

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**

**REPLY BRIEF FOR RESPONDENTS VET VOICE
FOUNDATION AND MISSISSIPPI ALLIANCE
FOR RETIRED AMERICANS
SUPPORTING PETITIONER**

ROBERT B. MCDUFF
PALOMA WU
MISSISSIPPI CENTER
FOR JUSTICE
210 E. Capitol Street,
Suite 1800
Jackson, MS 39201
(601) 352-2269

MARC E. ELIAS
Counsel of Record
ELISABETH C. FROST
DAVID R. FOX
CHRISTOPHER D. DODGE
RICHARD A. MEDINA
TINA MENG MORRISON
ELIAS LAW GROUP LLP
250 Massachusetts
Ave. NW, Suite 400
Washington, DC 20001
(202) 968-4490
eliasm@elias.law

RULE 29.6 DISCLOSURE STATEMENT

I, Marc E. Elias, counsel for Vet Voice Foundation and the Mississippi Alliance for Retired Americans, and a member of the Bar of this Court, certify that Vet Voice Foundation and the Mississippi Alliance for Retired Americans have no parent corporations, and that no publicly held company owns 10% or more of their stock.

Marc E. Elias
Counsel of Record
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW
Suite 400
Washington, DC 20001
(202) 968-4490
eliasm@elias.law

*Counsel for Vet Voice Foundation and the Mississippi
Alliance for Retired Americans*

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INTRODUCTION

Beginning more than 150 years ago, the Election Day Statutes replaced a chaotic federal election schedule in which States held elections on different days with one in which every State holds its elections on the same day. But that is all they did. They did not freeze in amber the procedures used in those elections. And in the 150 years since, State after State has adopted mail-ballot deadlines tied to mailing, rather than receipt, just like this Court’s own filing deadlines. Yet no reasonable English speaker would deny that federal elections are held on the same day nationwide, as the Election Day Statutes demand.

Congress did not secretly preempt laws like Mississippi’s more than a century ago. Nothing in the text of the Election Day Statutes addresses when ballots must be received, only when the election must be held. Even Respondents’ preferred dictionaries uniformly define “election” as “choice” or “selection,” and Mississippi requires each voter—and thus the entire electorate—to make their final choice and surrender their ballot by election day. Similar rules have existed since before World War II, and—except for one group of Gore voters whose claims were swiftly rejected—there is no evidence that anyone, anywhere, ever thought the Election Day Statutes had anything to say about them until Respondents sallied forth with their theory in the wake of the 2020 elections.

Every federal law touching ballot receipt since the Election Day Statutes reflects Congress’s consistent view that those statutes impose no receipt deadline. Most notably, UOCAVA has for forty years provided

that military-overseas voters must vote by State absentee ballot if it is provided “60 days *before the deadline for receipt of the State ballot under State law*” and “received by the appropriate State election official not later than the *deadline for receipt of the State absentee ballot under State law.*” 52 U.S.C. §20303(b)(3),(e)(2) (emphases added). These provisions make little sense if federal law already imposed its own uniform receipt deadline, so Respondents’ approach would set federal statutes “at war with one another.” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502 (2018).

Respondents cannot even agree on how military-overseas voters are treated under their theory, a question on which the outcome of the 2000 presidential election turned. *Harris v. Florida Elections Canvassing Comm’n*, 122 F. Supp. 2d 1317, 1324-25 (N.D. Fla. 2000). RNC says military-overseas ballots, too, must be received by election day. RNC.Br.43-44. Apparently, Gore won. The U.S. argues the opposite, claiming UOCAVA exempts military voters from the Election Day Statutes, U.S.Br.24—an argument irreconcilable with UOCAVA’s text and entirely absent from the decision in *Harris*. Libertarians ignore the issue.

The Election Day Statutes and laws like Mississippi’s have coexisted since at least 1918. That is not because everyone missed a blaring federal deadline. It is because the Election Day Statutes require only that federal elections be held on a particular day, as Mississippi does. They do not regulate procedural details like the choice between mailing and receipt deadlines.

ARGUMENT

I. The text of the Election Day Statutes does not impose a receipt deadline.

Everyone agrees the Election Day Statutes set a deadline—voting must end on election day. And everyone agrees that the entire election process does not need to end then, and that counting and canvassing can come later. The only question is whether the election day deadline must be a *receipt* deadline rather than a mailing or postmark deadline. There is no support for Respondents’ argument that it must.

