No. 24-1260

IN THE

Supreme Court of the United States

MICHAEL WATSON,
MISSISSIPPI SECRETARY OF STATE,

Petitioner,

v.

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE AND REPRESENTATIVE RICHARD HUDSON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CHARLES R. SPIES
Counsel of Record
ROBERT L. AVERS
THOMAS J. PHILBRICK
DANIEL C. ZIEGLER
1825 Eye Street, NW, Suite 900
Washington, DC 20006
(202) 466-5964
cspies@dickinsonwright.com

Counsel for Amici Curiae

390307

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT. 3

ARGUMENT. 5

I. This Court should affirm the Fifth Circuit based solely on the plain texts of 2 U.S.C. § 7, 3 U.S.C. § 1, and the Mississippi law. 5

II. All available extra-textual evidence supports the Fifth Circuit's interpretation of 2 U.S.C. § 7 and 3 U.S.C. § 1 9

A. This Court need not examine legislative history in determining whether Mississippi's law is preempted by federal election law 9

B. The texts of UOCAVA, MOVE, and HAVA do not contradict the plain text of 2 U.S.C. § 7 and 3 U.S.C. § 1 11

i. Silence cannot overrule speech 12

ii. The General/Specific Canon cuts against the Senators' argument. 13

Table of Contents

Page

iii. The Presumption Against Implied Repeal Canon cuts against the Senators' argument 14

iv. The Prior Construction Canon weighs against the Senators' argument. 16

C. The legislative histories of UOCAVA, MOVE, and HAVA do not evidence any intent to approve of States' receipt of ballots after election day 19

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

Cases

Arizona v. Inter Tribal Council of Arizona, Inc.,
570 U.S. 1 (2013) 5

Azar v. Allina Health Servs.,
587 U.S. 566 (2019) 11

Barney v. Dolph,
97 U.S. 652 (1878) 10

Bragdon v. Abbot,
524 U.S. 624 (1998) 17

Busbee v. Smith,
549 F. Supp. 494 (D.D.C. 1982) 13

Connecticut Nat. Bank v. Germain,
503 U.S. 249 (1992) 5

Conroy v. Aniskoff,
507 U.S. 511 (1993) 19

Epic Sys. Corp. v. Lewis,
584 U.S. 497 (2018) 11

Ex parte Collett,
337 U.S. 55 (1949) 11

Ex parte Yarbrough,
110 U.S. 651 (1884) 3, 4, 23

Cited Authorities

Page

Foster v. Love,
522 U.S. 67 (1997) 4, 6-8, 14, 17-19

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1 (2000) 4, 5

Maddox v. Board of State Canvassers,
149 P.2d 112 (Mont. 1944) 8

Millsaps v. Thompson,
259 F.3d 535 (C.A. 6, 2001) 8

N.L.R.B. v. SW Gen., Inc.,
580 U.S. 288 (2017) 9

Posadas v. Nat'l City Bank of New York,
296 U.S. 497 (1936) 15, 16

Rapanos v. United States,
547 U.S. 715 (2006) 12

Sedima, SPRL v. Imrex Co., Inc.,
473 U.S. 479 (1985) 12

Toibb v. Radloff,
501 U.S. 157 (1991) 9

United States v. Noce,
268 U.S. 613 (1925) 14

Page

Voting Integrity Proj., Inc. v. Bomer,
199 F.3d 773 (5th Cir. 2000) 8

Statutes

2 U.S.C. § 7 . . . . . .2-21, 23

2 U.S.C. § 8 . . . . . .11, 13

2 U.S.C. § 8(b)(4) 13

3 U.S.C. § 1 . . . . . .2-21, 23

3 U.S.C. § 21(1) 13

Help America Vote Act, Pub. L. No. 107-252, § 706,
116 Stat. 1725 (2002). 18

Constitutional Provisions

U.S. Const. art I, § 4, cl. 1 . . . . . .2, 11

U.S. Const. art. II, § 1, cl. 4 . . . . . 1-2, 11

Other Authorities

148 Cong. Rec. S10412-S10413
(daily ed. Oct. 15, 2022) 22, 23

155 Cong. Rec. S7965
(daily ed. July 23, 2009). 20

Page

155 Cong. Rec. S7966
(daily ed. July 23, 2009) 21

Act of July 8, 2020, ch. 472 § 1, 2020 Miss. Laws 1411 . . .6

Hearing at H.R. 4393 Before the H. Comm. On
House Admin., 99th Cong. 13 (1986) 19

Pub. L. No. 107-252, 116 Stat. 1666 22

A. Scalia & B. Garner,
Reading Law: The Interpretation of Legal Texts
(2012) 10, 14, 15, 17

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the National Republican Congressional Committee ("NRCC") is a national political party committee registered with the Federal Election Commission. The mission of the NRCC is to advocate for and support Republican candidates for election to the United States House of Representatives. Due to its mission, the NRCC has a keen interest in preserving and upholding the integrity of federal elections laws. The NRCC has appeared as *amicus curiae* in several cases touching on federal elections laws, and as such is both interested in and well situated to opine on the issues in this case.

