

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL WATSON, MISSISSIPPI)
SECRETARY OF STATE,)
Petitioner,)
v.) No. 24-1260
REPUBLICAN NATIONAL COMMITTEE,)
ET AL.,)
Respondents.)
- - - - -

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Place: Washington, D.C.
Date: March 23, 2026

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5 Petitioner,)
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7 REPUBLICAN NATIONAL COMMITTEE,)
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11
12 Washington, D.C.
13 Monday, March 23, 2026

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15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:04 a.m.

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1 APPEARANCES:

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3 Mississippi; on behalf of the Petitioner.

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7 Justice, Washington, D.C.; for the United States,
8 as amicus curiae, supporting the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24-1260, Watson versus Republican National Committee.

Mr. Stewart.

ORAL ARGUMENT OF SCOTT G. STEWART

ON BEHALF OF THE PETITIONER

MR. STEWART: Mr. Chief Justice, and may it please the Court:

States have broad power over elections. Throughout our history, they've used that power to change how they hold elections. Nowhere is that change more apparent than in Election Day itself. Congress set the federal Election Day in 1845. At the time, everyone voted in person. There was no absentee voting. There was no secret ballot. Voters challenged each other's qualifications at the polls on Election Day, and states received ballots on Election Day. Over time, states changed all those practices. They did so as Congress extended Election Day to all federal offices. They've done so ever since.

No one claims that in setting the

1 federal Election Day, Congress blocked most of
2 those changes. The dispute is whether Congress
3 blocked just one change, allowing ballots cast
4 by Election Day to be received after that day.
5 States have allowed that for over a century.
6 Congress has respected it. No one challenged
7 it until now. The question is whether Congress
8 in 1845 blocked that practice.

9 The answer is no. The Election Day
10 statutes adopt a simple rule: States must make
11 a final choice of officers by Election Day.
12 That is the plain meaning of an election. As
13 this Court said in *United States versus*
14 *Classic*, from time immemorial, an election to
15 public office has been, in point of substance,
16 no more and no less than the expression by
17 qualified electors of their choice of
18 candidates.

19 Mississippi satisfies that rule. It
20 makes a choice on Election Day. And only that
21 rule respects the last 180 years of state
22 lawmaking. If Election Day must be what it was
23 in 1845, that takes out much more than the
24 ballot receipt laws of 30 states today. It
25 dooms absentee voting, modern methods of

1 voting, the secret ballot, and more. Congress
2 did not adopt that destabilizing view when it
3 simply set the Election Day. The Fifth Circuit
4 was wrong to rule otherwise. This Court should
5 reverse.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Just to be clear, you
8 have -- you said in your opening statement
9 sometimes, you said, the decision -- the choice
10 has to be made by Election Day, and at other
11 points, you say on Election Day. Which is it?

12 MR. STEWART: I -- I think the
13 state-wide choice needs to make -- be made by
14 Elect -- or -- or on Election Day itself, when
15 the entire electorate has voted, Justice
16 Thomas. I think voters themselves need -- need
17 to make their individual selections by Election
18 Day.

19 JUSTICE THOMAS: If I give my ballot,
20 mail-in ballot, to my neighbor, is that a
21 choice?

22 MR. STEWART: It's a choice. It's not
23 a final choice that can be recognized in the
24 context of an election.

25 JUSTICE THOMAS: So when do I know

1 whether or not a choice is final?

2 MR. STEWART: When you've submitted to
3 the state, to the appropriate state election
4 official, through the designated state process.

5 JUSTICE THOMAS: So why isn't it the
6 rule then that the final -- or the formalized
7 decision, electoral decision, isn't made until
8 that's done?

9 MR. STEWART: Until -- until it's
10 submitted to the official, Your Honor.

11 JUSTICE THOMAS: Yeah.

12 MR. STEWART: I think -- I mean, I
13 think the choice is made once the voter has
14 made -- the voters as -- as a whole have made
15 an irrevocable decision by casting ballots.

16 JUSTICE THOMAS: What does that mean?

17 MR. STEWART: A final -- a final
18 choice. They've -- they've cast their ballots.

19 JUSTICE THOMAS: Well, if -- I made a
20 final choice when I handed it to my neighbor.

21 MR. STEWART: But it's a final choice
22 within an official state process, Justice
23 Thomas, which --

24 JUSTICE THOMAS: Well, I think the
25 ballot is an official state process. Is that

1 enough?

2 MR. STEWART: Not enough to be known
3 in a public way to the state. That happens
4 when it is parted with and submitted through --
5 through mail to the -- to the appropriate
6 election official. Then it's final.

7 CHIEF JUSTICE ROBERTS: If -- if "day"
8 means -- includes a period after a particular
9 day of the election, does -- does it include a
10 particular day before the day of the election?
11 Or does your logic require a different
12 consideration?

13 MR. STEWART: Forgive me if I -- I may
14 not be understanding the question correctly,
15 Your Honor, but I think the key is that the
16 Election Day is the day by which a final choice
17 electorate-wide must be made. It can't be made
18 after that day by voters or -- or the
19 electorate as a whole. But individual
20 selections can surely be made before that day
21 because there's still no final choice until you
22 have an electorate-wide deadline.

23 CHIEF JUSTICE ROBERTS: Is there any
24 limit to that?

25 MR. STEWART: As to how early people

1 could vote?

2 CHIEF JUSTICE ROBERTS: Sure. Yeah,
3 they fill out a ballot if you're giving them a
4 ballot and, you know, drop it off two weeks
5 before.

6 MR. STEWART: As far as the federal
7 Election Day statutes are concerned, Your
8 Honor, I don't think there -- there is a limit
9 to how early that could occur. I think you
10 just need the day when the electorate as a
11 whole needs to have chosen.

12 There might be other practical or
13 other barriers in that. Of course, elect --
14 elections are a very long process to begin
15 with, the entire electoral process, as surely
16 things are happening weeks or months before.
17 But I think even a couple weeks before, even
18 earlier than that in some cases, people are
19 making individual selections. It's just
20 Election Day itself is the day for the final
21 collective choice.

22 JUSTICE BARRETT: Counsel, I
23 understand -- I want to go back to your answers
24 to Justice Thomas. So I understand that
25 Mississippi's particular rule says that it has

1 to be deposited in USPS or with a common
2 carrier, but I don't understand why
3 Mississippi's definition in the next case would
4 preclude a state from adopting a law along the
5 lines of the one that Justice Thomas is
6 proposing.

7 For example, if I have someone in my
8 neighborhood in my HOA who says, listen, I'm
9 going to take everybody's votes in, what if the
10 state said that's fine; if you've cast your
11 final vote and you've -- you know, you've
12 designated someone to carry your vote to, as
13 long as it gets to the ballot box five days
14 after Election Day, it's fine. Why does your
15 definition preclude what Justice Thomas
16 hypothesized?

17 MR. STEWART: Right. And I think,
18 Justice Barrett, the answer is that submission
19 to mail or common carrier is -- is different in
20 kind than, say, submitting it to a relative
21 or -- or sort of a neighbor in that way.

22 JUSTICE BARRETT: What's the
23 difference? They're not government officials.

24 MR. STEWART: They -- they are
25 impartial third parties that have a duty to

1 deliver what they're owed without altering it.

2 JUSTICE BARRETT: But what about the
3 definition that you're proposing precludes
4 that? Your definition didn't say final as
5 submitted to an impartial third party or final
6 as submitted to a common carrier.

7 You said the final choice has been
8 made. And there are lots of different ways, it
9 seems to me, that you could make a final
10 choice. And you also have the problem of this
11 revocability from the Postal Service
12 regulation.

13 MR. STEWART: So -- so I think, to
14 start with the first part, Your Honor, I mean,
15 I think we're going at a historically
16 recognized form of finality. I think history
17 is -- is helpful in a number of ways, and one
18 way is that as long as we've had mail-in
19 voting, we -- we have -- for almost as long as
20 that time, we -- we've had post-Election Day
21 ballot receipt. I mean, mail-in voting I think
22 in general has been understood as a
23 permissible, unchallenged method of --

24 JUSTICE BARRETT: I wouldn't rely on
25 the history if I were you since you're telling

1 us not to rely on the other side's history,
2 like just because it's always been done that
3 way doesn't mean it has to be done that way,
4 which I actually find -- there's a good point
5 in your favor, but then it seems to me that
6 you're flipping back around and saying, well,
7 absentee voting has always been done that way
8 by common carrier, and so that's how we would
9 expect it to be done.

10 MR. STEWART: Well, I think it says
11 something that for a hundred years we've --
12 we've had people voting by mail and that's been
13 an understood means of submitting a ballot to
14 the state.

15 I think what it embodies, Justice
16 Barrett, is there's an intuition that when you
17 send -- when you put something through the
18 Postal Service, it's final, it's trusted,
19 it's -- it's not like giving it to kind of a
20 non-official third-party.