Respondents have an uphill battle, because mailing and postmark deadlines pervade American law. Tax returns are due on April 15, and that means postmarked, not delivered. 26 U.S.C. §§6072(a), 7502. Documents are “timely filed” in this Court if they “bear[] a postmark ... showing [they were] mailed on or before the last day for filing,” even if they are received a few days later. Rule 29.2. And since at least the mid-nineteenth century, the common-law mailbox rule has presumed that acceptances of contractual offers are effective when mailed, not when received. *E.g.*, *Tayloe v. Merchants’ Fire Ins. Co.*, 50 U.S. (9 How.) 390, 400 (1850). The U.S.’s argument that Congress adopts such rules expressly, U.S.Br.14, misses the point—no one claims Congress adopted a mailbox rule, only that it did not foreclose one.

Respondents’ textual argument that the Election Day Statutes foreclose an election day mailing deadline focuses entirely on the word “election.” But contemporaneous sources overwhelmingly confirm that

“election” just means “choice” or “selection,” as this Court has held. See *Foster v. Love*, 522 U.S. 67, 71, (1997) (“[t]he act of choosing a person to fill an office” (citation omitted)); see also *Newberry v. United States*, 256 U.S. 232, 250 (1921) (“final choice of an officer by the duly qualified electors”); *United States v. Classic*, 313 U.S. 299, 318 (1941) (“the expression by qualified electors of their choice of candidates”); VVF.Br.17-18 (collecting sources). The great weight of contemporaneous precedent agrees.¹

An election-day mailing deadline like Mississippi’s is entirely consistent with these definitions, because it sets a deadline for “selection” and “choice.” Every Mississippi voter must make their selection and surrender their ballot before the end of Congress’s chosen election day. And because that rule applies to everyone, RNC’s focus on the public’s choice rather than a voter’s choice, RNC.Br.16-18, does not help it. The public has made its choice by election day; all that remains is to receive and count the ballots to see what that choice was. Either form of deadline, therefore, is consistent with the legislative history the U.S. misleadingly paraphrases, U.S.Br.30: it ensures that “*the choice* of electors would always be perfected in one

¹ *E.g.*, *McKinney v. Barker*, 203 S.W. 303, 304 (Ky. 1918); *Pitcher v. Dervage*, 156 P. 218, 220 (Okla. 1916); *Oregon-Wisconsin Timber Holding Co. v. Coos Cnty.*, 142 P. 575, 577 (Or. 1914); *Dooley v. Jackson*, 78 S.W. 330, 334 (Mo. 1904); *McKee v. Home Sav. & Tr. Co.*, 98 N.W. 609, 610 (Iowa 1904); *Reid v. Gorsuch*, 67 N.J.L. 396, 401 (1902); *Bowler v. Eisenhood*, 48 N.W. 136, 138 (1891); *State v. Hirsch*, 24 N.E. 1062, 1063 (Ind. 1890); *Nicholls v. Shakespeare*, 6 So. 592, 597 (La. 1889); *In re Meendsen’s Contested Election*, 5 Pa.C.C. 198, 202 (Pa. Quar. Sess. 1878).

day.” Cong. Globe, 28th Cong., 2nd Sess. 14 (Rep. Hale) (emphasis added), and “that no votes cast after [election] day [can] be received.” *Id.* at 15 (Rep. Chilton).

Libertarians and the U.S. scrounge up a handful of outlier definitions that, while still primarily defining election as “choice” or “selection,” also mention the “receipt” or “taking” of votes, sometimes literally in smaller print. LP.Br.20-21; U.S.Br.9. But those tertiary definitions and the sources they cite are merely describing features of elections at a time with no mail voting. They had no occasion to assess whether ballot “receipt” or “taking,” rather than mailing, must have ended before an “election” occurs.