Amicus curiae Richard Hudson is the United States Representative for North Carolina's eighth congressional district. He is also the current chair of the NRCC. Because of his roles as the current chair of the NRCC and as a representative for North Carolina's eighth congressional district, Representative Hudson has a keen interest in preserving and upholding the integrity of federal elections laws. Representative Hudson's roles make him both interested in and well situated to opine on the issues in this case.

Amici are dedicated to ensuring the States administer federal elections in strict accord with Congress's laws, as is their constitutional duty. *See* U.S. Const. art. II,

---

1. No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* or their counsel, made any monetary contribution to its preparation or submission.

§ 1, cl. 4; U.S. Const. art I, § 4, cl. 1 (giving Congress plenary discretion to establish the time of federal elections, state laws to the contrary notwithstanding). As an elected member of Congress and an organization representing all Republicans in the United States House of Representatives, *Amici* have a strong interest in—and firsthand experience with—the integrity of the federal election processes, including the parameters for casting and receiving absentee ballots. *Amici* are therefore uniquely situated to comment on both federal election law and the Mississippi law at issue in this case.

Of particular concern to *Amici* are the arguments advanced by a group of Democratic United States Senators, namely Ron Wyden, Alex Padilla, Angela Alsobrooks, Richard Blumenthal, Maria Cantwell, Catherine Cortez Masto, Tammy Duckworth, Tim Kaine, Amy Klobuchar, Jeff Merkley, Jacky Rosen, Adam Schiff, Chris Van Hollen, and Mark Warner (collectively, the "Senators") in their brief *amici curiae* in support of Petitioner. The Senators contend that this Court should reverse the Fifth Circuit based on three laws that are, in their view, more suited to the current moment than 2 U.S.C. § 7 and 3 U.S.C. § 1. They read those three more-recent laws as effectively repealing 2 U.S.C. § 7 and 3 U.S.C. § 1, which were enacted as an exercise of Congress's constitutional authority to preempt contrary state election laws and establish a uniform day for the election of federal officers. Rather than apply the full range of federal election law even-handedly, the Senators would have this Court favor three laws of their choosing based on scattered and selectively-chosen portions of those statutes' texts and legislative histories.

Together, *Amici* submit this brief to highlight the dangers of the Senators' positions. *Amici* also submit this brief to set the record straight that Congress's enactments governing the time and manner of the election of federal officers are uniform and consistent—there is no conflict between 2 U.S.C. § 7 or 3 U.S.C. § 1 and the three statutes the Senators highlight, regardless of their difference in age. Viewed as a whole, Congress's enactments interlock to convey one clear statement of legislative intent: that the election of federal officers must be held on one uniform day across all fifty States and the several Territories. This *amici* brief advocates for the respect and effectuation of *all* of Congress's enactments, which is a relevant matter not already brought to this Court's attention that will shed helpful light on the issues presented on appeal.

SUMMARY OF THE ARGUMENT

Congress enacted 2 U.S.C. § 7 "to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States." *Ex parte Yarbrough,* 110 U.S. 651, 661 (1884). Notwithstanding those evils, the Senators appeared as *amici curiae* in this case and asked the Court to set aside 2 U.S.C. § 7 and its twin, 3 U.S.C. § 1, so that elections may occur at different times in the different States—this time with this Court's endorsement. *See generally*, Brief of Fourteen United States Senators as *Amici Curiae* Supporting Petitioner ("Senators' Brief"). As support for this request, the Senators point to the legislative history of three contemporary election laws that, in their view, repeal portions of 2 U.S.C. § 7 and 3 U.S.C. § 1 and are better suited for contemporary electoral contexts than those older statutes. This Court should reject the

Senators' invitation to allow "more than one evil" to again arise in our elections. *Ex parte Yarbrough*, 110 U.S. at 661.

First, the conflict between Mississippi's statute on the one hand and 2 U.S.C. § 7 and 3 U.S.C. § 1 on the other is "a narrow one turning entirely on the meaning of the state and federal statutes[.]" *Foster v. Love*, 522, U.S. 67, 71 (1997). If this Court reviews the texts of the relevant state and federal statutes, Mississippi's statute is plainly preempted. And the Court should end its analysis there—with the statutes' texts, which have a plain meaning. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (quotation omitted).

