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 PETITIONER

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INTRODUCTION

Respondents claim that in the 1800s an election was linked to ballot receipt, and so in setting the federal "election" day Congress understood that day to require ballot receipt. That argument is undone by the very authorities on which respondents rely. Respondents' authorities show that election day in the 19th century had four central features: the voter's physical presence at the polls; the voter's submission of a ballot to officials; an on-the-spot voting-qualifications check by officials and other voters; and officials' receipt of the voter's ballot. Respondents deem only casting and receipt to be essential to an election. But when the federal election-day statutes were enacted, the other features were just as essential. Officials would not receive a ballot unless the voter appeared in person on election day and cleared a qualifications check. If federal law requires election-day ballot receipt, then it requires physical presence and on-the-spot qualifications checks on election day—a view that respondents never advance.

The better view is that election day requires that the voters make a final choice of officers by doing what all agree is "integral" to an election—"marking and submitting" ballots to officials. LP22. But election day does not require ballot receipt any more than it requires other features—in-person voting and on-the-spot qualifications checks—used in the 19th century. The State has shown why text, precedent, and history compel that view. MS23-35. And respondents' own authorities compel that view. Those authorities show that the voters' choice of officers must be final on election day, that the method for finalizing that choice turns on state law, and that the common state-law method in the 1800s included ballot receipt. None of

that shows that "election" day requires ballot receipt. Because state law defines how the voters choose officers, States can change electoral practices yet still hold an "election." States have done that for 165 years. They may do so here. States may decide that the voters' final choice is made when they have submitted their ballots to state officials rather than when officials receive them. This Court should adopt that view and reverse the judgment below.

ARGUMENT

The Federal Election-Day Statutes Allow Ballots That Are Cast By Election Day To Be Received After That Day.

A. Text, Structure, And Context Show That Ballots Must Be Cast—Not Received—By Election Day.

Statutory text, structure, and context show that Mississippi law comports with the federal election-day statutes, 2 U.S.C. § 7; 2 U.S.C. § 1; 3 U.S.C. § 1. An "election" is the conclusive choice of an officer, that choice is made when the voters have cast their ballots, and under Mississippi law the voters do that by election day. MS24-26, 35-37; *contra* RNC16-25, 45; LP14-22, 30-31; US8-15.

1. The RNC contends that an *election* is "the State's public process of selecting officers"—not "individual voters' selections"—and so an election requires ballot receipt. RNC17, 19; *see* RNC16-21, 24-25; *cf.* LP30-31; US12-14.

That argument fails. The State agrees that an election is not individuals' "selections." As the State has explained, an election is "the conclusive choice of an officer," MS24, which a State achieves only when

the voters make an electorate-wide "final choice using the State's official process for facilitating voting," MS27. None of that shows what the RNC needs: that the State's "receipt of ballots" is itself part of an "election." RNC16. The RNC attacks the State's view—that ballot casting defines an election—as an "arbitrar[y]" "assumption." RNC21-22. But tying an election to ballot casting flows from the plain meaning of *election*. Definitions of "election"—drawn from dictionaries, this Court's cases, and respondents' own authorities—emphasize the voters' collective choice and the need for that choice to be expressed within an official process. *E.g.*, MS24-25 ("choosing"; "selecting"; "as by ballot"; "public choice"); RNC17 ("public choice"); LP21 (same). So an election occurs when the voters have "marked and submitted [their ballots] to election officials as state law requires." MS25. That is a "public process" (it is dictated by state law, not private whim) and produces the "final public choice" of officers that an election demands. RNC16, 17, 21. Mississippi law meets those criteria. MS35-37.