Anderson’s *A Dictionary of Law* 394 (1889)—after saying “election” means “choosing, or selecting”—cites *Commonwealth v. Kirk*, which defined “election” as “the voting and the taking of the votes” in the course of upholding a conviction for election wagering. 4 B.Mon. 1, 2 (Ky. 1843). Kentucky at the time voted *viva voce*, so there was no occasion to consider whether “voting” and “taking” might occur at different times. See Ky. Const. of 1799, art. VI, §16. Anderson also cites *State v. Tucker*, which agrees with Vet Voice that “[t]he primary meaning of the word election is choice—the act of choosing,” and that the election occurs “when the ballots are cast.” 54 Ala. 205, 210 (1875). And while *Tucker* also describes “election” as “the act of casting and receiving the ballots,” *id.*, that again simply reflects contemporaneous Alabama law,

under which votes were exclusively cast in person. See Ala. Code §§246-262 (1867).²

Abbott’s *Dictionary of Terms & Phrases Used in American or English Jurisprudence* (1879) is even clearer. The general definition is “to choose, and the choosing of officers, by public vote.” *Id.* at 418 (“election” has “long and extensively [been] in use to signify the right to choose, or act of choosing”). Libertarians’ preferred definition is included only for “election, as used in Alabama statutes concerning the time of filing official bonds,” language that Libertarians conveniently excise. *Id.* (citing *Tucker*, 54 Ala. at 209) (emphasis added). The U.S. also adds another dictionary, *Bouvier’s Law Dictionary & Concise Encyclopedia* (8th ed. 1914), which similarly defines election as “Choice; selection,” before explaining that it means “the act of casting and receiving the ballots,—the actual time of voting, not the date of the certificate of election” *Id.* at 979 (citing *Tucker*, 54 Ala. 205). As this phrasing and

² The other cases cited for this aspect of the definition do not mention taking or receipt of ballots at all. See *People v. Molitor*, 23 Mich. 341 (1871) (no definition); *Nevada ex rel. Clarke v. Irwin*, 5 Nev. 111, 121 (1869) (“the ordinary meaning of the word ‘elected’ implies a popular vote”); *Saunders v. Haynes*, 13 Cal. 145, 153 (1859) (“An election is the deliberate choice of a majority or plurality of the electoral body”).

the reliance on *Tucker* make clear, Bouvier was distinguishing voting from certification—not mailing from receipt. *See id.*³

Libertarians do not even agree with their cited treatise, which defines “election” as “the act of casting and receiving the ballots, *counting them, and making the return,*” 15 Walter H. Michael, *Cyclopedia of Law and Procedure* 279 (W. Mack ed., 1905) (emphasis added), language that Libertarians again conveniently omit, LP.Br.21. No one argues States must, or even could, complete counting and certification on election day. Pet.App.13a. And the treatise also includes other definitions, including “[t]he deliberate choice of a majority,” “[a] choice of persons for public offices,” “[t]he act of choosing a person,” the “choice of a person or persons,” and “[t]he selection of one person.” Michael, *supra*, at 279.

The U.S. (U.S.Br.9) misleadingly cites a different page of the same treatise, which explains that the start of the deadline for election challenges “must depend upon the wording of the statute under construction,” and provides four possibilities—it may run for “[a] number of days after the election day, *or* the day on which ballots are deposited, *or* after the return-day

³ Earlier versions of Bouvier—closer in time to what Respondents say is the relevant period—omit any mention of “receipt” from the definition of “election.” *See* 1 John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 519 (14th ed. 1877); 1 John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 460 (5th ed. 1854).

... *or* after the official declaration of the result.” Michael, *supra*, at 400 (emphases added). This page does not define “election day” as turning on ballot deposit—if anything, it confirms that “election day” and “the day on which ballots are deposited” can be *different* days. *See id.* The U.S. similarly misrepresents another treatise it cites, U.S.Br.9, which makes clear that “When [an] Act of Voting Is Complete” differs from State to State: in Tennessee, voting is complete when the voter hands over their ballot even if the ballot is not deposited “in the box until after the close of the polls,” while Alabama requires that “the ballot is deposited in the box.” 10 *The Am. & Eng. Encyclopedia of Law* 850 (2d ed. 1899) (citing, *e.g.*, *Steinwehr v. State*, 37 Tenn. 586, 589-90 (1858) (“The act of the officer in putting the ballot into a box for safety, until the polls are closed, is not an element of the act, but a distinct duty of the officer.”)). Both treatises in fact support Vet Voice’s position that the word “election” does not inherently require a particular receipt deadline—it is a matter for state law.

Respondents offer no reason why a handful of tertiary definitions should be privileged over how *every* dictionary “consistently define[s]” election to mean choice or selection. *See Voisine v. United States*, 579 U.S. 686, 692 (2016); *see also New Prime Inc. v. Oliveira*, 586 U.S. 105, 114 (2019) (adopting definition “consistently afforded” to word). It is “telling that all the dictionaries cited” in the briefing define election as choice or selection but only one or two “define[] the word broadly enough to encompass” receipt, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568 (2012), and even then only as descriptions of existing state

procedures. If receipt were as elemental to “election” as Respondents insist, “we would expect to see more support for that meaning.” *Id.* at 569. “That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense.” *Id.* at 568.