Second, even if this Court accepts the Senators' invitation to go beyond the statutes' plain language and to dive into a murky world inhabited by "legislative history," "the legislative record," and "Congress's understanding," *see e.g.,* Senators' Brief Sections I and II, those sources ultimately cut *against* the Senators' (and thus Petitioner's) position. For one, the texts of the three statutes selected by the Senators—specifically, the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), Military and Overseas Voter Empowerment Act ("MOVE"), and Help America Vote Act of 2002 ("HAVA")—are not at odds with 2 U.S.C. § 7 and 3 U.S.C. § 1. Next, under the Prior-Construction Canon, Congress enacted MOVE and HAVA with knowledge of this Court's interpretation of 2 U.S.C. § 7 and 3 U.S.C. § 1 in *Foster v. Love*, which rejected the arguments now made by the Senators. Last, the legislative history of UOCAVA, HAVA, and MOVE do not evidence

any intent—even a fractured intent, much less an intent codified in law—to approve of States' receipt of ballots after election day.

In all, this Court should affirm the ruling of the Fifth Circuit based only on the texts of 2 U.S.C. § 7, 3 U.S.C. § 1, and Mississippi's statute. If this Court goes beyond the texts of those relevant statutes, it should still affirm the ruling of the Fifth Circuit because all extra-textual evidence supports the Fifth Circuit's interpretation.

ARGUMENT

I. This Court should affirm the Fifth Circuit based solely on the plain texts of 2 U.S.C. § 7, 3 U.S.C. § 1, and the Mississippi law.

"Congress says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). Accordingly, when the text of a statute is plain, the "sole function of the courts . . . is to enforce it according to its terms." *Hartford*, 530 U.S. at 6 (quotation marks and quotations omitted). This is particularly so in the context of election laws, where "the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14 (2013). Here, the meaning of each statute at issue—2 U.S.C. § 7, 3 U.S.C. § 1, and the Mississippi law being challenged—is clear from the respective plain text.

2 U.S.C. § 7 states that "[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is

established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter." Simply put, 2 U.S.C. § 7 specifies the precise day on which the election of Congressional officeholders must take place, and it applies that specification to all fifty states.

The same is true for 3 U.S.C. § 1, which states that "[t]he 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." Again, the text is clear: electors must be appointed on the specific day set aside for the election. Taken together, 2 U.S.C. § 7 and 3 U.S.C. § 1 thus "mandate[] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster*, 522 U.S. at 70.

In light of this clarity, the bluntness with which the Mississippi law contradicts 2 U.S.C. § 7 and 3 U.S.C. § 1 is startling. That law provides that Mississippi election officials can receive and count absentee ballots up to "five (5) business days after the election" as long as those ballots are "postmarked on or before the date of the election." *See* Act of July 8, 2020, ch. 472 §1, 2020 Miss. Laws 1411. In other words, the Mississippi statute allows for the receipt of ballots *after* the singular election day specified by 2 U.S.C. § 7 and 3 U.S.C. § 1. Mississippi's law is therefore in direct conflict with federal election law.

In holding the Mississippi law was preempted by federal election law because it allowed elections governed by 2 U.S.C. § 7 and 3 U.S.C. § 1 to occur on a day other than the one mandated by Congress, the Fifth Circuit followed

in this Court's footsteps. In *Foster v. Love*, this Court considered whether 2 U.S.C. § 7 preempted a Louisiana statute that made it possible for federal elections to conclude before the day established by Congress. *Foster*, 522 U.S. at 69-70. There, the Court concluded that 2 U.S.C. § 7 "along with 2 U.S.C. § 1 (setting the same rule for electing Senators under the Seventeenth Amendment) and 3 U.S.C. § 1 (doing the same for selecting Presidential electors), mandates holding all elections for Congress and the Presidency on a single day throughout the Union." *Id.* In reaching this conclusion, the Court reasoned that "[w]hen the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder (subject only to the possibility of a later run-off[.]" *Id.* at 71. In other words, a federal "election" occurs when the electorate has "ma[d]e a final selection" among the candidates for office, and that occurs when the last valid ballot is received for counting. *Id.*; *see also* App10a ("it makes no sense to say the electorate as a whole has made an election and finally chosen the winner before all voters' selections are received."). Thus, in *Foster v. Love*, this Court held Louisiana's statute was preempted by federal elections law because it allowed an "election" to occur on a day different than that specified by Congress.