The RNC claims that by tying ballot casting to what "state law requires," MS25, the State "collapses the meaning of 'election' into whatever state law says it means." RNC22; *cf.* US13-14. That is not so. Ballots must be cast as "state law requires" because—as the RNC agrees, RNC16-18—an election requires voting to occur within an official state process. *See infra* Parts A-2 & A-3 (canvassing authorities—invoked by the Libertarian Party and the United States—tying an "election" to state-law requirements). That does not mean that States have "complete discretion" (US13) to say what qualifies as ballot casting. *Contra* RNC22-23; US12-14. The federal election-day statutes require that the voters make a final choice by

election day and thus that ballots be marked and submitted to officials by that day. MS25. That gives those statutes "meaningful preemptive effect," RNC22-23: States cannot let voters submit ballots after election day. *Contra* US12 (suggesting that the State's rule allows otherwise). Perhaps a State could adopt a method that would not satisfy any plausible understanding of ballot casting. This case presents no such issue. *See* MS40. Mississippi requires voters to timely mail ballots to an official. *See* Miss. Code Ann. § 23-15-637(1)(a) ("the registrar"); *contra* RNC22-23; US13-14 (both raising the specter of delivery to party operatives or other non-officials). By permitting certain voters to vote by "mail[ing]" their ballots "to state officials," RNC28, Mississippi has adopted a historically recognized method of ballot casting. *See*, *e.g.*, 1915 Iowa Acts 203, 205 § 6 (voter must mail ballot "to the officer issuing" it); 1915 Wis. Sess. Laws 588, 590 § 44m-6 (same); 1913 N.D. Laws 206, 208 §§ 7-8 (voter mails ballot to county auditor); RNC28 n.4 (collecting other early mail-in voting laws that required mailing ballots to election officials). Indeed, respondents claim that some mail-in ballots in Mississippi arrive too late, not that mail-in voting (as conducted in Mississippi or generally) cannot constitute ballot casting or be used in an "election." And although the United States faults other States' laws, US12 & nn.2-3, it does not claim that any State allows voters to submit ballots after election day.

The RNC also disputes that mail-in ballots in Mississippi are final when cast. These arguments fail too. The RNC says that agency regulations suggest that mail-in ballots in Mississippi are not final when cast. RNC23-24. But the statute the RNC challenges establishes that those ballots *are* "final" when cast.

Miss. Code Ann. § 23-15-637(3). The regulations also provide that mail-in absentee ballots are final when mailed—which must occur by election day. MS41 (addressing regulations). The RNC faults regulations on affidavit ballots for allowing someone to submit "two 'final' ballots." RNC22-23. The RNC does not say why this matters. Anyway, the RNC does not dispute that only one ballot is counted: the affidavit ballot is a backup. MS41. And if the RNC's quarrel is with regulations, it should have challenged them. Last, the RNC reprises its forfeited argument that postal-service regulations undercut the finality of mail-in ballots in Mississippi. RNC24; *cf.* US14. But again, under Mississippi's law a mail-in absentee ballot is final when cast and cannot be uncast. MS41.

2. The Libertarian Party's lead argument (LP14-20, 22, 31) runs as follows: When Congress enacted the federal election-day statutes, state election codes treated an election as having "two essential components": a voter's act of "offering to vote" (by submitting a ballot to an election official) and an official's act of "receiving" the voter's ballot. LP15; *see* LP14-18. Both components occurred on election day. LP18-19. So the federal election-day statutes require that ballots be "received into official custody" on "election" day. LP22; *see* LP20.

The Libertarian Party's argument is undone by the state election codes on which it relies. Those codes show that in the 19th century election day had not two components but at least four: the voter's physical presence at the polls; the voter's submission of a ballot to an official; an on-the-spot voting-qualifications check by officials or other voters; and the official receipt of the ballot. *E.g.*, Ala. Code §§ 205-10, 212-18 (1852); Ill. Rev. Stat. ch. 37, §§ 15, 18, 19 (1845); 1852

Ind. Acts ch. 31, §§ 18-22; Kan. Gen. Laws ch. 86, §§ 7-14 (1862); *see* LP15-18 & nn.3-4, nn.6-8 (collecting state laws with these features); LP17-18 (describing "typical[ ]" in-person "qualifications" checks). The Libertarian Party deems only casting and receipt "essential" to an election. But in 1845 and 1872, the other two features were just as essential. The codes cited by the Libertarian Party show that officials would not receive a ballot unless the voter appeared in person on election day and cleared a qualifications check. LP17-18 (making that point); *cf.* RNC6, 25 ("[i]n-person voting" was a "nearly universal requirement" in 1845). If "election" day requires ballot receipt, then it requires physical presence and on-the-spot qualifications checks—a view that would upend how States hold elections today.