Congress’s Elections Clause power preempts state laws only “so far as it is exercised, and no farther.” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (citation omitted). In the Election Day Statutes, Congress merely designated a uniform election day. It did not demand that election day be a ballot receipt deadline, rather than a ballot mailing deadline. The matter, therefore, remains with the States.

II. Respondents’ position is inconsistent with other federal statutes.

Given the dearth of evidence that the word “election” alone demands a receipt deadline, it is no surprise that when Congress has wanted to regulate ballot receipt, it has done so plainly. The 1942 Soldier Voting Act, Pub. L. 77-712, §9, 56 Stat. 753, 756, prohibited counting war ballots “received by the appropriate election officials ... after the hour of the closing of the polls.” The 1944 amendment added that “any extension of time for the receipt of absentee ballots permitted by State laws shall apply to ballots cast under this title.” Act of Apr. 1, 1944, Pub. L. 78-277, §311(b), 58 Stat. 136, 146. The VRA guarantees counting of presidential absentee ballots “returned ... to the appropriate election official ... not later than the closing of the polls in such State” on election day, while

also authorizing States to adopt “less restrictive voting practices” instead. 52 U.S.C. §10502(d), (g). UOCAVA references “the deadline for receipt of the State absentee ballot under State law” and “the date by which an absentee ballot must be received in order to be counted.” *Id.* §§20303(b)(3), 20304(b)(1). Congress does not stand alone; Libertarians cite a variety of nineteenth century state laws that likewise “clearly define[]” ballot receipt deadlines—they do not rely on the word “election” alone. LP.Br.18.

Congress undeniably included no similar language in the Election Day Statutes. And “[i]t is a fundamental principle of statutory interpretation that ‘absent provision[s] cannot be supplied by the courts.’” *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019) (citing Scalia & Garner, *Reading Law* 94 (2012)). Doing so is “particularly inappropriate where, as here, Congress has shown that it knows how to adopt the omitted language or provision,” by expressly including it in other statutes. *Id.* It is not the Court’s “role to second-guess Congress’ decision to” designate a day for federal elections without specifying whether it is a receipt deadline or a mailing deadline. *Id.* And while some of the Election Day Statutes are older than the statutes expressly addressing ballot receipt, the statute governing presidential elections was substantially amended just four years ago, with no mention of ballot receipt. *See* 3 U.S.C. §1.

But it gets worse for Respondents. Their construction of the Election Day Statutes would render key provisions of some of these other statutes nonsensical, rather than reading the law “as a harmonious whole.”

Epic Sys., 584 U.S. at 502. “The body of the law should make sense,” and “it is the responsibility of the courts, within the permissible meanings of the text, to make it so.” Scalia & Garner, *supra*, at 252. There would be no reason for the 1942 Soldier Voting Act to impose a receipt deadline for war ballots if the Election Day Statutes already imposed one for all ballots. It would be bizarre for the 1944 amendment to expressly allow war ballots to benefit from any later State-law deadlines, if the Election Day Statutes preempted those deadlines. And it would be odd for UOCAVA to repeatedly cross-reference State ballot-receipt deadlines if the Election Day Statutes already imposed a uniform federal deadline. Libertarians’ attempt to recast these later statutes as “carveouts” to the Election Day Statutes (LP.Br.42) ignores that they do not purport to enact exceptions to the Election Day Statutes. Instead, these laws are silent as to the Election Day Statutes, while enacting rules that are inconsistent with Respondents’ position on what they say.

Moreover, legislative history makes clear that in enacting the 1942 Soldier Voting Act and 1944 amendment, and in cross-referencing state deadlines in UOCAVA and the MOVE Act, Congress knew that many States had election day mailing deadlines for absentee ballots. VVF.Br.41-42, 45-46. In enacting UOCAVA, for example, Congress recognized that “several States accept[ed] absentee ballots, particularly those from overseas, for a specified number of days after election day,” and such laws “aid[] in protecting the voting rights” of military-overseas voters. H.R. Rep. No. 99-765, at 8 (1986); *see also Uniformed and Overseas Citizens Absentee Voting: Hearing on*

H.R. 4393 Before the Subcomm. on Elections of the H. Comm. on Admin., 99th Cong. 21 (1986) (Statement of Henry Valentino, Director, Federal Voting Assistance Program) (specifying that at least “[t]welve [States] ha[d] extended the deadline for the receipt of voted ballots to a specific number of days after the election”).