That's exactly what Mississippi's statute does here. The Fifth Circuit therefore properly relied on the plain text of these provisions and this Court's holding in *Foster v. Love* in determining that Mississippi's law was preempted by 2 U.S.C. § 7 and 3 U.S.C. § 1. App.3a-4a. Relying on the Elections Clause of the Constitution, the texts of 2 U.S.C. § 7 and 3 U.S.C. § 1, and—merely as confirmatory evidence, *not* as evidence in the first

instance—the historical practice surrounding ballot receipt, the Fifth Circuit concluded that ballots are cast when received, and elections are complete when the last ballot is received on the day of the election. App.8a-13a. These findings are consistent with precedent from this Court and other courts around the country. *See, e.g.*, *Foster*, 522 U.S. at 70 (holding that federal election law preempted a Louisiana law that made it possible for candidates to be elected before election day); *Maddox v. Board of State Canvassers*, 149 P.2d 112, 116 (Mont. 1944) (holding that federal election law preempted a Montana law that, like the Mississippi law at issue here, allowed election officials to receive ballots after the close of election day); *Voting Integrity Proj., Inc. v. Bomer*, 199 F.3d 773, 774 (5th Cir. 2000) (upholding a Texas law that allowed voting up to 17 days before election day because election results would not be finalized before election day took place).

Taken together, these cases all reinforce the principle that a State cannot "create a regime of combined action meant to make a final selection on any day other than federal election day." *Millsaps v. Thompson*, 259 F.3d 535, 547-58 (C.A. 6, 2001). Mississippi's law contradicted that principle, and the Fifth Circuit properly held it was preempted.

The texts of 2 U.S.C. § 7 and 3 U.S.C. § 1 are clear—they establish one uniform day for the election of Presidential, Vice-Presidential, and Congressional candidates to office. Any State law that allows the election of candidates for the offices of President, Vice-President, or Congress on a day other than that mandated by 2 U.S.C. § 7 and 3 U.S.C. § 1 is preempted. And because federal law is clear, this

Court need not consider anything more. *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 305 (2017) (holding "The text is clear, so we need not consider [] extra-textual evidence").

II. All available extra-textual evidence supports the Fifth Circuit's interpretation of 2 U.S.C. § 7 and 3 U.S.C. § 1.

A. This Court need not examine legislative history in determining whether Mississippi's law is preempted by federal election law.

In their *amici* brief, the Senators argue that selective aspects of the legislative history of three more-recent federal elections laws show that Congress did not intend to preempt laws like the Mississippi law at issue in this case. Despite claiming that "text, structure, and legislative history" are "valid sources of discerning congressional purpose," the Senators' argument ultimately coalesces around only one of those: legislative history. *See* Senators' Brief, p. 11. Indeed, the entire rest of their brief relies on the fundamental assumption that legislative history is not only relevant but in fact determinative of whether Mississippi's law is preempted.

Yet despite leaning heavily on legislative history, the Senators do not even attempt to establish the existence of ambiguity in any of the three statutes they have chosen, which is a prerequisite for the use of legislative history. *See Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (noting that courts may only "refer to a statute's legislative history to resolve statutory ambiguity"). And while the Senators never establish ambiguity in the statutes at issue here, they nonetheless invite the Court to consider legislative

history merely because 2 U.S.C. § 7 and 3 U.S.C. § 1 are old. A consistent theme throughout the Senators' brief is that the age of those statutes, especially in comparison to the relative recency of the three statutes they prefer, is ample reason to limit or reduce the clear preemptive effect of 2 U.S.C. § 7 and 3 U.S.C. § 1. *See, e.g.,* Senators' Brief, at 12 (referring to 2 U.S.C. § 7 and 3 U.S.C. § 1 as "more than a century old"); *id.* (referring to 2 U.S.C. § 7 and 3 U.S.C. § 1 as "[f]ederal law long ago").

But a statute's age is no barrier to its modern application. *See, e.g., Barney v Dolph*, 97 U.S. 652, 656-57 (1878) (noting that both an old law and a new law "are to stand" together unless "there is a positive and irreconcilable repugnancy between" them); *see also* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* at 336-339 (2012) (discussing the Desuetude Canon, which is "[t]he bright-line rule [] that a statute has effect until it is repealed. If 10, 20, 100, or even 200 years pass without any known cases applying the statute, no matter: The statute is on the books and continues to be enforceable until it is repealed."). And nowhere in the Senators' argument is an acknowledgement of the obvious preemptive authority exercised by Congress in 2 U.S.C. § 7. Instead, the Senators offer only the theoretical claim that "statutes enacted by a later Congress can alter or clarify the preemptive scope of prior legislation." Senators' Brief, p. 12. Even if that is true, the concept has no bearing on whether existing federal election law preempts Mississippi's statute. Whether the Senators would have preferred Congress to limit the preemptive effect of 2 U.S.C. § 7 is not relevant here: that statute remains on the books, so it continues to be enforceable. *See* Scalia, *Reading Law* at 336.

