat. 673. This makes clear that later processes related to certification are viewed as "ascertainment" and can happen after "appointment"—but "appointment" must happen on Election Day.

Last, in 2022, Congress removed 3 U.S.C. § 2's exception and substituted an exception for States to extend Election Day only for force majeure events. 3 U.S.C. § 21(1). But it continued to require that the electors "shall be appointed, in each State, on election day." 3 U.S.C. § 1. And "appoint" retains the same meaning it always has. See Black's Law Dictionary (12th ed. 2024) ("To fix" or "To choose or designate (someone) for a position or job").

Mississippi largely ignores this statute and its implications for the question here. The primary discussion of 3 U.S.C. § 1 is by Professor Morley, who contends that "the federal election day statutes cannot be applied literally." Morley *Amicus* Br. 3. Of course, the Court "do[es] not aim for 'literal' interpretations," but it *does* "seek the law's ordinary meaning." *Niz-Chavez* v. *Garland*, 593 U.S. 155, 168–69 (2021). "The soundest legal view seeks to discern literal meaning in context," for courts can err by "reading [text] either nonliterally or hyperliterally." A. Scalia & B. Garner, *Reading Law* 40 (2012).

Here, all the relevant circumstances—dictionary definitions, statutory history, and related provisions—confirm that appointment means designation rather than the process of choosing. It is hard to read the 1845 statute any other way, and Congress's retention

of "appointed" throughout the statutory evolution "brings the old soil with it." *Stokeling* v. *United States*, 586 U.S. 73, 80 (2019) (cleaned up).

Neither Mississippi nor its allies try to make any sense of Congress's longstanding requirement that "appointment" must happen *on Election Day*. They have no explanation for another plausible meaning of "appointment" other than designation of electors. Indeed, Respondents supporting Mississippi *agree* that the relevant meaning of "appointment" is "designation to office." Vet Voice Resp. Br. 18 n.5 (quoting N. Webster, *An American Dictionary of the English Language* 46 (rev. ed. 1844)). That "designation to office" is supposed to happen on Election Day, and *that* can only happen if the voters' choices are made *and* received by Election Day. No one tries to show that this ordinary meaning of "appoint" is somehow absurd. Thus, Mississippi's interpretation depends on giving "appoint" in 3 U.S.C. § 1 an atextual and ahistorical meaning.

Professor Morley also argues that "[i]t does not appear that Congress intended that these statutes be applied literally" because "[m]ost basically, notwithstanding 3 U.S.C. § 1, presidential electors are not, have never been, and cannot be 'appointed' on Election Day." Morley *Amicus* Br. 4–5. But no sound theory of statutory interpretation reads language "notwithstanding" the statute at hand. And this view is contradicted by the 1845 and 1948 predecessor statutes, which expressly provided an exception so that electors could be "appointed on a subsequent day" when a State "fail[ed] to make a choice on [election] day." 5 Stat. 721; see also 62 Stat. 672. By

distinguishing appointment from "h[olding] an election," this exception shows that "appoint[ment]" is not some abstract synonym for the process of "choosing." Contra Vet Voice Resp. Br. 18 n.5. Appointment must happen on Election Day, and Mississippi's theory makes that impossible.

The legislative history does not change the ordinary meaning of "appointed." According to Professor Morley, Congress used the language it did in 1845 because, at the time, "South Carolina's presidential electors were [still] appointed by the state legislature rather than chosen through a popular election." Morley *Amicus* Br. 4 (citing Cong. Globe, 28th Cong., 2d Sess. 14 (Dec. 9, 1844) (statement of Rep. Elmer)). "[I]n the earlier history of our government, most of the States appointed their electors by the action of their legislatures." Cong. Globe, 28th Cong., 2d Sess. 14 (Dec. 9, 1844) (statement of Rep. Elmer). Cognizant of this background—in which "appointment" seemed to mean actual designation of electors—Congress continued to carry over the term "appointed" in 1845 in later years. That strongly suggests that the original public meaning of the word aligns with designation, not an abstract process of choosing.

The legislative history also reiterates Congress's overriding concern in enacting the Election Day statute: "to guard against frauds in the elections of President and Vice President, by declaring that they shall all be held on the same day." *Id.* at 29 (statement of Rep. Rathbun). To eliminate the problem of individuals voting in multiple States, Congress wanted "all regular stated elections for the choice of

electors of President and Vice President of the United States [to] be held on the same day, and on one single day, in all the States of the Union." *Id.* at 14 (statement of Rep. Duncan); see *id.* at 14, 30–31 (statements of Reps. Elmer and Washington Hunt) (similar); accord Morley *Amicus* Br. 9–15. Once again, this understanding favors reading "appointed" to require that all actions necessary for designation be finished on a single Election Day.

Professor Morley points out potential tension between this reading and the practical reality that, in States that no longer appointed electors via their legislatures, the process of determining who the people designated as electors might extend beyond Election Day. He emphasizes a note in the legislative history explaining that "[a]fter the electors have been chosen by the people, the returns have to be made to the Secretary of State, which would require at least ten days in a State of ordinary size." Morley *Amicus* Br. 5 (quoting Cong. Globe, 28th Cong., 2d Sess. 29 (Dec. 13, 1844) (statement of Rep. Payne)).

But this statement was not in the context of defining "appointed." And the broader objection to giving "appointed" its ordinary meaning is unavailing. First, that Congress was aware of practical realities yet continued to use the term "appointed" suggests that it did not intend a new meaning. Second, when all votes are received by Election Day, it is at least possible to say at the end of that day that the election is over and "the electors have been chosen by the people" and thus designated. *Ibid.* The State's ministerial tasks of counting and "ascertainment" (3 U.S.C. § 5) could happen on that day or later, for

everything that voters need to do to designate an elector—including returning their ballot—is done. But on Mississippi's reading, electors could *never* be "appointed" on Election Day, for ballots could be outstanding, in the hands of third parties (including private entities), and subject to recall (as explained below). On Mississippi's view, an elector is "appointed" on Election Day even though the State does not have all the votes. That view stretches "appointed" beyond any plausible interpretation. Thus, 3 U.S.C. § 1 significantly undermines Mississippi's interpretation.