If Congress thought these deadlines were already preempted, it would be odd in the extreme for Congress to have cross-referenced them multiple times—in 1944 and again in 1986 and 2009—without clearly saying so. “The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them.” *Wyeth v. Levine*, 555 U.S. 555, 575 (2009) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)); *see also Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). Libertarians argue Congress in UOCAVA may have focused on the one State with a *pre*-election day receipt deadline rather than the twelve with *post*-election day deadlines. LP.Br.42. But Congress could have easily referenced only pre-election day deadlines if it wanted.

Libertarians retort that “[c]ongressional inaction cannot amend a duly enacted statute.” LP.Br.38 (quoting *Cent. Bank of Denv. v. First Interstate Bank of Denv.*, 511 U.S. 164, 186 (1994)). But no amendment is needed, because these later enactments demonstrate Congress *never* understood the Election

Day Statutes as Respondents do. And Congress’s interpretation of its own statutes is entitled to significant weight—even if separated in time. “[W]henver Congress passes a new statute, it acts aware of all previous statutes on the same subject.” *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). “The later act can therefore be regarded as a legislative interpretation of the earlier act in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting.” *United States v. Stewart*, 311 U.S. 60, 64 (1940) (citations omitted).

United States v. Price is not to the contrary, see LP.Br.39—it addressed arguments based on subsequent “legislative history.” 361 U.S. 304, 313 (1960). “With respect to subsequent *legislation*, however, Congress has proceeded formally through the legislative process.” *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). “Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969). That is what Congress has done here.

III. Respondents’ theory cannot account for military-overseas voters.

Respondents’ interpretation would have especially disastrous consequences for military-overseas voters, who face unique obstacles to voting and who benefit from mailing rather than receipt deadlines in 31 states—including 17 states with mailing deadlines *only* for military-overseas voters. VVF.Br.6-7, 47-49.

Respondents splinter on this issue. Libertarians do not directly address it. *See* LP.Br.41-43. RNC concedes that its construction of the Election Day Statutes would require election day receipt deadlines for military-overseas voters, too, because UOCAVA and the MOVE Act “do not change the default date by which ballots must be received.” RNC.Br.43-44. This would be a true sea change, preempting 31 States’ laws and changing the rightful winner of the 2000 presidential election, where Bush’s 739-vote advantage in Florida military-overseas ballots received after election day was greater than his 537-vote margin. *See Harris*, 122 F. Supp. 2d at 1320. *Harris* rejected Gore supporters’ Election Day Statutes challenge to those ballots; on RNC’s account, the challenge should have been sustained. *Id.* at 1324-25. RNC’s only response (RNC.Br.39 n.6) misreads *Harris*, which emphasized that because the ballots in question were “mailed or signed by election day,” they had been “cast ... on election day,” as the Election Day Statutes required. *Harris*, 122 F. Supp. 2d at 1325. So too for every ballot in Mississippi.

The U.S., in contrast, says UOCAVA “carves out” military-overseas voters “from the federal election-day deadline.” U.S.Br.24-25 & n.5. But RNC gave up this argument for good reason—UOCAVA simply does not say that. In support, the U.S. cites three subsections of UOCAVA, none of which creates such a carve-out.

The first, 52 U.S.C. §20303(b), provides that federal write-in absentee ballots must “be submitted and processed in the manner provided by law for absentee

ballots in the State involved.” Section 20303(b) also provides that the federal write-in absentee ballot “shall *not* be counted” if a state absentee ballot is received by the “deadline for receipt of the State absentee ballot under State law.” (Emphasis added.) The second, 52 U.S.C. §20303(d), provides only that military-overseas voters who receive both a state absentee ballot and a federal write-in absentee ballot may still vote the state ballot. And the third, 52 U.S.C. §20304(b)(1), merely requires procedures to deliver ballots by whatever receipt deadline applies.