In short, none of the Senators' arguments for considering legislative history in this case hold water. "[L]egislative history is not the law." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018). And "there is no need to refer to [] legislative history where the statutory language is clear," as it is here. *Ex parte Collett*, 337 U.S. 55, 61 (1949). Doing so would only "muddy [the] clear statutory language" of 2 U.S.C. § 7 and 3 U.S.C. § 1. *Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019) (quotation marks and quotation omitted). Accordingly, this Court need not consider legislative history in evaluating the Fifth Circuit's decision.

B. The texts of UOCAVA, MOVE, and HAVA do not contradict the plain text of 2 U.S.C. § 7 and 3 U.S.C. § 1.

Congress may govern the timing of federal elections. *See* U.S. Const. art I, § 4, cl. 1; U.S. Const. art II, § 1, cl. 4. Congress exercised that authority when it enacted 2 U.S.C. § 7 and 3 U.S.C. § 1 to establish a single day for the election of candidates for Presidential, Vice-Presidential, and Congressional offices. To be sure, there are exceptions to that rule, but where Congress has created exceptions to the single election day created by 2 U.S.C. § 7 and 3 U.S.C. § 1, it has done so explicitly. The Senators, however, argue that UOCAVA, MOVE, and HAVA create additional exceptions to the one-election-day rule that has existed for 150 years. Unlike the true exceptions to the rule, which are, for example, limited to "extraordinary circumstances," *see* 2 U.S.C. § 8, the Senators' proposed exception would swallow the rule whole. In other words, the Senators read UOCAVA, MOVE, and HAVA to mean that an election does *not* have to occur on the day established by 2 U.S.C.

§ 7 and 3 U.S.C. § 1, i.e., 2 U.S.C. § 7 and 3 U.S.C. § 1 are functionally repealed. For the reasons below, this Court should disregard their unsupported and selectively narrow reading.

i. Silence cannot overrule speech.

The Senators admit that MOVE is silent about whether a State may accept marked ballots after the election day established by 2 U.S.C. § 7 and 3 U.S.C. § 1, *see* Senators' Brief, p. 7, and they do not cite any provision of UOCAVA or HAVA that addresses that issue. *See generally*, Senators' Brief. They nonetheless maintain, however, that 2 U.S.C. § 7 and 3 U.S.C. § 1 should not preempt the Mississippi law in this case. They are wrong. None of the statutes they cite create exceptions of any kind to 2 U.S.C. § 7 or 3 U.S.C. § 1.

A determination of whether UOCAVA, MOVE, and HAVA created exceptions to the generally applicable single-election-day rule starts with their texts. And viewing the texts of UOCAVA, MOVE, and HAVA beside the texts of 2 U.S.C. § 7 and 3 U.S.C. § 1 reveals no jarring inconsistencies—indeed, no inconsistencies whatsoever. Where 2 U.S.C. § 7 and 3 U.S.C. § 1 speak clearly about the date of federal elections, UOCAVA, MOVE, and HAVA are silent. And congressional silence, as the Fifth Circuit noted, cannot overrule congressional speech as expressly articulated through its enacted laws. *See* App.18a-21a (citing *Sedima, SPRL v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985) ("[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute."); *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (plurality op.) (noting the Court's "oft expressed

skepticism toward reading the tea leaves of congressional inaction").

Congress's silence, to the extent it says anything, actually cuts against the notion that UOCAVA, MOVE, and HAVA create exceptions to 2 U.S.C. § 7 and 3 U.S.C. § 1. Consider, for example, 2 U.S.C. § 8, which created an exception to the single election day rule for "extraordinary circumstances." *See* 2 U.S.C. § 8(b)(4) (defining "extraordinary circumstances" as "when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100."). Section 8's purpose—to create an exception to the single election day rule—is evident on its face, and courts have accordingly recognized it as creating an exception. *See e.g.*, App.21a-22a (citing *Busbee v. Smith*, 549 F. Supp. 494, 526 (D.D.C. 1982) ("section 8 creates an exception to section 7's absolute rule in a limited class of cases."). In contrast, no court of which *Amici* are aware has ever held that UOCAVA, MOVE, or HAVA's texts create an exception to 2 U.S.C. § 7 and 3 U.S.C. § 1. And the one court that has considered the question—the Fifth Circuit panel below—held that UOCAVA, MOVE, or HAVA do not create an exception to 2 U.S.C. § 7 and 3 U.S.C. § 1. *See generally*, App.1a-26a. Simply put, Congress has the ability to create exceptions to 2 U.S.C. § 7 and 3 U.S.C. § 1, *see e.g.*, 2 U.S.C. § 8; 3 U.S.C. § 21(1), but it did not do so in UOCAVA, MOVE, or HAVA.

ii. The General/Specific Canon cuts against the Senators' argument.