21 JUSTICE GORSUCH: Well, what if --
22 what if -- what if a state came up with a law
23 that said so long as a notary, that's official,
24 that's recognized, certified that you cast your
25 ballot on Election Day and it was delivered

1 later by whatever means, common carrier or not,
2 what -- what in your theory of the preemptive
3 effect of this statute would preclude that law?

4 MR. STEWART: I think two points on
5 that, Justice Gorsuch. One I think is that --

6 JUSTICE GORSUCH: Pick your best.

7 (Laughter.)

8 MR. STEWART: Well, I think one's kind
9 of in -- a point in our favor and one -- one's
10 kind of a point against our friends, which is
11 that there's a finality of submitting it to an
12 official and --

13 JUSTICE GORSUCH: Yeah, it's been --
14 it's been notarized by -- well, how about a
15 justice of the United States Supreme Court. Is
16 that official enough for you?

17 MR. STEWART: I mean, it -- it -- it's
18 pretty official. I don't think it's been --

19 JUSTICE GORSUCH: Pretty official.

20 (Laughter.)

21 MR. STEWART: It's -- it's pretty
22 good, Your Honor, but I don't -- I don't think
23 it kind of hits submission to the state.

24 JUSTICE GORSUCH: Ah. Okay. Well,
25 that -- I wanted to explore -- so -- so that's

1 not submitted to the state? Even if it's
2 notarized, an -- an affidavit, it was final on
3 the day of and somebody brings it in to the
4 state offices a week or three months later,
5 that doesn't count, but if it goes into the
6 mail, it does?

7 What in the statute -- what words in
8 the statute would you have us read that into,
9 that rule into?

10 MR. STEWART: Well, I mean, I -- I
11 think -- I mean, just to make sure I
12 understand, I -- I think that's fine under my
13 friend's view too, Your Honor. I mean, a
14 notary could be --

15 JUSTICE GORSUCH: I'm asking about
16 your view, counsel.

17 MR. STEWART: Sure. So I -- I
18 think --

19 JUSTICE GORSUCH: You're saying that's
20 not fine, and I want to understand what --
21 what -- what in the federal law preempts that.

22 MR. STEWART: Well, I think, number
23 one, I -- I just am not -- at least as I'm
24 understanding the hypothetical, it doesn't
25 appear to be submission to the state, Your

1 Honor, in the same --

2 JUSTICE GORSUCH: Oh, it gets
3 submitted to the state three weeks later, just
4 not by common carrier.

5 MR. STEWART: Well, I mean, if -- I
6 mean, if what you're saying, Your Honor, is
7 it's -- that a -- that a notary has been deemed
8 a sufficient ballot receiver under state law,
9 then I think --

10 JUSTICE GORSUCH: Yes. Then that's
11 okay too?

12 MR. STEWART: I --

13 JUSTICE GORSUCH: Okay. What if state
14 law -- so now you're saying that is okay.

15 MR. STEWART: I -- I think it -- it
16 may -- you know, it may depend on how -- you
17 know, what the level of officiality is at the
18 time.

19 JUSTICE GORSUCH: Well, the -- the
20 state says it's official, by God, when -- when
21 a Supreme Court justice or -- or perhaps just a
22 notary says it's official. That's good enough
23 under your theory. It has to be, I think.

24 And if that's okay, why can't a state
25 say: How about a time-stamped video showing

1 that I voted on Election Day? Here I am
2 filling out my ballot, and then -- and -- and
3 then my brother or maybe some aggregator of
4 ballots brings it in a week or three later.

5 MR. STEWART: And --

6 JUSTICE GORSUCH: That's got to be
7 okay too, doesn't it?

8 MR. STEWART: I -- I think it's still
9 just -- I -- I -- I keep coming back, Justice
10 Gorsuch, to this pedigree of submitting it to a
11 state. I mean, I think, as a good example --

12 JUSTICE GORSUCH: Well, the state says
13 that's official, the state says that's fine,
14 ballot aggregators are great, and so long as
15 it's a time-stamped video or a notary or maybe
16 a Supreme Court, or who knows what, the
17 librarian says you cast it on -- on the day of
18 the election, we're good -- we're good to go,
19 right?

20 MR. STEWART: I mean, I -- I do -- I
21 do -- do still have some concern that it has
22 not been submitted through --

23 JUSTICE SOTOMAYOR: Counsel, why are
24 you fighting the premise? In the Civil War, at
25 least two states permitted military officers

1 who weren't sworn state officials, they were
2 federal officials but not sworn state
3 officials, to accept the ballots and transmit
4 it by mail to the state, okay?

5 And that was in the Civil War, all
6 right? Since 1918, we've had laws like
7 Mississippi. By 1944, eight of them. By --
8 since then, 12 more by 1886. And now half the
9 states permit absentee ballots that are dropped
10 in the mail, correct? No different than in the
11 Civil War.

12 We have no federal law that says
13 that's not okay, for the state to designate
14 someone by whom an official ballot has to be
15 given by Election Day, correct?

16 MR. STEWART: I --

17 JUSTICE SOTOMAYOR: And if the state
18 wants to make it a notary republic, if it wants
19 to make it a military officer, if it wants to
20 make it a Supreme Court justice, if it wants to
21 make it anyone, as long as it's done by
22 Election Day, that's what counts, correct?

23 MR. STEWART: I mean, I think that's
24 possible. We're not quite asking for that,
25 Your Honor. I really don't mean to fight

1 the --

2 JUSTICE SOTOMAYOR: No, you don't
3 because you're only defending this law. And
4 this law is very consistent with what happened
5 in the Civil War. It's very consistent with
6 what has happened for over a hundred years.

7 There's nothing in federal law that
8 has prohibited it explicitly, correct?

9 MR. STEWART: That -- that's right,
10 Your Honor.

11 JUSTICE SOTOMAYOR: All right.

12 JUSTICE ALITO: Well, Justice
13 Sotomayor is asking you what I think she
14 intends to be a friendly question, but maybe
15 you want to think about whether you want to go
16 that far.

17 What if the state designates in an
18 official of the Republican Party or the
19 Democratic Party who receives these ballots,
20 collects ballots, and fills out an affidavit
21 saying, I received all these and -- and I -- I
22 will faithfully deliver them? Would that be
23 okay?

24 MR. STEWART: Well, I think it's -- I
25 think it's actually okay under my friends'

1 view, Your Honor. We're not -- we're not
2 making that ask.

3 I mean, as far as my friends' view are
4 concerned, so long as somebody's designated a
5 ballot receiver, they can be fine. Party boss,
6 party bag man, relative, any of those, so long
7 as the state says you are a ballot receiver,
8 that's fine.

9 The only thing that apparently is not
10 fine is U.S. Postal Service common carrier.
11 And I think that is, I think, a very -- a very
12 odd way to read those statutes --

13 JUSTICE ALITO: Well, the Postal
14 Service is not part of the state, and a common
15 carrier isn't part of any government.

16 MR. STEWART: It's -- that's right,
17 Your Honor. But, I mean, certainly, we all
18 know the status of the U.S. Postal Service is a
19 highly regulated government entity with certain
20 obligations. Common carriers in a very similar
21 way, high -- highly regulated with similar
22 obligations.

23 And they give -- in both cases,
24 they're imbued with a duty to deliver what they
25 receive. And, in fact, a duty that's, I -- I

1 think, a good example -- maybe a good example
2 is the fact that the IRS accepts tax returns,
3 which are obviously highly consequential
4 documents with key timeliness requirements, the
5 IRS accepts tax returns both through the mail
6 and through common carrier.

7 JUSTICE ALITO: Well, you will -- you
8 will accept ballots that are received within
9 five days after Election Day, that what -- what
10 is, you know, the whatever -- the -- the date
11 that's -- that's set as Election Day, right?

12 MR. STEWART: That's right, Your
13 Honor.

14 JUSTICE ALITO: And you have a variety
15 of line-drawing problems. So we've been
16 exploring one, to whom and by what means is
17 this thing to be -- the ballot to be delivered
18 to the state. But how -- what -- what about
19 the length of time that a state could choose?

20 Is it the case -- isn't it the case
21 that some state allows -- will -- will count
22 ballots that are received 21 days after
23 Election Day?

24 MR. STEWART: There are a couple that
25 at the outlier it's kind of canvassing and it

1 could go that far. I think more common --

2 JUSTICE ALITO: Is -- is that okay?
3 Is that all right?

4 MR. STEWART: As far as -- as far as
5 the federal Election Day statutes are
6 concerned, yes, Your Honor. And I think this
7 actually gets to a good point that -- that
8 loops back to something Justice Gorsuch was
9 mentioning, was -- was getting at in a certain
10 way, which I think he was saying, one, the
11 federal Election Day statutes decides that.