The better view is that an election requires a final choice of officers, but does not require that final choice to be achieved precisely as it was in the 1800s. That view flows from the plain meaning of "election" and respects these state codes: the voters must make a final choice by election day and thus do what all agree is "integral" to an election—"marking and submitting" ballots. LP22. But election day does not require ballot receipt any more than it requires in-person voting and an on-the-spot qualifications check.

3. The United States contends that there was "a firm link between 'election day' and ballot-receipt" in the 1800s, and so Congress "understood" "election" day to require ballot receipt. US9, 10; *see* US8-12; *cf.* LP20-21. But the United States' authorities show only that the voters' "choice" must be "perfected" on election day, that the method of "perfect[ing]" that choice turns on state law, and that the common state-law method in the 1800s included ballot receipt.

US10. They do not show that election day requires ballot receipt.

To start, it is no surprise that some authorities associate an "election" with ballot receipt. *See* US9-11; LP20-21. That association is natural: when the federal election-day statutes were enacted, States generally received ballots by election day. MS31-32; *see*, *e.g.*, 1 Bouvier's Law Dictionary and Concise Encyclopedia 979 (8th ed. 1914) (cited at US9) ("Election has often been construed to mean the act of casting and receiving the ballots"). In a similar way, some authorities associate an election with features, like ballot counting, that all agree (RNC20, 33; LP19-20, 34; US11) are not part of an election. 15 Cyclopedia of Law and Procedure 279 (1905) (cited at LP21 and US9) (an election includes "counting" "the ballots" and "making the return"); *Norman v. Thompson*, 72 S.W. 62, 63 (Tex. 1903) (cited at LP21 and US15) (same).

This is all very different from showing that election day requires ballot receipt. And these authorities do not show that. They instead show that state law defines how voters perfect the final choice that an election requires. Courts thus emphasized that "the will of the voters" must be "expressed" "in the manner prescribed by law." *People ex rel. Le Roy v. Foley*, 43 N.E. 171, 172 (N.Y. 1896) (cited at US11); *see City of Inglewood v. Kew*, 132 P. 780, 783 (Cal. Ct. App. 1913) (cited at US10) ("the act of voting" requires that the voter's "wish or preference" be one that "under [state] law may be considered and given effect"); *A.T. & Santa Fe Railroad Co. v. Commissioners of Jefferson County*, 17 Kan. 29, 39 (1876) (cited at US16) (tying an election's features to "the circumstances and conditions prescribed by

law"); *cf. Maddox v. Board of State Canvassers*, 149 P.2d 112, 115 (Mont. 1944) (cited at RNC22, 39-40; LP28-29; US11 & n.1) (state law preempted because it allowed voting after election day). Treatises confirm the primacy of state law. *See*, *e.g.*, 10 The American and English Encyclopedia of Law 850 (2d ed. 1899) (cited at US9) (saying what Tennessee and Alabama law required); 29 C.J.S. Elections 292 (1941) (cited at US9) (relying on state-court decisions to declare that "[o]rdinarily a ballot cannot be counted as a vote until it has been deposited in the ballot box"); George W. McCrary, A Treatise on the American Law of Elections §§ 199, 244 (1887) (cited at LP20, 22) (Michigan and New York law).

And because state law defines how the voters make the choice that an election requires, States can change electoral practices yet still hold an election. As the Montana Supreme Court recognized, "methods of voting" change, and a new method's legality depends on a State's law. *Goodell v. Judith Basin County*, 224 P. 1110, 1114 (Mont. 1924) (cited at US10); *see id.* at 1113 (noting that whatever other state courts have decided under their laws, this case turns on "our state Constitution"). "[D]eposit[ing]" a ticket "in a receptacle" is "*a mode* of designating an elector's choice of a person for office," but it is not *the only* mode. 8 Judicial and Statutory Definitions of Words and Phrases 7361 (1905) (cited at US9) (emphasis added); *see United States v. Classic*, 313 U.S. 299, 318 (1941) (noting that "form, "mode," and "method" of "election[s]" "change[ ] from time to time"); MS29-30, 31. A State can deem a vote "complete" only "when accepted" by an official. *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 143-44 (1865) (single-Justice

opinion) (cited at LP18, 22, 31; US10). But an election does not require a State to do that.