The Senators argue that UOCAVA, MOVE, and HAVA were "legislated against [a] settled backdrop" of

state mailbox rules for absentee ballots. Senators' Brief, at 6. In their view, this generalized backdrop of *state* rules about the timing of ballot receipt should overrule Congress's specific statements about that timing in 2 U.S.C. § 7 and 3 U.S.C. § 1. They forget, however, that if two provisions conflict, the more specific provision controls over the general one. *See* Scalia, *Reading Law* at 183-88 (explaining that when two provisions conflict, under the General/Specific Canon "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence").

Here, the General/Specific Canon prevents this Court from enforcing UOCAVA, MOVE, and HAVA's general statements about election administration over 2 U.S.C. § 7 and 3 U.S.C. § 1's specific statements mandating a singular election day. The Senators' conclusion that state mailbox rules are not preempted by 2 U.S.C. § 7 and 3 U.S.C. § 1 runs headlong into the fact that 2 U.S.C. § 7 and 3 U.S.C. § 1 *specifically* address the date of federal elections, which, under *Foster v. Love*, includes the precise date by which all marked ballots must be received. Thus, even if UOCAVA, MOVE, and HAVA generally discussed, alluded to, or "presuppose[d]" the validity of states mailbox rules, those generalities would not control over the specific mandate that there be one election day.

iii. The Presumption Against Implied Repeal Canon cuts against the Senators' argument.

"Implied repeals are not favored." *United States v. Noce*, 268 U.S. 613, 619 (1925). The presumption against implied repeals arises from "the need for a code of laws

whose application—or at least whose very existence—is clear." Scalia, *Reading Law*, at 328. The logic is simple: if Congress legislated once, it should counter-legislate, i.e., repeal, with clarity equal to that of the initial legislation. The canon against implied repeal ensures much-needed clarity in what laws are (and are not) in force. The presumption against an implied repeal may be overcome only "(1) [w]here provisions in the two acts are in irreconcilable conflict" and "(2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute," *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). Neither of those prerequisites exist here.

The Senators' argument is, at bottom, that UOCAVA, MOVE, and HAVA impliedly repeal 2 U.S.C. § 7 and 3 U.S.C. § 1's creation of a uniform day for federal elections. Their argument fails because, first, there is no conflict between 2 U.S.C. § 7 and 3 U.S.C. § 1 on the one hand and UOCAVA, MOVE, and HAVA on the other. *See Supra* Section I. The argument also fails because it violates the canon against implied repeal and does not fall within either narrow exception.

The first prerequisite for overcoming the presumption against implied repeal is inapplicable here because the earlier acts, 2 U.S.C. § 7 and 3 U.S.C. § 1, do not irreconcilably conflict with the later acts, UOCAVA, MOVE, and HAVA. Nothing in UOCAVA, MOVE, and HAVA will be rendered inoperable if this Court affirms the Fifth Circuit. UOCAVA, MOVE, and HAVA do not draw anything from state mailbox rules, and those statutes will continue in-force unhindered by the preemption of Mississippi's mailbox rule. That the earlier statutes can

be applied with no effect on the later statues demonstrates the lack of an "irreconcilable" conflict between the two.

The second prerequisite is also inapplicable because UOCAVA, MOVE, and HAVA plainly cover none of the subject matter of 2 U.S.C. § 7 and 3 U.S.C. § 1. 2 U.S.C. § 7 and 3 U.S.C. § 1 provide for a single election day for Presidential and Vice-Presidential candidates and members of Congress, respectively. UOCAVA and MOVE involve the voting rights of members of the armed forces and overseas voters, while HAVA involves States' administration of elections and securing citizens' access to the ballot. They do not deal with the timing of the election and are thus not "clearly intended as a substitute." *Posadas*, 296 U.S. at 503. Because neither of the prerequisites for overcoming the presumption against implied repeals are met here, that presumption applies, and the Senators' unspoken contention that UOCAVA, MOVE, and HAVA impliedly repeal 2 U.S.C. § 7 and 3 U.S.C. § 1's creation of a uniform day for federal elections fails.

iv. The Prior Construction Canon weighs against the Senators' argument.

As noted, the Senators argue that when Congress enacted UOCAVA, MOVE, and HAVA, it "legislated against [a] settled backdrop" of state mailbox rules for absentee ballots. Senators' Brief, p. 6. They appear to believe that when Congress enacted those statutes, it was thinking only of laws like the Mississippi statute at issue here. To begin, the Senators do not explain why this Court should view Congress's enactment as adopting the view of the fourteen states that accept ballots post-election day

rather than the rule of the other thirty-six States that do not accept ballots post-election day. It strains credulity that Congress would impliedly adopt the view of a steep minority of the States simply by failing to explicitly reject their view. More to the point, Congress enacted MOVE, which "substantively amended UOCAVA," and HAVA after this Court decided *Foster v. Love*. Senators' Brief, p. 7. Accordingly, under the Prior-Construction Canon, *Foster v. Love*'s definition of "election" was the true "backdrop" for the enactment of those statutes.