These provisions cross-reference state receipt deadlines and incorporate them into the military-overseas voting process for federal elections, but they nowhere purport to exempt military-overseas voters from what Respondents say is the *federal* receipt deadline implied by the Election Day Statutes. The U.S.’s position would involve a disfavored implied partial repeal, which would require the statutes to be “irreconcilable.” *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974). But they are not irreconcilable. The Election Day Statutes can easily be read to say what they mean and mean what they say, *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), and they say nothing to impose an election day receipt deadline rather than a mailing deadline.

IV. Respondents’ arguments are inconsistent with more than a century of unchallenged state practice.

Respondents do not dispute that, in *every* federal election since 1918, at least one State has accepted mail ballots received after election day, and that most

States have adopted post-election receipt deadlines at some point since the Election Day Statutes were enacted. Respondents' position would mean federal elections have been conducted illegally for over a century—but no one noticed until now.

1. At the threshold, Respondents' approach to history confuses prevailing *practice* with prevailing *meaning*. Elections in the mid-nineteenth century were conducted very differently, but even Respondents do not argue we must abandon the Australian ballot for *viva voce* or preprinted, color-coded tickets. Congress did not, simply by using the term election, freeze election practices “in amber.” *United States v. Rahimi*, 602 U.S. 680, 691 (2024); *see also id* at 738 (Barrett, J., concurring) (rejecting the use of historical practice when “unmoored” from the meaning of the relevant laws). The question is not how our nineteenth-century ancestors conducted elections. It is what they understood the text of the Election Day Statutes to demand.

This distinction is critical, because the nineteenth-century absence of mailing rather than receipt deadlines is entirely consistent with both sides' interpretation of “election.” Vet Voice is not arguing that the Election Day Statutes demand a mailing deadline, only that they allow one. And the historical record is bereft of any evidence that States with receipt deadlines ever thought the Election Day Statutes compelled them, or any suggestion that mailing deadlines violated the Election Day Statutes when States began to adopt them in the early twentieth century.

For this reason, the historical approach from *New York State Pistol and Rifle Association v. Bruen* has no application here. 597 U.S. 1 (2022). *Bruen* was answering a fundamentally different question—the scope of the “*pre-existing* right” to bear arms protected by the Second Amendment, which the Court had held was defined by the founding era—practice. *Id.* at 20 (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 592 (2008)). In that context, if activity had gone unrestricted, that suggested it was part of the historically protected right. *See id.* at 26-27. Here, in contrast, the question is not the scope of historical practice but the meaning of the Election Day Statutes’ text, and an early lack of mailing deadlines is fully consistent with Vet Voice’s account of what that text means.

2. The lodestar precedent Respondents rely on confirms this point. *Maddox v. Board of State Canvassers* expressly turned on state law and did not suggest the Election Day Statutes compelled the result reached. 149 P.2d 112, 113 (Mont. 1944); VVF.Br.26. RNC’s quotations from *Maddox* bridge six paragraphs of text explaining how Montana’s laws dictated the case’s outcome. RNC.Br.40 (quoting *Maddox*, 149 P.2d at 114-15). And both the *Maddox* concurrence and dissent agreed the Court’s holding would allow the State to adopt post-election day receipt deadlines by amending the statute. *See Maddox*, 149 P.2d at 117 (Morris, J., concurring) (“The majority opinion by implication would approve a legislative Act authorizing the reception of and counting of ballots subsequent to the election day fixed by law.”); *id.* at 118 (Erickson, J., dissenting in part) (“The majority does not question the right of the legislature to make provision for the

counting of ballots which are not received until after election day.”). Respondents also ignore that other States contemporaneously held that a “vote is cast when the ballot is marked ... [and] placed in envelopes and mailed on election day.” *Burke v. State Bd. of Canvassers*, 107 P.2d 773, 778 (Kan. 1940); *In re Op. of the Justs.*, 113 A. 293 (N.H. 1921).

3. In any event, Respondents’ historical account is selective. Respondents’ contention that ballots cast “in the field” during the Civil War were “received” on election day and “counted” on that day rests on the legal fiction that military officers on the battlefield stood in the shoes of state election officials. RNC.Br.33; LP.Br.32. But as a practical matter, the soldiers’ votes were not “received” in any meaningful sense until well after election day. If the Election Day Statutes permitted States to designate military officers as the “recipients” of soldiers’ votes, there is no reason why that same rationale should not permit States to so designate postal workers or common carriers. And even if the formalities of handing a ballot to an election official or military officer differ from the act of mailing, LP.Br.33, that is a difference in the “manner” of voting—not the “time” of voting. *Cf. Smiley v. Holm*, 285 U.S. 355, 366 (1932) (distinguishing “supervision of voting” from regulations as to “times and places”). Respondents agree “the Election-Day statutes do not regulate the *manner* in which ballots may be cast.” LP.Br.35.