C. Mississippi's theory would enable the mischief Congress sought to avoid.

Mississippi's arguments against the decision below are unavailing. On Mississippi's theory, Congress wrote a law to ensure Election Day uniformity—without any care about when votes would be received, or even who would have the ballots in the meantime. That is not a persuasive understanding of federal statutes that sought a streamlined Election Day.

Below, Judge Oldham—joined by Judges Smith, Ho, and Duncan—noted that on Mississippi's theory, "States [w]ould be free to accept ballots for as long as they'd like after Election Day." Pet. 34a (concurring in denial of rehearing en banc). Mississippi has no meaningful response. Rather, it points to dates when congressional terms start, suggesting that these "deadlines" "force action." Br. 45–46. But members of Congress have seen the start of their terms delayed because of unresolved or late elections, and Mississippi does not explain why the same consequence could not occur here—or why setting a uniform Election Day to prevent such dangers to the

federal government would not be within Congress's proper exercise of its fail-safe Elections Clause authority, namely that "every government ought to contain in itself the means of its own preservation."[26] Thus, it remains true that under Mississippi's theory, "nothing whatsoever prevents the States from innovating with ever-later ballot receipt deadlines 2 months, or even 2 years, after Election Day." Pet. 34a (Oldham, J., concurring in denial of rehearing en banc).

Mississippi glosses over the fact that custody of ballots between Election Day and a later deadline will not be by the State, but by third parties—including private parties. Under Mississippi law, mail-in ballots can be given not only to the U.S. Postal Service but also to private carriers "such as United Parcel Service or FedEx Corporation." Miss. Code Ann. § 23-15-637(1)(a); see *id.* § 23-15-631(1)(c). Thus, control of ballots *after Election Day* will be with third parties, not the voter or any part of the State.

Mississippi also glosses over the fact that voters can recall mail—including their ballots—from these third parties. The Postal Service's "Package Intercept"

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[26] Federalist No. 59; see, *e.g.*, M. Weiner, *NY Certifies Claudia Tenney as Winner of House Race over Anthony Brindisi*, Syracuse Post-Standard (Feb. 8, 2021), https://perma.cc/D65T-XN54 (House election certified in February after "a three-month legal battle over disputed absentee ballots and affidavit ballots"); R. Berg-Andersson, *Dates of Biennial Federal Elections for Congress: From 1872 On*, Green Papers (June 3, 2009), https://perma.cc/8W2Y-GEEA (noting historical "elections being held *after* the term to which [the] Congressmen were being elected had already, technically, begun").

"lets the sender (or authorized representative) stop delivery or redirect a package, letter, or flat that is not out for delivery or already delivered." *USPS Package Intercept*, https://perma.cc/4D8P-N8VX. Other third parties that Mississippi lets handle ballots after Election Day also allow recall and rerouting. See, *e.g.*, *UPS Delivery Intercept Options*, https://tinyurl.com/mpem98kh. Thus, it is inaccurate to say that "[u]nder Mississippi law, the voters make their conclusive choice of federal officers by federal election day" and "cannot change their votes after that day." Mississippi Br. 35–36.

Mississippi insists that under its law, "a mail-in absentee ballot is 'final' when cast—it cannot be 'uncast.'" Br. 41. But that appears incorrect both practically (as explained) and under Mississippi law. Mississippi's reference to "final" comes from this statutory provision:

> The Secretary of State shall promulgate rules and regulations necessary to ensure that when a qualified elector who is qualified to vote absentee votes by absentee ballot, either by mail or in person with a regular paper ballot, that person's absentee vote is final and he or she may not vote at the polling place on election day.

Miss. Code Ann. § 23-15-637(3). This provision says nothing about whether a mailed ballot can be recalled. And the relevant regulations say 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." 1 Miss. Admin. Code pt. 17, R. 2.1; see *id.* R. 2.3(a). Obviously, that would not happen

until after the ballot is received, meaning that a mailed ballot is *not* "final" when handed to—or recalled from—a third party.

What's more, it is not obvious why Mississippi's reading would preclude a State from letting voters hang on to their own ballots, then deliver them sometime in the future (if they still want to). Though Mississippi frames its theory of "casting" a vote as "marking *and submitting*," *e.g.*, Br. 1 (emphasis added), it is unclear why putting the ballot in the hands of another potentially private party for provisional future delivery should matter on Mississippi's understanding. Mississippi's dictionaries (Br. 24–25) do not appear to draw the line that Mississippi needs for its meaning of "election"—after submission but before receipt. Cf. Pet. 8a n.5. And the logic of Mississippi's history argument—that historical implementation of the relevant statutes has no bearing on States' ability "to explore" other avenues (Br. 31)—suggests that Mississippi's theory could not limit post-Election Day vote casting.

At a minimum, Mississippi's theory means that States could authorize *anyone*—ballot harvesters, unions, political parties—to hold ballots for any period of time after Election Day without supplying proof of when they received those ballots. Again, some States with laws like Mississippi's already do not require any postmark or other proof of mailing in at least some situations. See 10 Ill. Comp. Stat. Ann. 5/19-8(c). Mississippi's theory would also mean that voters could retract their votes anytime in that period. Those results cannot be squared with Congress's establishment of "a uniform election day." Pet. 14a.

This Court should reject Mississippi's theory and hold that ballot receipt is a necessary part of an election under the default federal rule.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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