The Prior-Construction Canon states that after a term has been interpreted by a jurisdiction's highest court, that term acquires a "technical legal sense . . . that should be given effect in the construction of later-enacted statutes" in the same field of law. Scalia, *Reading Law*, at 324. In other words, "[i]f a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort . . . they are to be understood according to that construction." *Id.* at 322; *see also Bragdon v. Abbot*, 524 U.S. 624, 645 (1998) (holding that after language is authoritatively construed, "repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate" the prior construction.). As applied here, the Prior Construction Canon instructs that *Foster v. Love*'s rejection of Louisiana's attempt to define "election" so that it might occur on a day other than that specified by Congress in 3 U.S.C. § 1 and 2 U.S.C. § 7 controls over any other interpretation of the law (including by States in their enactment of state mailbox rules) because it is the "authoritative construction by the jurisdiction's court of last resort" on that issue. Scalia, *Reading Law*, at 322.

The Senators' brief, however, turns the Prior-Construction Canon on its head by arguing that Congress enacted MOVE and HAVA, not with awareness of *Foster v. Love*'s definition of "election," but instead with awareness of the "settled backdrop" of certain selected state mailbox rules. The logical conclusion of the Senators' argument is that when Congress does not specifically reject applicability of State rules, it will be deemed to have "presuppose[d] the[ir] continued validity." Senators' Brief, p. 6. But that logic contradicts the Prior-Construction Canon and seeks to prioritize particular State elections laws over the nationally applicable range of federal elections laws and this Court's authoritative interpretation of those federal laws. And the Senators admit as much in their brief, arguing that MOVE's "silen[ce] on receipt deadlines for mail-in ballots" adopted a *new* definition of "election" that differs from the one this Court applied in *Foster v. Love*. *See* Senators' Brief, p. 7.

The Senators assert similar importance in Congress's guidance in HAVA that, "with respect to any election for Federal office," a state may not refuse an absent uniformed services voter's registration to vote if it is filed during an election year. *See* Pub. L. No. 107-252, § 706, 116 Stat. 1725 (2002). Again, however, Congress's use of "election" without defining it should be read, by way of *Foster v. Love* and the Prior-Construction Canon, to mean it was aware of this Court's definition of "election" and legislated against that backdrop. What is more, under the previously-discussed General/Specific Canon, a general statement about states' ability to refuse service members' voting registrations has no bearing on the specific instruction in 3 U.S.C. § 1 and 2 U.S.C. § 7—affirmed in *Foster v.*

Love—that ballots must be received by the close of election day. In sum, none of the Senators' arguments as to the importance of the state-law "backdrop" behind MOVE, UOCAVA, or HAVA overcome the fundamental primacy of *Foster v. Love*.

C. The legislative histories of UOCAVA, MOVE, and HAVA do not evidence any intent to approve of States' receipt of ballots after election day.

The Senators cite UOCAVA and MOVE's legislative histories as evidence of congressional intent to prevent 2 U.S.C. § 7 and 3 U.S.C. § 1's preemption of state mailbox rules like the Mississippi law at issue here. As noted above, this Court need not wade into the legislative history to decide this case because the relevant statutes' texts are plain. *See e.g., Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy."). Text alone is sufficient because the relevant statutes are reasonably susceptible to only one interpretation—that given to them by the Fifth Circuit. Nonetheless, *Amici* will address the Senators' legislative history arguments because the history they cite, when read in context, militates against their overall position.

The Senators begin with committee statements of Rep. Bill Thomas. When explaining why military voting needed overhaul, Rep. Thomas described a hypothetical situation in which a military voter's marked ballot was "received after the State's official reception date." Hearing at H.R. 4393 Before the H. Comm. On House Admin., 99th Cong. 13 (1986). But in his hypothetical, the "official

reception date" for absent voter ballots was "the close of polls on election day"—in other words, the end of the election as defined by 2 U.S.C. § 7 and 3 U.S.C. § 1. *Id.* Rep. Thomas's statements thus appear to evidence that he believed that elections must conclude on the date set for the election. Alternatively, his statements at the very least cannot be construed to support States' ability to receive ballots after the close of polls on election day because his hypothetical took for granted that there was one uniform election day by which all ballots must be received.

Next, the Senators quote floor statements of Sen. Chuck Schumer that, while lengthier than Rep. Thomas's comments, also evidence that he supported MOVE not to shift the election day by allowing states to extend voting beyond election day, but rather to move up military voting to meet the set election day.