Indeed, reading these authorities to mean that election day requires ballot receipt would require reading them to mean that election day requires physical presence and an on-the-spot qualifications check. Like the state election codes invoked by the Libertarian Party, authorities cited by the United States tie ballot receipt to an in-person qualifications check. The Kansas Supreme Court observed, for example, that "[e]lection-officers ... must be present to receive the votes, and decide as to the qualifications of voters." *A.T. & Santa Fe Railroad*, 17 Kan. at 39 (cited at US16). The Alabama Supreme Court similarly observed that voting entails having one's "right to vote" "be questioned" "at the polls." *Blackwell v. Thompson*, 2 Stew. & P. 348, 352 (Ala. 1832) (cited at US10).

The way to make sense of these authorities is the same way to make sense of 19th-century state election codes: to conclude that an election requires ballot casting, but does not require the other features—like in-person voting, on-the-spot qualifications checks, and ballot receipt—that often accompanied elections in the 19th century. To adopt that conclusion the Court need only embrace plain meaning: an *election* requires the voters' final choice, made within the State's official process. MS24-25, 27. The critical point is when the voters "cast" their ballots and thus make their "choice." *Foley*, 43 N.E. at 172 (cited at US11). What is central is "the act of choosing" and thus "when the ballots are cast." *State v. Tucker*, 54 Ala. 205, 210 (1875) (cited at LP21 and US10); *e.g.*, Benjamin Vaughan Abbott, Dictionary of Terms and Phrases Used in American or English Jurisprudence

418 (1879) (cited at LP20-21) (election is "the choosing of officers, by public vote"); RNC16-17. In the 19th century, ballots were generally perfected by official receipt. But an election is not limited to that practice.

These points resolve this case and expose the basic flaw in respondents' and the United States' view. They claim that a ballot can be "perfected"—a vote can be made "complete"—only when it is "received by election officials." US10-12; *see* RNC21-22; LP20, 22, 31. As the Libertarian Party puts it, "marking and submitting a ballot ... is integral to an election," but it "does not end" the election "because that by itself has no electoral consequence." LP22. But ballot receipt had "electoral consequence" in the 19th century—as it does today—only because state law "imbued" it with that consequence. LP20; *cf.* RNC35. Because state law confers electoral consequence—and because States may change electoral practices—States may imbue ballots with electoral consequence in other ways, such as deeming them cast when mailed. There is no more textual basis for concluding that a ballot can have electoral consequence only upon official receipt than for concluding that a ballot can have electoral consequence only if a voter offers it in person and withstands an on-the-spot qualifications check.

4. Respondents maintain that UOCAVA does not allow post-election-day ballot receipt. RNC45, 46; LP41-42. As respondents do not dispute, that means that the federal election-day statutes block federal courts from "extending ballot-receipt deadlines" for military voters under UOCAVA. MS44-45. The United States takes a different view. US23-25, 32 n.8. UOCAVA says that a voter who does not receive a state absentee ballot on time can use and return a "Federal write-in absentee ballot," but that this

federal ballot will not be counted if the voter's state ballot is "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). The United States reads this provision to "authorize post-election-day receipt for a tailored class of voters." US24 (cleaned up). That is untenable. If the federal election-day statutes bar post-election-day ballot-receipt deadlines in federal elections, it would be strange for States to have such deadlines for UOCAVA to bless in the first place. MS44-45. And if Congress was making an "exception[ ]" (US24) to what is (according to the United States) a clear bar on post-election-day ballot receipt, it would have spoken far more clearly than it did in UOCAVA.

Further, if the United States were right, then this Court would need to vacate, not affirm. *Contra* US32 n.8. The Fifth Circuit ruled that the federal election-day statutes preempt state laws allowing post-election-day ballot receipt for military voters. *See* App.19a-20a. The court of appeals allowed only that courts can exercise equitable power to extend ballot-receipt deadlines *for UOCAVA violations*. App.22a. The United States, by contrast, maintains that UOCAVA authorizes state laws allowing post-election-day ballot receipt for military voters, US24, and that this authorization is "why federal courts may enforce or order extensions of state-law ballot-receipt deadlines as to UOCAVA-ballots," US25 n.5.