12 I -- I think that's the key point in
13 our favor, is this is -- this is an area where
14 states get to go first to make these decisions.
15 Congress can step in, but the idea --

16 JUSTICE ALITO: So there's no limit?
17 Except I suppose the day when the presidential
18 electors have to be appointed or the day when
19 the -- the next Congress begins, starts its
20 session, that's the only limit on counting --
21 on counting mail-in ballots?

22 MR. STEWART: Those are some of the
23 limits, Your Honor. But I'd also say the
24 federal Election Day statutes don't require
25 states to count ballots at all. It doesn't

1 speak to counting, period. So, I mean, if a
2 state really didn't want to --

3 JUSTICE GORSUCH: Not -- not counting
4 but -- but being delivered. So I do think it
5 is a consequence, and you can tell me if I'm
6 wrong, but just so we can wrap this up, that by
7 any means and by any date up until the next
8 Congress meets, a -- a state can receive
9 ballots?

10 MR. STEWART: I think, for
11 congressional races, potentially, yes, Your
12 Honor. I think there -- there are other Title
13 III kind of things that push action earlier in
14 the presidential context, but, again, I mean,
15 there's nothing -- the key question is these
16 are one -- three one-sentence provisions and we
17 want to be, I think, very careful not to read
18 them for more than they're worth.

19 JUSTICE JACKSON: And, counsel,
20 isn't --

21 JUSTICE SOTOMAYOR: Counsel --

22 JUSTICE JACKSON: I was just going to
23 say, isn't -- isn't your point that the
24 line-drawing issues that have been raised are
25 only problems to the extent that Congress

1 thought they were problems? We're -- we're in
2 a preemption dynamic, and so the question I
3 think really is, what did Congress intend with
4 its statement about Election Day?

5 Did it mean to cabin the states so
6 that they did not have the discretion to make
7 these kinds of decisions?

8 And, in addition to what Justice
9 Sotomayor has said, which is we have no federal
10 statute that precludes this, I think we have
11 several stat -- federal statutes that suggest
12 that Congress was aware of post-Election Day
13 ballot deadlines, that the states had enacted
14 and, in fact, incorporated those in several
15 circumstances.

16 So can you speak to that? I'm -- I'm
17 talking about UOCAVA, for example, and some
18 other federal statutes that indicate that
19 Congress not only knew this was going on, but
20 then it interpreted and incorporated the
21 state's own post-ballot -- post-Election Day
22 ballot deadlines into federal law?

23 MR. STEWART: Sure, Your Honor. So
24 I -- I -- I think that's exactly right. So
25 UOCAVA is -- is maybe the best example where

1 Congress was told that about a dozen or so
2 states have post-Election Day ballot receipt
3 laws. It respected those explicitly as to a
4 deadline for -- for ballots in -- in -- in that
5 law. I think the United States has agreed with
6 us on -- on that very --

7 JUSTICE JACKSON: And Congress wasn't
8 worried, I think, about the states picking
9 dates that were, you know, we might think are
10 too long or whatnot. That -- that was not in
11 the statute. Congress just said whatever the
12 state has decided with regard to ballot receipt
13 deadlines is going to apply here, correct?

14 MR. STEWART: Right. And that's been
15 the case for 180 years, Your Honor. And I
16 think one feature that I -- you know,
17 obviously, we're -- we're -- we're searching
18 for what did the statutes mean at the time, but
19 I think it's very hard for my -- my friends to
20 explain a hundred -- the past hundred years of
21 history and this lawmaking. The Soldier Voting
22 Act in the 1940s was -- was another example
23 where Congress recognized and respected state
24 deadlines. And it just -- it gets very hard to
25 explain those things if you don't adopt the

1 view that the federal Election Day statutes
2 just do not set a ballot receipt deadline.

3 JUSTICE GORSUCH: I want to ask you
4 about the recall problem, and before I get to
5 that, throughout your brief, you say that
6 the -- that the federal statute does require
7 voters to submit their ballots to election
8 officials on Election Day, must be cast by
9 Election Day, and that the -- and that the
10 Election Day is the day to conclude and
11 consummate the election through a final
12 selection. You agree with all those statements
13 in your brief?

14 MR. STEWART: Yes.

15 JUSTICE GORSUCH: Okay. But, at the
16 same time, you say: Actually, it doesn't have
17 to be submitted to an election official; it
18 just has to be submitted to a common carrier.
19 And there's a contradiction there that I -- I
20 just want you to first address, and then I'll
21 give you my hypothetical.

22 MR. STEWART: Very good, Your Honor.
23 I think, when you put something in the mail,
24 you're not -- I think --

25 JUSTICE GORSUCH: That's not an

1 election official. FedEx isn't an election
2 official.

3 MR. STEWART: Right, but the recipient
4 certainly is the person who you're
5 submitting -- submitting it in the mail to. I
6 mean, that is -- that is the recipient.

7 JUSTICE GORSUCH: Sure. Of course.

8 MR. STEWART: And, right, Your Honor.
9 And I think --

10 JUSTICE GORSUCH: You submit it to
11 FedEx and they deliver it to the election
12 official, but -- but you say it has to be
13 submitted to an election official throughout
14 your brief, but then you say a common carrier
15 is okay, and that -- those two things don't add
16 up.

17 MR. STEWART: Well, I think the
18 difference is, say, you know, sending it to
19 your brother versus sending it to the
20 registrar.

21 JUSTICE GORSUCH: Well, we already
22 dealt with that. The brother turns out to be
23 okay so long as the state says so. You --

24 MR. STEWART: I think that's okay on
25 their view, Your Honor.

1 JUSTICE GORSUCH: It's also okay --

2 MR. STEWART: I -- I'm a little
3 more -- more guarded than that.

4 JUSTICE GORSUCH: Well, you -- I think
5 you already answered that one. So -- so here's
6 the hypo: Let's say you have a state where a
7 large portion of the electorate mails in their
8 ballots on or close to Election Day. Not
9 far-fetched. Many states are like that. Then
10 the day after the election, a story breaks that
11 one of the lead candidates engaged in an
12 inappropriate sexual escapade or perhaps is
13 colluding with a foreign power. Again, not
14 far-fetched, I think. And the competing
15 candidate immediately goes on the airwaves and
16 urges voters to recall their ballots and --
17 and -- and to tell the common carriers not to
18 deliver them. And many common carriers will do
19 that with anything that you send through the --
20 through them. FedEx, you just call them up and
21 say I want it back.

22 In that hypothetical, did the election
23 happen on Election Day? Oh, by the way, it
24 swings the election.

25 (Laughter.)

1 MR. STEWART: So the -- the election
2 did happen on -- on Election Day, Justice
3 Gorsuch. As -- as we've explained, our ballot
4 does not allow using mail recall, anything like
5 that. When somebody submits their ballot by
6 mail, it's final.

7 JUSTICE GORSUCH: Well, just -- just
8 first deal with my hypothetical, and then I'll
9 deal with your statute.

10 MR. STEWART: Okay. The -- the -- the
11 election happened on Election Day. It sounds
12 like --

13 JUSTICE GORSUCH: Even though it
14 changes the outcome.

15 MR. STEWART: I mean, I think it --

16 JUSTICE GORSUCH: Yes has to be your
17 answer, doesn't it?

18 MR. STEWART: I mean -- I mean, yes,
19 Your Honor. I'm just --

20 JUSTICE GORSUCH: Okay.

21 MR. STEWART: I -- I -- I want to be
22 clear about the --

23 JUSTICE GORSUCH: All right. And
24 then --

25 MR. STEWART: -- we are not agreeing

1 that the outcome can be properly changed in
2 that circumstance.

3 JUSTICE GORSUCH: Well, hold on. It
4 did in my circumstance -- in my hypothetical.
5 You can't change my hypothetical, counsel.

6 (Laughter.)

7 MR. STEWART: And I'm just saying it's
8 unlawful, Your Honor.

9 JUSTICE GORSUCH: It's -- what's --
10 what's unlawful? What --

11 MR. STEWART: I don't mean to
12 discourage your hypothetical. I'm just saying
13 that it -- that it's an unlawful circumstance
14 because we don't allow ballot --

15 JUSTICE GORSUCH: Oh, in Mississippi,
16 okay. But that hypothetical could happen in
17 another state, right?

18 MR. STEWART: I think, if the state is
19 not providing that on mailing there's a final
20 choice made, I think that would be a problem
21 with that law under the federal statutes, Your
22 Honor.

23 JUSTICE GORSUCH: Okay. Now you say
24 your statute -- you're -- you're -- you're
25 different. You admit my hypothetical could

1 happen, but you say it can't happen in
2 Mississippi because recall's not allowed. I
3 couldn't find that anywhere in Mississippi law.