Sen. Schumer began his floor statements: "The MOVE Act is a bipartisan[] solution to a serious, yet all too familiar, problem. The bottom line is, our soldiers overseas have a very difficult time in voting." 155 Cong. Rec. S7965 (daily ed. July 23, 2009). He continued, stating: "With the MOVE Act, with 58 cosponsors, we can tackle this problem head on and make voting for our military overseas men and women easier." *Id.* At the outset, then, the general focus of MOVE was on making voting "easier," not extending the election past the date already mandated by Congress. Sen. Schumer later noted the difficulties of timely voting "could be overcome. We have faxes, we have e-mails, we have computers, and we do not use them for our soldiers overseas." *Id.* Sen. Schumer advocated for MOVE as "allowing ballots to be sent electronically,

dealing with the time gaps and all the other problems we face." *Id.* at S7966.

The thrust of Sen. Schumer's statements was not that MOVE would amend any "deadline the State has set," as the Senators claim, *see* Senators Brief at 13, but rather that it would speed up voting to make the deadlines attainable. Indeed, if Congress wanted to extend military voters' ability to cast ballots after the election day set by 2 U.S.C. § 7 and 3 U.S.C. § 1, it could have done so in plain language. But MOVE did not contemplate moving the election day; it contemplated speeding up voting to meet the wall that was the election day set by 2 U.S.C. § 7 and 3 U.S.C. § 1. Thus, to the extent it is evidence of anything, Sen. Schumer's statements are evidence that he did not think the deadline for States to receive ballots extended beyond election day.

The Senators' brief does not discuss HAVA's legislative history. *See generally*, Senators' Brief. Instead, the Senators argue that because "Congress comprehensively revised election administration [in HAVA] while leaving state mail-in voting receipt rules, including mailbox-rule statutes, untouched," that silence indicates Congressional approval of States' mailbox rules. Senators' Brief, p. 16. But as addressed *Supra* Section II.B.i., Congress's silence says nothing about such rules. More to the point, even though the Senators say precisely why Congress remained silent on States' mail-box rules, they fail to elucidate the point. Congress did not address States' mail-box rules in HAVA because HAVA focused on "revis[ing] election *administration*," not on revising election *timing*. In

constitutional terms, HAVA dealt with the manner, not the time, of federal elections. HAVA's preamble states:

> An Act [t]o establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes. [Pub. L. No. 107-252, 116 Stat. 1666]

The preamble says lots about administration and nothing about timing. And that makes sense, since HAVA was enacted in response to the 2000 Presidential election in which Florida's chosen method of election administration—we all remember the infamous "hanging chad"—brought the country to a halt. In other words, HAVA aimed to resolve State issues of election administration by providing States with funding and assistance. HAVA did not address the timing of elections, a fact the Senators admit, because that was not the pressing issue of the time.

Sen. Christopher Dodd's floor remarks underline that HAVA was enacted to deal with *how*—not *when*—elections are held. Sen. Dodd remarked that "what gave rise to this legislation—[was] the fact that there was one of the most tumultuous elections in the history of our country that galvanized the attention, not only of the people of this country, but those throughout the world." 148 Cong. Rec.

S10412-S10413 (daily ed. Oct. 15, 2022). Sen. Dodd then described issues with Florida's administration of the 2000 election before stating "all of that turmoil provoked us to step up and find out whether our election laws could do with some changing[.]" *Id.* at S10413. At bottom, HAVA is about administration methods, not timing. For that reason, the Senators' arguments that HAVA is evidence of Congressional approval of States' mailbox rules miss the target. That issue wasn't on anyone's mind when Congress enacted HAVA.

CONCLUSION

The Senators rely on a smattering of more-recently enacted authorities to support the notion that the Fifth Circuit erred in finding the Mississippi law preempted by well-established federal election law. Notably, none of those authorities is the actual text of the relevant statutes: 2 U.S.C. § 7 and 3 U.S.C. § 1. But because the texts of those statutes yield but one interpretation—that recognized by the Fifth Circuit—this Court need not consider any extra-textual authorities.

Of course, to the extent it considers those authorities, the Court will find that they all point the same way: Congress established one uniform day for federal elections to remedy the sundry evils that arise from conducting federal elections at different times in different States. *See Ex parte Yarbrough,* 110 U.S. at 661. That uniform day for federal elections is the date by which every ballot that is to be counted must be *received* by the State. Hewing closely to the text, the Fifth Circuit properly held that Mississippi's law is preempted because it permitted receipt of marked ballots after the date for the election

of candidates to the Presidential, Vice-Presidential, and Congressional offices established by federal law. This Court should affirm that decision.

Respectfully submitted,

Charles R. Spies
Counsel of Record
Robert L. Avers
Thomas J. Philbrick
Daniel C. Ziegler
1825 Eye Street, NW, Suite 900
Washington, DC 20006
(202) 466-5964
cspies@dickinsonwright.com

Counsel for Amici Curiae