5. Respondents have little response to the State's points about statutory structure and context. MS25-26. Both defeat their position. The federal election-day statutes are spare, one-sentence provisions. It is natural to read them to embody a simple rule—the voters must choose by election day—that comports

with plain meaning and embraces what is "integral" (LP22) to an election. MS25-26. Respondents reject that straightforward view for a reading of "election" that embraces some 19th-century electoral practices (ballot casting and receipt) but scraps others that were just as essential (in-person voting and on-the-spot qualifications checks). That selective view has no textual basis. And statutory context confirms that when Congress wanted to dictate to States how to hold elections, it did so in text. It did not do that in the federal election-day statutes. So it left States free to change practices, so long as they achieve on election day what an election demands—a conclusive choice of officers. MS26.

B. Precedent Confirms That Ballots Must Be Cast—Not Received—By Election Day.

Precedent confirms that the federal election-day statutes require ballot casting—not ballot receipt—by election day. MS26-30, 39-42; *contra* RNC37-41; LP28-29, 43-45; US15-18.

In contending otherwise, respondents start with *Foster v. Love*, 522 U.S. 67 (1997). *Foster* recognizes that an election achieves "a final selection of an officeholder." *Id.* at 71. Respondents claim that ballot casting cannot achieve a "final selection" because it reflects only "the individual voter's selection on her ballot," not "the public selection of the electorate as a whole." RNC38; *see* LP28-29. But "the electorate as a whole" makes a "public," "final selection" (RNC38) when all voters cast ballots by a common deadline. MS27, 40-41. The Libertarian Party suggests that ballot casting cannot achieve a final selection because mail-in ballots can be "lost," "delayed," or "recalled." LP29. But when all voters cast ballots by election day,

they make a final selection by that day—even if some ballots are lost or delayed. And Mississippi voters may not recall mail-in ballots. MS41. (Respondents no longer dispute that their mail-recall argument is forfeited. *Ibid.*)

Foster also recognizes that when the federal election-day statutes "speak of 'the election,'" they "plainly refer to the combined actions of voters and officials meant to make" a final selection. 522 U.S. at 71. Respondents claim that, without ballot receipt, voters casting ballots are engaging in a "unilateral" act that lacks the "official[ ]" action—and thus the "combined actions"—that an election requires. RNC37-38; *see* LP28-29; *cf.* US15-17. But when the voters submit ballots to officials as state law requires, they are not engaging in a unilateral act: "voters" are taking the "combined actions" with "officials" that an election requires. 522 U.S. at 71; *see* MS27. Respondents' "combined actions" argument is particularly misplaced given their insistence that closing the ballot box—an official's unilateral act—is what ends an election. *E.g.*, RNCiii, 2, 16, 18, 21, 25, 37; LP2, 10, 13, 20, 28. For its part, the United States suggests that "combined actions" mean a voter-to-official "handoff." US16. But it says that this handoff may be made "personally or via a third-party," *ibid.*—which is what Mississippi law allows.

Citing *Foster*, the United States contends that the State's view "cannot explain early voting." US16; *cf.* US14-15. It says that if the voters' choice defines an election, then the election "would happen over multiple days" (as ballots are cast) rather than "'on federal election day.'" US15, 16 (quoting *Foster*, 522 U.S. at 72). It adds that, "if everyone voted early," "the election would be *over* before [election] day, contrary

to *Foster*." US16. If those points were sound then they would doom the United States' view: the receipt of early ballots would occur "over multiple days" and the election would be over if all were received "before [election] day." US15, 16. Anyway, those points are unsound. The State's view explains early voting. An election—"the conclusive choice of an officer"—occurs when all voters must cast their ballots by a common deadline. MS24-25. That accords with *Foster*: all voters must cast ballots by election day, so the "voters" "combine[ ]" with "officials" on that day to take the "actions" "meant to make a final selection of an officeholder." *Foster*, 522 U.S. at 71. Indeed, in upholding early-voting laws, courts have emphasized that those laws kept ballot casting open through election day. *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775-76 (5th Cir. 2000); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1171-72, 1175-76 (9th Cir. 2001).