4 In fact, what I did see was a statute
5 that says that you -- that the Secretary of
6 State can promulgate rules and regulations.
7 That's 23-15-637(3). And then I went and
8 looked at the regulations, and Rule 2.1 says
9 that an absentee ballot is the final vote of a
10 voter when the ballot is marked accepted.

11 That doesn't preclude recall.

12 MR. STEWART: And --

13 JUSTICE GORSUCH: In fact, that allows
14 recall.

15 MR. STEWART: -- I -- I don't -- I
16 respectfully don't agree with that, Your Honor.
17 I mean, what --

18 JUSTICE GORSUCH: Where -- where does
19 it say recall is not permitted? I couldn't
20 find that anywhere in your statutes or the
21 rules.

22 MR. STEWART: And I think, by
23 providing that ballots are final when cast
24 under our statute itself --

25 JUSTICE GORSUCH: No, it doesn't. It

1 says they're final when marked accepted.

2 MR. STEWART: That's the regulation,
3 Your Honor.

4 JUSTICE GORSUCH: Yeah. It's your --

5 MR. STEWART: Yeah. And it -- and --

6 JUSTICE GORSUCH: It's your
7 regulation, and it allows recall.

8 MR. STEWART: It does -- respectfully,
9 it does not allow recall, Your Honor. The
10 ballot is final when cast.

11 JUSTICE GORSUCH: Show me where --
12 would you read to me the provision that
13 precludes it?

14 MR. STEWART: It's -- it's subsection
15 (3) of the statute that my friends have
16 challenged.

17 JUSTICE GORSUCH: I read you
18 subsection (3) that says the Secretary of State
19 can make rules.

20 MR. STEWART: And --

21 JUSTICE GORSUCH: And then I read you
22 the rule.

23 MR. STEWART: To ensure that the
24 ballots are final when cast. They -- the --
25 the key thing --

1 JUSTICE GORSUCH: But the rule says --

2 MR. STEWART: -- is that ballots are
3 final when cast.

4 JUSTICE GORSUCH: It says -- no.
5 Votes promulgated by an absentee ballot with
6 the absentee ballot -- person's absentee vote
7 is final. You can make rules about when
8 they're final. And what the rule says it is
9 final when marked accepted.

10 MR. STEWART: And that's -- I mean,
11 it's speaking to a processing rule about what
12 to do when somebody's -- you know, when
13 somebody's ballot potentially doesn't arrive on
14 time. They submit an affidavit ballot. But I
15 would come back to the -- the text of the
16 statute, Your Honor. I mean, "final when cast"
17 is -- is what our law --

18 JUSTICE BARRETT: Mr. Stewart, I just
19 want to ask a clarifying point to this. Is it
20 possible for a portion of Mississippi's statute
21 to be unlawful, not -- just -- just go with me
22 here -- a portion of Mississippi's statute to
23 be unlawful insofar as it potentially permits
24 recall but still that, you know, would not
25 address whether Mississippi's statute was

1 unlawful insofar as it allowed ballot receipt
2 after Election Day?

3 MR. STEWART: Yes, Your Honor. I
4 mean, I think one possibility would be, like,
5 hey, look, you need a more unambiguous finality
6 here and you need to foreclose recall, period,
7 full stop.

8 JUSTICE BARRETT: Okay. And -- and on
9 this question, I just want to make sure I
10 understand what you're saying. When you said,
11 yes, my friends on the other side say it's okay
12 for private parties to deliver just like you
13 do, are you saying that's just a manner of
14 receipt, and whether your -- whether the ballot
15 is received before or after the election, on
16 all sides, everybody agrees that absentee
17 ballots can be turned in by having, you know,
18 the neighbor, the party operative, or whatever
19 scoop them up and bring them to the -- the
20 ballot box?

21 MR. STEWART: Your Honor, I mean,
22 maybe -- you know, I'm not sure if I answered
23 the earlier thing as crisply as I could. I'm
24 not comfortable with the neighbor piece. I do
25 have serious concerns about that. I -- I --

1 JUSTICE BARRETT: But is that tied to
2 the ballot receipt problem, or is that just
3 tied to, hey, maybe this is an unlawful way of
4 executing absentee balloting regardless of when
5 the ballots make it to the official?

6 MR. STEWART: I think it's the
7 finality of the choice that has to be done by
8 Election Day. And --

9 JUSTICE BARRETT: Okay.

10 MR. STEWART: -- my -- my concern is
11 that if you're not sending it by mail or common
12 carrier --

13 JUSTICE SOTOMAYOR: You're getting
14 caught up, counsel, again. Could you go back
15 to the question? Justice Barrett is not
16 arguing with you.

17 MR. STEWART: Fair, Your Honor.

18 JUSTICE SOTOMAYOR: What she's saying
19 and what you said earlier is -- and you believe
20 that under your adversary's -- the opposing
21 counsel's theory, you can give it to the RNC
22 operative, you can give it to anybody, and so
23 long as it's received on Election Day by the
24 state, that's okay. That's what you're saying
25 your opposing counsel is saying. And you're

1 saying the only question before us is, if they
2 can designate an appropriate vehicle to
3 transmit the votes, then that's okay.

4 MR. STEWART: I think I was saying
5 the -- the latter part, yes, Your Honor.

6 JUSTICE SOTOMAYOR: Mm-hmm.

7 MR. STEWART: I actually think, under
8 my friend's view, it's okay -- like, a state
9 can deem the ballot -- deem received when the
10 party operative himself or herself receives it
11 because all that person has to do is be a
12 ballot receiver designated by the state.

13 JUSTICE SOTOMAYOR: Right.

14 MR. STEWART: And we're trying to hew
15 more closely not just to the text but also the
16 historical hundred-year-long you can submit it
17 by mail.

18 JUSTICE SOTOMAYOR: Okay.

19 CHIEF JUSTICE ROBERTS: Thank you --

20 JUSTICE SOTOMAYOR: So -- but the
21 bottom line is that states can choose when the
22 final vote has to be counted?

23 MR. STEWART: States have discretion
24 over counting.

25 JUSTICE SOTOMAYOR: Exactly.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas, anything further?

4 JUSTICE THOMAS: Just as a point of
5 clarification, without looking at the
6 subsequent history, what do you think the
7 federal law required as far as the Election
8 Day?

9 MR. STEWART: That the voters make a
10 final choice by that day. The -- the way I'd
11 boil it down, Justice Thomas, is choice is
12 critical and unchanging; method of making that
13 choice is malleable. And that does also
14 explain all the subsequent history.

15 JUSTICE THOMAS: And you don't have to
16 formalize that choice?

17 MR. STEWART: You do by submitting --
18 by parting with your ballot and submitting it
19 to the state.

20 JUSTICE SOTOMAYOR: Have we had any --

21 CHIEF JUSTICE ROBERTS: Justice --
22 Justice Alito?

23 JUSTICE SOTOMAYOR: I'm sorry.

24 JUSTICE ALITO: Your position does
25 require some difficult line-drawing problems,

1 and maybe that's inevitable, but one is the
2 degree of confidence that one must have in the
3 entity or person who transmits the ballot to
4 the state. We've talked about that. One is
5 how long after the Election Day vote -- votes
6 must be -- votes can be received. A third is
7 whether it has to be postmarked.

8 Are there -- aren't there quite a --
9 aren't there eight states that do not require a
10 postmark for late ballots?

11 MR. STEWART: There are a number of
12 states that don't require that, Your Honor. I
13 think postmarking is -- is good evidence that
14 something has been timely submitted. That's
15 kind of borne out in the tax context.

16 I -- I think, you know, if -- if
17 somebody were challenging a law like that, it
18 would potentially be a very different kind of a
19 challenge. They'd have to make sort of factual
20 showings to challenge that ballots were not
21 cast by Election Day but surely not this case.

22 JUSTICE ALITO: Well, maybe these --
23 maybe it's inevitable that some sort of
24 line-drawing decisions like these have to be
25 made, unless the rule is anything goes, you

1 know, states can do anything they want in this
2 area.

3 We don't have a whole lot to go on
4 here. We have the phrase "Election Day" and we
5 have history. If we looked just at the phrase
6 "Election Day," what would we take from that?

7 I think you're -- you've been saying
8 we're -- and we're moving in this direction.
9 We don't have Election Day anymore. We have
10 election month or we have election months. I
11 mean, the early voting can start a month before
12 the election. The ballots can be received a
13 month after the election.

14 MR. STEWART: Well, I -- I think the
15 best way to read it, Your Honor, is that by
16 setting Election Day, the Congress set the
17 final choice day. And that's the key thing,
18 final choice day. What Congress was concerned
19 about at the time was some states making final
20 choices, say, a month before other states were
21 making final choices and the distortions, the
22 fraud, the risks that -- that that had.