Even during the Civil War, the exact formalities varied from State to State. Not every State deputized officers as election officials. Some, including Nevada

and Connecticut, simply provided that “[s]uch ballot boxes or other receptacles for votes shall be opened, and said votes received, under the supervision and charge of the three highest or senior officers in command,” without formally designating those officers as election officials or requiring any oath. 1862 Conn. Pub. Acts 15, 17 (Spec. Sess.); 1866 Nev. Stat. 210, 215 (similar). Rhode Island similarly provided that soldiers should deliver their ballots “to the officer commanding the regiment or company to which he belongs,” with such ballots to be “returned by such commanding officer to the Secretary of State within the time prescribed by law for counting votes in such elections,” to be “received and counted.” Josiah Henry Benton, *Voting in the Field* 186-87 (1915) (quoting 1864 R.I. Acts & Resolves 4 (May Session)).⁴

Regardless of the formalities, field votes could not be meaningfully counted until they were received by election officials at home. It was “understood” that “a sufficient period would elapse between the day of the election, which was the day on which the soldiers were to vote in the field, and the *counting of the votes* of the State by *the officers who were to count them*, to enable the votes to reach them.” *Id.* at 318 (emphasis added). Votes sometimes did not arrive in time to be counted: “In Vermont nearly all the votes were delayed beyond

⁴ Notwithstanding the RNC’s suggestion that no legislation was ever passed under this constitutional provision, RNC.Br.35, “[t]his amendment required no legislation to enable soldiers to vote in the field under it, and the soldiers from Rhode Island voted in the field under it at the November election, 1864.” Benton at 187.

the time for counting them in 1864 and were lost in that way.” *Id.* at 318. Absent receipt by in-state election officials, the soldiers’ votes would not be counted in the election.

This Civil War practice thus fails the Fifth Circuit’s own test for “consummation” of an election. Civil War-era election officials did not know, by the end of election day, that “there are X ballots to count because the proverbial ballot box is closed.” Pet.App.13a. That information was unknowable until the field ballots or returns were received by state officials days or weeks later. Until then, soldiers’ votes were “just an ordinary piece of paper that is neither binding nor effectual.” LP.Br.12. But simply because a ballot is not counted does not mean it was never validly cast. *See Steinhewer*, 37 Tenn. at 590. And if the realized possibility that field votes might be lost did not invalidate field voting under the Election Day Statutes—and Respondents do not argue that it did—then the wholly hypothetical possibility that ballots might be recalled or lost in the mail cannot do so either. RNC.Br.24.

4. Respondents attempt to distinguish early twentieth century laws allowing out-of-precinct voting on similar grounds. RNC.Br.35; U.S.Br.22-23. But, like Civil War field ballots, ballots cast on election day outside the voter’s home precinct were not meaningfully “received” until they arrived at the relevant precinct and could be counted. If depositing the ballot in the “ballot box” is what matters, RNC.Br.28, 30, then these laws, too, were preempted. Under Missouri’s law, out-of-precinct voters would “mark” their ballot, on election day then “fold the same and hand it to the

judge,” “but such ballot *shall not be deposited in the ballot box.*” 1913 Mo. Laws 323, 325 (emphasis added). They were instead “securely sealed in an envelope” and sent “by registered mail” to the county clerk of the voter’s home county, “where such votes belong.” *Id.* That is just like Mississippi’s law—except that out-of-county election officials are replaced by postal workers.

5. Finally, even Respondents do not dispute that States enacted post-election receipt deadlines for mail ballots *at least* as early as 1918. VVF.Br.36-37. By 1942, eight States had such deadlines. VVF.Br.38. In 1986, the number was twelve. VVF.Br.45-46.⁵ At least fourteen States (plus D.C.) had such deadlines by 2000. *See* VVF.Br.46 n.11. An additional fourteen States have enacted similar deadlines since. *See* VVF.Br.7 nn.2&3. While the number of States with post-election deadlines has fluctuated, at least one State has accepted ballots arriving after election day in every federal election since 1918.