Respondents dispute that *Republican National Committee v. Democratic National Committee*, 589 U.S. 423 (2020) (per curiam), confirms that ballot casting is fundamental to an election but ballot receipt is not. They say that *RNC* involved a primary election, did not interpret the federal election-day statutes, and did not address all their arguments. RNC40-41; LP43-45; *cf.* US17. But they ignore what matters. *RNC* applied the plain meaning of *election* to distinguish ballot "cast[ing]" from ballot "recei[pt]" and emphasized that "allow[ing] voters to mail their ballots after election day" "would fundamentally alter the nature of the election by allowing voting ... after the election." 589 U.S. at 424, 426; *see* MS27-28, 42.

Last, the United States tries to explain away cases showing that an "election" in the 19th century was not

confined to particular practices. US17-18. It says that those cases concerned "whether the state constitution permitted a soldier to vote outside his home district" and that none involved "a law extending the ballot-receipt deadline past election day." US17; *see* US17-18. But those cases show what matters: in the 19th century, an election was not limited to particular practices—even practices that had been universal. A State had to make a conclusive choice of officers by election day, but had leeway over how to do that. MS29-30.

C. History Confirms That Ballots Must Be Cast—Not Received—By Election Day.

History confirms that the federal election-day statutes require ballot casting—not ballot receipt. MS29-35, 42-43; *contra* RNC25-33; LP22-28, 35-38; US18-31.

1. To start, history explains 19th-century election-day ballot-receipt practices and defeats the view that States adopted them because of a ballot-receipt requirement. MS31-33. Respondents emphasize that for much of our history States received ballots by election day and, on that basis, declare that an election requires that practice. RNC25-29; LP22-28; *cf.* US18-23. But respondents cite nothing showing that any State imposed an election-day ballot-receipt deadline because it thought the federal election-day statutes (or an election) require it. MS42-43. A sounder inference from these practices is that for much of our history there was little reason for another practice. That did not make ballot-receipt timing a settled issue: it was not even a ripe issue. Once it ripened, States began to change practices. MS31-32.

Respondents suggest that in the 1800s "[a]n ordinary person would not have understood 'election' to require ballot marking but not official receipt when elections were conducted in a way that made that distinction impossible." RNC29; *see* RNC29-30; LP35. But an ordinary person would have understood that an election's defining feature is the voters' collective choice expressed through an official process (MS24-25, 26-27) and that electoral practices are otherwise dynamic (MS29-30, 31). So an ordinary person would not have thought that an "election" ruled out post-election-day ballot receipt any more than it ruled out remote soldier voting, civilian absentee voting, or the secret ballot, MS31; *see* MS34-35—none of which respondents claim are preempted.

The RNC faults the State's view of Civil War soldier-voting laws. According to the RNC, the State argues that those laws—which, the RNC claims, show that an election requires ballot receipt—"don't matter" because their "purpose" was only "to ensure fair and honest elections." RNC31; *see* RNC31-32; *cf.* US19-21. The State in fact argued that history defeats the view that States held "elections in the field" "because of any election-day ballot-receipt requirement." MS33; *see* MS32-33. The text of those laws and judicial decisions construing them show what States were doing: limiting elections to qualified voters and blocking fraud. MS33. The RNC says that "timeliness and integrity" were not "mutually exclusive goals." RNC32. But history bears out the integrity goal, reflects that States required ballot casting by election day (timeliness), and does not show that States were pursuing an election-day ballot-receipt requirement. MS32-33. The United States says that "if an 'election' did not dictate ballot-

receipt timing, it is strange *no* State loosened its rules for soldiers in the field—including proxy-voting States, which easily could have deemed soldier-ballots timely by their postmark." US21; *see* US 20-21. But some States did loosen rules for soldiers—in particular, with proxy voting. MS11. When they did so, elections often went poorly. MS11-12 (citing problems in New York and elsewhere); *see* US28 (noting fraud in New York). History shows that States on the whole were not ready to further loosen their rules while maintaining election integrity. *See* MS11-12, 32-33.