23 And when everybody's making a final
24 choice on the same day, even if some individual
25 choices are made before then, you're honoring

1 the statutes, and I think, you know, I think,
2 Justice Alito, you made this observation, you
3 know, not a lot to go on because the statutes
4 are just not very -- there's not a lot of
5 prolixity there.

6 I think that's a point in favor of
7 deference to the states. You know, if Congress
8 has not spoken to something, especially in this
9 context, where states are expressly empowered
10 to regulate these things, that's a big point in
11 favor of letting states continue to do so as
12 they -- they have for a century.

13 JUSTICE ALITO: Do you think it's
14 legitimate for us to take into account
15 Congress's desire, Congress's passage of the
16 Election Day statutes for the purpose of
17 combatting fraud or the appearance of fraud and
18 will and some of the briefs have argued that
19 confidence in election outcomes can be
20 seriously undermined if the apparent outcome of
21 the election at -- on the day after the polls
22 close is radically flipped by the acceptance
23 later of a big stash of -- of ballots that flip
24 the election or -- yeah.

25 MR. STEWART: I think --

1 JUSTICE ALITO: You've got ballots
2 that are delivered by somebody -- by -- you
3 know, by a neighbor and they're received a
4 month after the election and they don't have
5 postmarks.

6 MR. STEWART: I -- I think the best
7 way to do it is to honor the statute's purpose
8 by -- but doing so by respecting the statute's
9 text and animating context.

10 And what these statutes were getting
11 at was not just any kind of fraud writ large in
12 all elections, which, you know, no statute
13 could do but a situation where, okay, you know,
14 State 1 votes -- you know, has their election
15 on one day, ends it, and State 2 neighboring
16 has its election three weeks later because the
17 concern would be let's say State 1 goes for one
18 party, and then State 3 goes for the other
19 party with a huge turnout for that other party.

20 You could have potential fraud.
21 People went across state lines and voted or you
22 could have the appearance of that sort of fraud
23 even if it didn't actually happen, like people
24 just said, oh, my gosh, they voted for that
25 person, I -- you know, big turnout.

1 So I think that's the kind of thing
2 that animated those statutes, whereas fraud
3 writ large was not -- was not a good example.

4 I do think it's -- it's notable that
5 my -- my friends with the United States, you
6 know -- you know, obviously, they -- they --
7 they've sounded the antifraud theme. They
8 haven't cited a single example of fraud from
9 post-Election Day ballot receipt in this
10 century.

11 JUSTICE ALITO: All right. Okay.
12 Thank you. I'll let my colleagues have a
13 chance.

14 MR. STEWART: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 JUSTICE SOTOMAYOR: Has there been any
18 history of voter recall in the mails in -- in
19 Mississippi? You say the law doesn't permit
20 it, but has there been any history of it?

21 MR. STEWART: None that I've ever
22 heard of, Your Honor. I mean, this isn't
23 something that was raised until the appellate
24 reply briefs. And nobody cited a single
25 example in history of it.

1 JUSTICE SOTOMAYOR: All right. And I
2 understand Justice Alito's questions about the
3 policy questions of what will create discomfort
4 or not. But the Constitution vests the issue
5 of elections in the states unless superseded by
6 Congress, correct?

7 MR. STEWART: That's right, Your
8 Honor.

9 JUSTICE SOTOMAYOR: So, if there is a
10 policy question to be had, the entities to
11 decide that are the states and Congress, not
12 the courts, correct?

13 MR. STEWART: That's right, Your
14 Honor.

15 JUSTICE SOTOMAYOR: And absent a law
16 in federal law that suggests that absentee
17 ballots must be received by a certain time,
18 there's no explicit requirement of that,
19 correct?

20 MR. STEWART: Right, Your Honor, or
21 even implicit.

22 JUSTICE SOTOMAYOR: And -- and the
23 implicit, we have the military acts that since
24 World War II at least and the Civil War, I
25 should go back that far, have permitted

1 absentee ballots to be received long past
2 Election Day, correct?

3 MR. STEWART: We have a very long
4 history of that, Your Honor.

5 JUSTICE SOTOMAYOR: Exactly. So the
6 people who should decide this issue are not the
7 courts but Congress, correct?

8 MR. STEWART: Right, Your Honor.
9 And I -- I think what --

10 JUSTICE SOTOMAYOR: The states and
11 Congress.

12 MR. STEWART: That's right, Your
13 Honor. And as I -- as I was mentioning in my
14 colloquy with, I believe, Justice Alito
15 earlier, that's kind of the structure of our
16 system. States go first. If Congress doesn't
17 like it, it overrides.

18 And, as I think Justice Scalia said
19 for the Court in Arizona Inter Tribal, we
20 respect what Congress said as far as it went
21 but no farther. And that's kind of the history
22 of voting and election law in the country to
23 begin with.

24 JUSTICE SOTOMAYOR: One last question.
25 With respect to history, history is informative

1 of what's been permitted by Congress because
2 what we're looking for is what understanding
3 Congress had with respect to elections,
4 correct?

5 MR. STEWART: That's right, Your
6 Honor, yeah.

7 JUSTICE SOTOMAYOR: All right. And it
8 doesn't talk about the receipt of absentee
9 ballots after elections at all, so we look to
10 the history of whether Congress has accepted
11 it, correct?

12 MR. STEWART: I think that does help
13 here, Your Honor.

14 JUSTICE SOTOMAYOR: All right. But
15 the attempt by some of the amici here to
16 Bruenize this inquiry and say that history
17 tells us how elections must be held and on what
18 date and when receipt can happen or not happen,
19 why is that not an acceptable way to look at
20 this?

21 MR. STEWART: Well, I -- I think the
22 difference between Bruen and here, Your Honor,
23 is that Bruen -- in Bruen, the Court -- the --
24 the question at issue, you know, whether a
25 restriction on firearms is consistent with our

1 historical tradition of firearm regulation,
2 there's a rich history addressing precisely
3 that issue. Sometimes through analogy but very
4 much, I mean, Bruen itself, I believe, I want
5 to say 40 pages of history just analyzing those
6 things.

7 We don't have anything like that, a
8 rich history suggesting that Congress was even
9 thinking about locking in Election Day ballot
10 receipt or anything like it. It was addressing
11 different things.

12 JUSTICE SOTOMAYOR: All right. Thank
13 you, counsel.

14 MR. STEWART: Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: I guess, Mr. Stewart,
17 your answers to Justice Sotomayor's questions
18 leave me unsure about what you think about
19 these appeals to history.

20 I mean, you've said that there's not a
21 lot of text here. I agree with that. I think
22 that the way this case has been argued all
23 around suggests that that's so. So -- so then
24 we're left with history. Or are we left with
25 history? You seem to appeal to history

1 sometimes -- Justice Barrett said this -- but
2 then repudiate the appeals to history at other
3 times.

4 And I guess I want to know what we're
5 supposed to be doing when we're looking at this
6 statute and deciding this question with respect
7 to all this historical evidence, scant or not
8 scant as it may be.

9 MR. STEWART: Sure, Your Honor. So
10 I -- I -- I think the best way I can break it
11 down is this, is that history's informative
12 here. And the way it's most informative is
13 that since Congress set -- I mean, throughout
14 our history and, certainly, since Congress set
15 the federal Election Day, election
16 administration in our country has been very,
17 very dynamic.

18 As I tried to highlight in my opener,
19 it was one thing, in-person, on-the-spot
20 qualification checks by fellow voters, ballots
21 were naturally received on Election Day, all
22 those features. As soon as Congress had a
23 reason to alter the methods by which a choice
24 was made, it did so.

25 But the one constant is that the

1 voters, in a popular government, it's most
2 critically the voters, the constant is that the
3 voters make a final choice of officers by
4 Election Day.

5 So I think history shows that election
6 administration is dynamic. States have wide
7 leeway. They just have to make sure that the
8 voters make a choice by Election Day.

9 JUSTICE KAGAN: Thank you.

10 MR. STEWART: Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 JUSTICE GORSUCH: Almost done,
14 Mr. Stewart.

15 You -- you -- you emphasized to
16 Justice Kagan and many others that the -- the
17 final choice at least has to be done on
18 Election Day, and so recall would be a problem
19 for you if -- if it could happen.

20 But you say that -- that that doesn't
21 happen in Mississippi, that that's -- that's
22 your position, right?

23 MR. STEWART: Right. It's not
24 permitted.

25 JUSTICE GORSUCH: If recall could

1 happen, that would be a problem for your
2 position?

3 MR. STEWART: I think there --
4 potentially. I think there's --

5 JUSTICE GORSUCH: Because then it
6 wouldn't be a final decision on Election Day,
7 right?

8 MR. STEWART: That's right, Your
9 Honor.

10 JUSTICE GORSUCH: Okay.

11 MR. STEWART: I think there
12 would still be a factual question, though, of
13 whether -- I still have not been cited anything
14 to say that recall is actually a thing that can
15 happen in the rule.