For over a century, these laws have gone unchallenged. That is strong evidence that Respondents’ recently announced interpretation is wrong. Libertarians ignore these state laws. RNC dismisses them as

⁵ Respondents are wrong that only two States had post-election receipt deadlines in 1977. In addition to Nebraska and Washington, Alaska required only a postmark by election day—a provision enacted in 1960, shortly after statehood. 1960 Alaska Sess. Laws ch. 83, §4.15; 1977 Alaska Sess. Laws ch. 16, §1. Hawaii also had a post-election receipt deadline between 1970 and 1973. *See* 1970 Haw. Sess. Laws 17, 59-60; 1973 Haw. Sess. Laws 442, 472. *Contra* RNC.Br.43.

“late-in-time outliers.” RNC.Br.36 (citing *Bruen* 597 U.S. at 70). That is wrong for several reasons.

First, the last Election Day Statute was enacted in 1914, just four years before Maryland adopted a law directly analogous to Mississippi’s. 1918 Md. Laws 130. Respondents cite nothing to show the public understanding of “election” changed in the interim. Indeed, dictionary definitions are remarkably consistent. *Supra* §I. “Election” meant the same thing in 1918 that it did in 1914, 1872 and 1845. And one of the Election Day Statutes was substantially rewritten just four years ago, when most States had post-election day receipt deadlines for at least some voters.

Second, it does not matter that some of these statutes were short lived. RNC.Br.36; *cf.* LP.Br.41. If anything, this demonstrates that ballot receipt is a matter of state policy, not federal law. State legislatures often reverse course on election administration issues. Rarely do they enact legislation—even temporarily—that they believe to be preempted by federal law. And it is rarer still that such acts go unchallenged for over a century. That these States experimented with post-election ballot receipt *at all* is strong evidence nobody understood the practice to be preempted, particularly given the dearth of evidence that repeal was ever tied to the Election Day Statutes.

Third, even if the Court applies *Bruen*, the “late-in-time outliers” in that case were three States that restricted carrying firearms in the late nineteenth century, and a smattering of territorial restrictions that the Court dismissed in part because of the “miniscule territorial populations who would have

lived under them.” 597 U.S. at 64-68. The eight States that had post-election deadlines at the outbreak of World War II collectively had jurisdiction over nearly a third of the nation’s population. *See Historical Population Change Data (1910-2020)*, U.S. Census Bureau (Apr. 26, 2021), <https://www.census.gov/data/tables/time-series/dec/popchange-data-text.html>. All told, *thirty-four States* plus D.C. and several territories have enacted such laws throughout history.

V. Mississippi’s law serves the purposes of the Election Day Statutes.

Respondents vaguely insist the Election Day Statutes were meant to combat voter fraud but fail to explain how an election-day receipt deadline furthers that purpose. Setting aside that tampering with mail is a crime, 18 U.S.C. §§1701-1709, Respondents never explain why ballots in transit in the days after an election are more susceptible to fraud than ballots in transit in the days before. RNC argues “Congress established a uniform Election Day to combat election fraud by preventing double voting, reduce burdens on voters, and prevent results from States with early elections from influencing voters in other jurisdictions.” RNC.Br.46. By requiring ballots to be completed and mailed by election day, Mississippi’s law advances all these goals and undermines none.

Mississippi sets a clear, predictable deadline for voters that is in their power to meet: They must mail their ballots by election day. Respondents’ rule, far from being “clear” or making it “easier to comply,” LP.Br.46, would *undermine* clarity and predictability

by forcing voters—especially military-overseas voters—to guess when they must mail ballots to ensure they will count. That is not a recipe for “election integrity and voter confidence.” RNC.Br.47. And if Congress does think a “single clear nationwide [receipt] deadline,” LP.Br.46, would be beneficial, it can enact one. This Court may not do Congress’s work by reading an unwritten deadline into centuries-old statutes.

CONCLUSION

The Court should reverse.

Respectfully submitted,

Marc E. Elias
Counsel of Record
Elisabeth C. Frost
David R. Fox
Christopher D. Dodge
Richard A. Medina
Tina Meng Morrison
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW,
Suite 400
Washington, DC 20001
(202) 968-4490
eliasm@elias.law

Robert B. McDuff
Paloma Wu
MISSISSIPPI CENTER FOR
JUSTICE
210 E. Capitol Street,
Suite 1800
Jackson, MS 39201
(601) 352-2269

*Counsel for Vet Voice Founda-
tion and the Mississippi Alli-
ance for Retired Americans*

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