The RNC also disputes that, "[i]f States' concern" during the Civil War "had been ballot receipt by an election official, they could have dispatched a functionary to just gather up ballots," but "[t]hat was not their practice." MS33. The RNC says that "some States with *proxy voting* systems did 'dispatch a functionary.'" RNC31 (emphasis added); *see* RNC31-32. That skirts the point. When States held "*elections in the field*," they did not dispatch functionaries to just gather up ballots, which undercuts the RNC's view that States were motivated by an election-day ballot-receipt requirement. MS33 (emphasis added). And with proxy voting, the "functionary" who gathered up ballots was not achieving the official receipt that (the RNC claims) an election requires. Official receipt occurred when the proxy "drop[ped]" those ballots in ballot boxes in soldiers' "home precinct[s]" on election day. RNC26. *That* is why States with proxy voting received ballots on election day: because proxy voting was a form of in-person ballot casting that necessarily occurred on election day—not because of a ballot-receipt requirement. *See* Josiah Henry Benton, Voting in the Field: A

Forgotten Chapter of the Civil War 15, 91, 148-49 (1915); *contra* US19.

2. History shows that the federal election-day statutes do not impose particular electoral practices, including particular ballot-receipt practices. MS31; *see* MS9-13, 29-30. That is why those statutes do not bar absentee voting, modern methods of absentee voting, or the secret-ballot system. *See* MS31, 34-35.

The RNC dismisses this history on the ground that it does not "show experimentation on whether to close the ballot box on election day." RNC30; *see* RNC30-31. That ignores what matters: election administration in the 1800s was dynamic and an "election" did not require particular practices. MS9-13, 29-30, 31. The RNC suggests that "[s]tate experimentation with everything but the ballot-receipt deadline only reinforces the necessity of election-day receipt." RNC31. But in the 1800s—and especially in 1845, the critical date here, MS33-34—States overwhelmingly required in-person voting (and in 1845, in one's home district) with on-the-spot qualifications checks. MS9-10, 11-12, 32-33; LP17-18; *supra* Part A-2. If a lack of contemporaneous experimentation dooms post-election-day ballot receipt, it dooms much more.

3. History shows what drove Congress to enact the federal election-day statutes. MS30-31. It was "problems from States holding elections on different days"—fraud from double voting, undue influence, burdens on voters—"not a problem of ballot receipt." MS31.

The Libertarian Party dismisses this as a "psychoanalysis of what Congress probably had in mind when enacting the Election-Day statutes." LP37 (cleaned up). But it is established history that the

State documented (MS5-8), the Libertarian Party does not contest (and at times presses, LP5), and the RNC embraces (RNC6, 46). And in statutory interpretation, "historical context" matters. *Executive Benefits Insurance Agency v. Arkison*, 573 U.S. 25, 37 (2014). The Libertarian Party says that "the notion that ballot receipt has nothing to do with" fraud is "fanciful." LP37; *see* LP46-47; *cf.* RNC46-47. That is a fair policy argument. But respondents never connect that point to these statutes' historical context. That context shows that Congress set a "uniform" election day to stop people from voting in multiple elections. MS5-7, 31; *see also* MS34, 37-38, 46 (also addressing "uniformity"); *contra* LP37 (claiming that the State "ignores" Congress's "uniformity" concern).

Respondents suggest that post-election-day ballot receipt renews the evils that the federal election-day statutes were designed to combat. RNC46-47; LP46-47. Mississippi's law produces none of those evils. MS37-38. Respondents cite no contrary evidence and never claim that Mississippi's law produces fraud. Indeed, respondents carefully chose not to base their case on alleged fraud. *E.g.*, LP CA5 Br. 5 (Dkt. 73) ("To be clear, Plaintiff does not allege voter fraud.").