16 JUSTICE GORSUCH: No, I understand.
17 But, if it could happen, that would be a
18 problem for your theory because a final choice
19 wouldn't have happened on Election Day, right?

20 MR. STEWART: Fair, yeah.

21 JUSTICE GORSUCH: Okay. So you -- you
22 say Mississippi prohibits it. We -- we've --
23 we've been through whether that's the case or
24 not.

25 MR. STEWART: Very good.

1 JUSTICE GORSUCH: But let -- let's say
2 it did. Let's say there was a law prohibiting
3 recall. How would it ever be enforced?
4 Because how is a state to know and how is even
5 a common carrier carrying an envelope to know
6 whether that is a ballot that needs to be
7 recalled? And who are you going to prosecute?

8 MR. STEWART: Well, I think -- I think
9 it could be enforced similar to -- to other
10 vote -- voter things. I mean, in our state,
11 there are notarization and affidavit
12 requirements, signing things. I think one --
13 if -- if -- if it were critical to -- for the
14 voter to say that there will be no recall, the
15 voter could say, I hereby commit that I will
16 not attempt to or recall this package in any
17 way, shape, or form. They could just add that,
18 sign it.

19 I take the point about proof problems,
20 but, I mean, gosh, Justice Gorsuch, I mean,
21 violating state election laws in a state that
22 really is antifraud and really takes wide
23 measures to enforce its laws, that would be
24 quite a thing for a voter to do.

25 JUSTICE GORSUCH: Well, in my

1 hypothetical, which, you know, you say is
2 unlikely to swing an election and all of that
3 on recall, but as soon -- you know, if -- if
4 history teaches anything, scant or not scant,
5 it's that as soon as something's allowed, it
6 will happen eventually, right?

7 And -- you know, so -- so somebody --
8 my hypothetical happens and everybody recalls
9 their ballots. I'm just not sure what recourse
10 the state would have against people who
11 violated its anti-recall law.

12 MR. STEWART: I mean, if people are,
13 say, recalling things through a common carrier,
14 there's going to some record that they recalled
15 those things. A state --

16 JUSTICE GORSUCH: How's a state ever
17 going to find out about it?

18 MR. STEWART: I mean, I think the
19 same -- the same way it would find --

20 JUSTICE GORSUCH: It's going to go --
21 you're going to go prosecute individuals?

22 MR. STEWART: I mean, Your Honor, I'd
23 say, like, if somebody is lying in an affidavit
24 that they're not going to recall something, I
25 mean, if -- if people are doing that with

1 impunity, we have quite a problem, but it is a
2 problem that the state can address and
3 enforce --

4 JUSTICE GORSUCH: I just don't know
5 how they'd ever find out about it.

6 MR. STEWART: I mean, I think you --
7 obviously, you know, some crimes are harder to
8 find out and prosecute than others, Your Honor,
9 but I think it's still -- I mean, people can do
10 things, try to, like, tamper with ballots, all
11 that sort of thing. I think it's just still a
12 matter of respecting the statutes.

13 JUSTICE GORSUCH: Thank you.

14 MR. STEWART: Thank you, Justice
15 Gorsuch.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE KAVANAUGH: When did
19 Mississippi switch to this method?

20 MR. STEWART: 2020. In 2024, it added
21 common carriers.

22 JUSTICE KAVANAUGH: And why?

23 MR. STEWART: It was first because of
24 the pandemic. I have -- I don't know that
25 there's necessarily an answer about why as to

1 the 2024 one in a -- in a clear way.

2 JUSTICE KAVANAUGH: And the other side
3 makes a point when we're looking at history, to
4 the extent historical practice is relevant,
5 that it only became widespread to allow it to
6 be mailed by Election Day in more recent years
7 and that the predominant approach was to
8 require receipt by Election Day throughout the
9 historical practice you cite, until very
10 recently.

11 How are we supposed to think about
12 that?

13 MR. STEWART: I mean, I think it's the
14 same way to think about, I -- I think, the
15 broader history of election law, is, when --
16 when states have kind of seen a problem,
17 they've adapted and adjusted in -- often in --
18 in the direction of allowing -- making sure
19 more votes can be counted. I mean, that was
20 obviously a big thing when absentee voting
21 started to become a prominent thing. You know,
22 certainly, we cared for much about our history
23 of people showing up in person, but we realized
24 that was very difficult for people away from
25 home and that we wanted to, you know, kind of

1 widen the tent and make it -- make it so that
2 people could vote.

3 And I think perhaps another
4 realization, even though we've had UOCAVA for
5 40 years, Justice Kavanaugh, is that for
6 military voters in particular, this is a
7 perennial challenge about making sure that they
8 can actually get their ballots in on time. I
9 mean, that's perhaps why UOCAVA voters in
10 particular are a very popular group for
11 post-Election Day ballot receipt.

12 JUSTICE KAVANAUGH: Would you say that
13 the states that require receipt by Election Day
14 are disenfranchising voters?

15 MR. STEWART: No, you're not --
16 they're not, Your Honor. I mean, a reasonable
17 ballot deadline does not do that. I would
18 asterisk just there are the practical barriers
19 for those overseas military voters.

20 JUSTICE KAVANAUGH: But, for the
21 citizens who are not within that class, you
22 would not use the term "disenfranchisement" to
23 say it has to be received by Election Day,
24 November 3rd, rather than -- I guess it would
25 be five business days -- November 10th? You

1 would not use that term to describe that,
2 correct?

3 MR. STEWART: I would not. Correct,
4 Your Honor.

5 JUSTICE KAVANAUGH: And then picking
6 up on Justice Alito's questions, Professor
7 Pildes and others have said that late-arriving
8 ballots open up a risk of what might
9 destabilize the election results. "If the
10 apparent winner the morning after the election
11 ends up losing due to late-arriving ballots,
12 charges of a rigged election could explode.
13 The longer after Election Day any significant
14 changes in vote totals take place, the greater
15 the risk that the losing side will cry that the
16 election has been stolen."

17 And my question is -- my questions,
18 one, is that a real concern? Two, does that
19 factor into how we think about how to resolve
20 the scant text and the maybe conflicting or
21 evolving history here?

22 MR. STEWART: I think -- I certainly
23 respect the perception. I think one thing
24 notable in this case and I think helpful is
25 that there -- there -- there has not been

1 much -- much of a showing about actual fraud
2 from post-Election Day ballot receipt itself.
3 I mean, that was --

4 JUSTICE KAVANAUGH: Well, I think
5 Justice Alito referred to and I think this
6 quote refers to the appearance of fraud. And
7 is that a real concern? Is that something we
8 should be thinking about? Confidence in the
9 election process? Just -- just curious how we
10 factor that in here.

11 MR. STEWART: Right, and I think it
12 would go back to the same answer I had for
13 Justice Alito about scant -- you know, there --
14 simple text, straightforward text, and
15 respecting the limits of that text, and looking
16 at the animated history, I think it really
17 was -- it was the double-voting fraud concern.
18 I don't know that people have that particular
19 concern.

20 I think, you know, obviously, people
21 can be, you know, unhappy when a -- a result
22 flips. I think Congress may be able to take
23 measures to address that. But I think there's
24 no good evidence that Congress was doing that
25 beyond preventing double voting in this

1 context.

2 JUSTICE KAVANAUGH: But, if you have
3 to have a deadline, which you acknowledged, and
4 if having a deadline of November 3rd rather
5 than November 10th doesn't -- for receipt,
6 doesn't disenfranchise anyone, why wouldn't it
7 make more sense to -- to take account in some
8 respect of that concern as we think about how
9 the text and history fit together?

10 MR. STEWART: Well, I think, I mean,
11 something that Congress was clearly, I think,
12 trying to do was adopting a simple rule in this
13 text. And I think a very simple rule is
14 everybody must cast their ballot by Election
15 Day. I mean, that's quite administrable. I
16 mean, if you have an Election Day ballot
17 receipt deadline, there are certainly things to
18 commend that. I think you're alluding to some
19 of those, Justice Kavanaugh.

20 But there's also a question of, when
21 do I vote? You know, I'm not sure. You know,
22 do I need to do it 7, you know, whatever it is?
23 Whereas, you know, if somebody wants to get all
24 the information possible, they like voting on
25 Election Day, you have a pretty nice, clear,

1 simple rule, and that seems to dovetail quite
2 well with the --

3 JUSTICE KAVANAUGH: Well, the simple
4 rule, but if it arrives on November 11th,
5 you're out.

6 MR. STEWART: Right, but I think
7 that's kind of baked into the risks you always
8 get when you're doing -- there are always some
9 risks, you know, regrettably with mail-in
10 voting. You can eliminate some of those risks
11 by voting in person, but --

12 JUSTICE KAVANAUGH: The risks would
13 seem the same no matter whether it's
14 November 3rd or November 10th, in other words,
15 that it could take longer than a week for the
16 mail to get there.

17 MR. STEWART: The risk is there,
18 but -- I -- I think if you have Election Day
19 ballot receipt -- and I -- I think what we're
20 addressing, I think, are more -- the way I
21 might frame the issues are these are policy
22 points. The question is, did Congress wall off
23 states from debating these policy points? I
24 think the answer is no.

25 And I think states could very

1 reasonably say, you know, look, we -- we do
2 want to get counting and get a result very
3 fast, but we are concerned about these military
4 voters, we do want voters to be able to get
5 whatever -- whatever information they want. I
6 mean, the weekend before, you know, that used
7 to be a big deal in elections at least. Maybe
8 it still could be in the future.

9 And I think a state could say: Hey,
10 look, federal law didn't wall us off from doing
11 this. We get that it has some things about it
12 that other states might weigh differently, but
13 we want to allow that for our voters.

14 JUSTICE KAVANAUGH: Well, I take your
15 point, but it really goes to just thinking
16 about what Election Day or day of election
17 means. But I -- I take your point. Thank you.

18 MR. STEWART: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE BARRETT: So I want to be
22 clear about what your definition of finality
23 requires. Would it require finality if the
24 vote arrives by Election Day as well?

25 So let's -- let's imagine an absentee

1 ballot that's put in the mail or sent by common
2 carrier well in advance of Election Day and
3 does -- is received and put in the ballot box
4 by Election Day.

5 Does that one have to be final? Or,
6 in other words, would it be a problem for you
7 that the U.S. Postal -- Postal Service permits
8 recall for those ballots that are sent in
9 advance? I guess what I'm asking is, do you
10 have the same problem either way?

11 You've -- you've taken a lot of
12 questions, and I have those questions, about
13 what the effect of this recall ability is. And
14 I guess my question is, I want to understand
15 what your definition of finality is and whether
16 it applies to the earlier absentee ballots as
17 well. Do they have to be final such that it
18 would be illegal to recall them pursuant to
19 whatever regulation the post office has?

20 MR. STEWART: Right. I think I got
21 it, Justice Barrett. Let me see if I can do
22 my -- my best on it.

23 I mean, I think, in theory, if
24 Election Day has not passed, there could be a
25 window for somebody to --

1 JUSTICE BARRETT: So it would be okay?
2 It wouldn't be illegal for somebody to recall a
3 ballot before Election Day? I guess I don't
4 understand why --

5 MR. STEWART: Well, I mean, if a state
6 allowed that, Your Honor. I mean, we don't --
7 we don't allow it.

8 JUSTICE BARRETT: So it would be okay
9 for the state. I know you don't allow it.

10 MR. STEWART: Right.

11 JUSTICE BARRETT: But I guess what I'm
12 under -- I guess I'm struggling because, if
13 your definition of the election or the vote or
14 casting the vote requires finality, I'm trying
15 to understand why that would be different
16 before the election -- when I'm saying before
17 the election, I'm talking about receipt, for
18 earlier-sent absentee ballots and for
19 later-sent. It seems like the same rule should
20 apply regardless. But it seems like you're
21 not -- you're saying something different.

22 MR. STEWART: Yeah, I -- I -- I'm
23 having a -- I guess I'm having a hard time
24 conceiving kind of a dual-track rule in --
25 in -- in that circumstance.

1 JUSTICE BARRETT: So would it be --
2 let me try to put it this way. Would it be
3 illegal for a state to permit absentee voting
4 but permit recall or -- or just kind of be
5 silent about this Postal Service regulation
6 that permits recall or anything a common
7 carrier did to permit recall? Is recall a
8 problem even if it's a possibility for those
9 earlier absentee ballots?

10 Because you can't consider them final.
11 All these questions that you've been taking are
12 about whether you could really consider the
13 ballot to be final if you could recall it. So
14 I'm asking whether that same finality test
15 applies for the earlier ballots.

16 MR. STEWART: And I'm not sure, Your
17 Honor. I mean, I think -- I -- I guess I just
18 keep coming back to you can't recall or change
19 your vote or -- or make any effort like that --

20 JUSTICE BARRETT: And that's true no
21 matter when you send it.

22 MR. STEWART: I think, I mean,
23 certainly, in our state, and I think -- I think
24 that's right, Your Honor.

25 JUSTICE BARRETT: But I mean as a

1 matter of the federal law. It just seems to me
2 that your definition has to be consistent, and
3 it sounds like you're changing it for the
4 earlier absentee ballots and saying finality
5 has some kind of different force for the
6 later-received absentee ballots.

7 MR. STEWART: Right. Well, I -- I
8 think a state has to do whatever it would need
9 to do to guarantee that on Election Day, all
10 ballots -- you know, every -- every cast vote
11 is final and cannot be recalled.

12 I -- I -- I'm having --

13 JUSTICE BARRETT: But it doesn't have
14 to be final at the time it's sent because it's
15 okay to recall it if you send it two weeks in
16 advance and you change your mind. That's not a
17 problem.

18 MR. STEWART: I -- I --

19 JUSTICE BARRETT: Okay. I'll
20 withdraw.

21 MR. STEWART: Yeah, I guess I'm having
22 trouble seeing how --

23 JUSTICE BARRETT: Okay.

24 MR. STEWART: -- the federal Election
25 Day statute itself would necessarily allow

1 that, Your Honor.

2 JUSTICE BARRETT: Well, it's about
3 your definition of election. It's about your
4 definition of what it means to cast a vote, but
5 let's put that aside.

6 Obviously, there's a lot of talk about
7 history in this case. Well, the Electoral
8 Count Reform Act was passed in 2022, and for
9 the first time, it defined Election Day.
10 Should that matter?

11 So should we be looking at how
12 Congress understood Election Day to mean in the
13 period of voting, what it thought in 2022, or
14 should we be looking at the late 19th century
15 and the Civil War practices?

16 MR. STEWART: I think most vitally it
17 still remains 1845 is the key date, especially
18 given that we have statutes that are trying to
19 manifestly achieve uniformity and what is
20 required of all federal offices. So I -- I do
21 think 1845 is the key date. And I --

22 JUSTICE BARRETT: So Congress carried
23 over in 2022 the same understanding of Election
24 Day that had persisted throughout?

25 MR. STEWART: I think that's right,

1 final choice of an officer.

2 JUSTICE BARRETT: Okay. Thank you.

3 MR. STEWART: Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: So let me just
7 clarify. This case is not about a Mississippi
8 practice or policy related to recalling
9 ballots, is that right?

10 MR. STEWART: That's right, Your
11 Honor.

12 JUSTICE JACKSON: So I -- I guess I'm
13 a little confused about those kinds of policy
14 questions, and I guess -- I think that the
15 Constitution's allocation of responsibility
16 here actually makes this case about who
17 decides.

18 I mean, there are a lot of policy
19 questions. Justice Alito ran through several
20 of them, who gets to receive the ballot, how
21 long after can they be submitted, does it have
22 to be postmarked. I suppose we can add is
23 recall allowed, et cetera, et cetera.

24 But the question, I think, is whether
25 Congress has precluded the states from making

1 those calls, drawing those lines, and your
2 position as I understand it is no.

3 MR. STEWART: That's correct, Your
4 Honor.

5 JUSTICE JACKSON: That the -- that the
6 scantness of Election Day in the federal
7 statutes actually is a point in your favor
8 because it indicates that Congress was leaving
9 it to the states to draw the various lines that
10 might arise in this circumstance.

11 Is that right?

12 MR. STEWART: That's right, Your
13 Honor. And that's reinforced, for example, by
14 the 1866 statute, which shows that when
15 Congress wanted to be really prescriptive in
16 this area, it was very prescriptive. It
17 described this is what the states have to do
18 and so forth.

19 JUSTICE JACKSON: So, if we were
20 focused, really focused on what we're asked to
21 answer here, which is, is the -- are the states
22 preempted by federal law from having
23 post-Election Day ballot deadlines, you would
24 say no?

25 MR. STEWART: No. No. Congress just

1 didn't decide that.

2 JUSTICE JACKSON: Let me ask you about
3 the history with respect to Bruen. I -- I -- I
4 guess I'm not sure I understood your answer to
5 Justice Sotomayor because it seems to me that
6 Bruen is not even the right methodology by
7 which to be thinking about this.

8 Bruen applied to the Second Amendment
9 because the Second Amendment incorporated a
10 preexisting right. And the point of the
11 history and tradition test was to try to
12 evaluate the contours of that right.

13 We -- we don't have that dynamic here.
14 We're trying, I thought, to figure out what
15 Congress meant when it included Election Day in
16 its federal statutes. So it seems odd to me
17 that the suggestion that the limitation on our
18 understanding of Congress's intent is somehow
19 tied to the state's practices.