Respondents dislike that States do not announce election results until weeks after the election. RNC1, 46-47; LP13, 47. But that is true under their rule too. They agree that canvassing, counting, and certifying results can and do lawfully occur after election day. RNC20, 33; LP19-20, 31-32. And gaps between holding an election and effectuating its results are not new. Canvassing, counting, and certifying take time. The passage of weeks between the presidential election and the certification of that election has long been with us. *See* Act of Mar. 1, 1792, ch. 8, § 2, 1 Stat.

239-40; 3 U.S.C. §§ 1, 7, 11, 21. So a lapse of time between election and effectuation would hardly have "ma[d]e no sense" in the 1800s. LP47. And for all of respondents' complaints about electoral processes continuing for "weeks after" election day, LP47, they do not claim that a State has ever missed a deadline to count, certify, or effectuate a federal election. *Cf.* US31 (raising specter of extending receipt deadlines by "100 days" but providing no support for it).

The United States says that the federal election-day statutes' main aim was to prevent fraud and preserve public confidence in elections, and so it is "unthinkable" that enacting Congresses would permit widespread ballot receipt after election day. US27-30. The United States cites 19th-century ballot-box stuffing and mail-in-ballot manipulation. US27-28. But a uniform election day targets the "fraudulent importation of voters" across state lines, H.R. Rep. No. 40-31, at 77-78 (1869) (cited at US28), not ballot-box stuffing, *see* MS5-8. The United States is also wrong about mail-in-ballot manipulation. It cites proxy voting. US28. Proxy voting went poorly when States failed to observe election-integrity measures, not because of a problem of ballot receipt. MS11-12.

4. Respondents' approach to history would mean that the federal election-day statutes preempt legions of state laws—including laws allowing absentee voting, making it permissive, and imposing the secret ballot—from the past 165 years. MS33-35.

Respondents insist that this is not so because the State's examples concern the "manner" of voting and the federal election-day statutes dictate only the "time" by which elections must occur. LP35-36

(emphasis omitted); *see* RNC32. That response has at least two problems.

One: Ballot receipt concerns the manner of elections and so is no different from the other practices that respondents' approach would preempt. Because ballot receipt is not part of an "election," a law allowing post-election-day ballot receipt does not regulate the "time" of an election. It regulates how votes are to be submitted to state officials and what effect ballots will have when submitted in that way—not when votes must be cast and thus when the "election" must occur. States regulate the "manner" of elections when they declare how voters "may cast their ballots" and what "effect ... shall be given ... to ballots thus cast." *Lehman v. McBride*, 15 Ohio St. 573, 609 (Ohio 1863); *see State ex rel. Chandler v. Main*, 16 Wis. 398, 418 (1863) (in regulating how the "act" of voting may "be accomplished," the State regulates the "mode" of elections).

Two: Respondents' argument conflicts with—and exposes the deep flaws in—their approach to history. Respondents' approach to history is to embrace the one 19th-century election-day practice that they like (ballot receipt), ignore even more central election-day practices (in-person voting, on-the-spot qualifications checks), and declare that the one practice they like defines an "election." *E.g.*, RNC32-33; LP35-36. That is bad history. It is also bad textualism. The three one-sentence provisions setting the day for the "election" cannot plausibly be read to enshrine respondents' one favored electoral practice but leave States free to discard other practices that were just as firmly part of election day in 1845 and 1872. MS25-26; *see* MS9-13, 33-35. Respondents insist that they "don't argue that history freezes all election practices in 1845."

RNC32. But they have no coherent account for why that is so. If this Court credits their view, it condemns 165 years of state lawmaking and laws in most States today. MS33-35, 47.

The Court can avoid all that by adopting a sound view of history. History—including the historical context animating the federal-election statutes, the dynamic nature of election administration across the same period, the absence of evidence that States required election-day ballot receipt because they thought an election required it, and 19th-century authorities affirming that an "election" is not limited to particular practices—shows that an election does not impose a ballot-receipt requirement. MS29-33. That view allows for the many innovations in electoral practices from 1845 to 1872 to 1914 to today: from military absentee voting to civilian absentee voting to the secret ballot to modern methods of absentee voting. This Court should hold—consistent with text, precedent, and sound history—that the federal election-day statutes do not preempt state laws that allow ballots that are cast by election day to be received after that day.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted.

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