20 MR. STEWART: I think that's right,
21 Your Honor. I think the other thing -- I think
22 the point I'd emphasize is that the idea of
23 embodying a preexisting right confirms that
24 there's something very much unchanging. And
25 the thing that we know about election

1 administration, it has very much been changing
2 throughout the course of our country.

3 JUSTICE JACKSON: It's been changing
4 throughout the course in a way that undermines
5 the notion that there was one consistent
6 practice, first of all, or that Congress's law,
7 the meaning of Election Day in the federal
8 statutes somehow was tied to what the states'
9 practices were about that.

10 I mean, I think this was your original
11 point, that there were lots of different
12 practices. And so, to the extent we're saying,
13 oh, you could only look at Election Day in the
14 federal statute to mean exactly what the states
15 were doing back at that time, this imperils a
16 lot of different things, not just post-Election
17 Day ballot deadlines, right?

18 MR. STEWART: That's right, Your
19 Honor. And, I mean, the only way to explain
20 all of these changes is to read them in line
21 with plain text and the limits of history,
22 which is to say election is a final choice.

23 I mean, otherwise, you have to do what
24 my -- my friends have to do, which is, hey,
25 look, we're going to pick out the one practice

1 from these eight -- 19th century codes that we
2 like, ballot receipts, say that's what an
3 election is, and just ignore in-person voting,
4 qualification check on the spot by fellow
5 voters, and that's just not sound history.

6 JUSTICE JACKSON: Can I ask you one
7 final thing about the amicus brief from the
8 Society For the Rule of Law Institute, because
9 I found it very interesting, and I didn't
10 really know what your view of it was.

11 That amicus brief focused on the
12 Electoral College and Congress's setting it up,
13 you know, back in 1787 with the understanding
14 that the casting of votes can happen on a
15 particular day and the receipt of those votes
16 by election officials can happen on a different
17 day.

18 And, in fact, the way the Electoral
19 College is set up, I think, at the time,
20 Congress permitted in nine -- in 1792 about a
21 month to elapse between the casting of votes,
22 which, by the way, it called Election Day, and
23 the receipt of the votes by the -- the electors
24 submitted them to the president of the Senate
25 up to a month after.

1 So I -- I think that to the extent
2 we're worried or thinking about historical
3 evidence, that seems to me to be pretty
4 significant and compelling historical evidence
5 of Congress's understanding of what was
6 required by Election Day versus the receipt of
7 those ballots at some subsequent point,
8 correct?

9 MR. STEWART: Yeah. I think that's --
10 that's well stated, Your Honor. The -- the
11 other thing I'd tie it to in the same amicus
12 brief, and I think the -- the brief, the amicus
13 brief does a nice job of tying it to this, is
14 that the key thing is -- is choice, choosing.
15 The Constitution refers to choosing, choice,
16 you know, those -- those -- those kind of
17 verbs.

18 And that's why that sort of thing is
19 allowed, that the key thing is --

20 JUSTICE JACKSON: And the choice is
21 made when you cast your vote under the
22 electoral process system, when the electors
23 cast their vote, right?

24 MR. STEWART: Right.

25 JUSTICE JACKSON: And that is

1 distinguished -- I'm just trying to make clear
2 that the casting of the vote and the receiving
3 of the votes historically have been conceived
4 of as two different things that can actually
5 happen at different times, right?

6 MR. STEWART: I think so, Your Honor.

7 JUSTICE JACKSON: Thank you.

8 MR. STEWART: Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Clement.

12 ORAL ARGUMENT OF PAUL D. CLEMENT

13 ON BEHALF OF THE RESPONDENTS

14 MR. CLEMENT: Mr. Chief Justice, and
15 may it please the Court:

16 All agree that elections for federal
17 office have to end on the day of the election
18 specified by Congress, and all agree that you
19 can't have an election unless you receive
20 ballots and there must be some deadline for
21 ballot receipt. Nonetheless, Mississippi
22 insists that ballots can trickle in days or
23 even weeks after Election Day.

24 That position is wrong as a matter of
25 text, precedent, history, and common sense.

1 Mississippi all but concedes that the original
2 public meaning of election included both
3 offering to vote and the receipt of that vote
4 or ballot by election officials.

5 And, of course, the key distinction
6 between voting and an election is an election
7 involves the combined action of voters and
8 election officials, as this Court underscored
9 in its decision against Foster against Love.

10 And, of course, Mississippi insists
11 that at the time these statutes were passed,
12 ballot receipt and the -- the casting of the
13 ballot were so inextricably intertwined no one
14 would have thought of one without the other.

15 That seems to me to be a damning
16 admission, but it also ignores the advent of
17 field and proxy voting in the Civil War and the
18 enormous efforts that states went to to ensure
19 that all of the ballots, whether by proxy or by
20 field vote, were received by Election Day.

21 In the state's view, all of those
22 herculean efforts were for naught or were
23 entirely gratuitous. Now the state's position
24 actually works even worse as a matter of common
25 sense.

1 If somebody in Gulfport the day after
2 the election asks is the election over, the
3 common sense answer is no, it's not. The
4 ballots are still coming in. And if somebody
5 asks who won, the truthful answer is we don't
6 know why yet. The ballots are still coming in.

7 And they may trickle in for weeks or
8 months. And, in fact, they may trickle in for
9 weeks or months with or without a postmark in
10 differing ways in differing states. That
11 reality gives the lie to the idea that we have
12 a uniform national Election Day.

13 I welcome the Court's questions.

14 JUSTICE THOMAS: How would you define
15 the day of election?

16 MR. CLEMENT: I would say that the day
17 of the election is the day when -- it's the
18 last day in which all the ballots are cast and
19 they are received into official custody.

20 JUSTICE THOMAS: So how would you
21 treat early voting as compared to late
22 reception of votes?

23 MR. CLEMENT: So I would say, I mean,
24 you know, I think the best place to look for a
25 treatment of early voting is the Kreisling --

1 the Keisling decision by Judge Kleinfeld in the
2 Ninth Circuit because, after Foster against
3 Love, there was a suggestion in Foster against
4 Love that maybe early voting is a problem.

5 He rejected that claim based on two
6 things. One is the distinct history of early
7 voting, and the second is the idea that was
8 explicit in this Court's decision in Foster
9 against Love that Election Day is the date of
10 consummation.

11 So I would say, under our theory,
12 early voting is permissible largely because it
13 has a different history and because of this
14 idea that the Election Day is the date where
15 the election is consummated.

16 JUSTICE THOMAS: Would you spend a few
17 more minutes on -- or at least a little bit
18 more time on the voting during Civil War?
19 There was some suggestion that that's an
20 example of late reception of votes.

21 And I think, in your intro, and this
22 was my thinking, that it was not, that proxy
23 voting was a way to make sure that the vote
24 occurred on Election Day as opposed to
25 afterwards.

1 MR. CLEMENT: Well, not surprisingly,
2 Justice Thomas, you are exactly right. So
3 proxy voting is the thing that happened in the
4 Civil War that is most analogous to absentee
5 voting. And the thing that is most striking
6 is -- I think five states had proxy voting --
7 every one of those five states required the
8 votes, the ballots, to be received by election
9 officials back home by Election Day.

10 Now that's an incredibly inconvenient
11 thing that was done in the Civil War to ensure
12 the ballots were received by Election Day. And
13 under the state's view, they didn't need to do
14 that.

15 Now it's really no different in the
16 context of field voting because there were,
17 like, maybe a dozen states -- if you're not
18 going to count the Confederate states, there
19 were about a dozen states that did field
20 voting. Again, every one of those ensured that
21 the ballots were received into official custody
22 by Election Day.

23 And, of course, most of the states
24 went to enormous efforts to replicate the
25 machinery of the ballot box and everything else

1 in the field and -- but -- and some variation
2 in that. But the one thing that didn't vary at
3 all was that the ballots had to be received
4 into official custody by Election Day.

5 And just one last thought on this
6 Civil War practice. My friend's only real
7 answer to the idea that, at 1845, there was an
8 understanding that everybody would have had
9 that, of course, the election involves both the
10 offer to vote and receiving the vote, the
11 ballot, into official custody, his only answer
12 to that is, well, like, nobody -- the issue
13 hadn't ripened, that nobody had even thought
14 that you could divide the two.

15 But the issue ripened in the Civil
16 War, and the issue ripened in such a way that
17 every state required the ballot to be received
18 into official custody by Election Day. And
19 then that certainly informs what Congress is
20 thinking in 1872 when they extend the
21 presidential Election Day deadline to the
22 congressional realm.

23 JUSTICE SOTOMAYOR: Mr. Clement, what
24 do I do with the two states during the Civil
25 War, Rhode Island and Nevada? You say five

1 favor you. At least two don't.

2 Nevada simply designated three of the
3 highest officers in command, didn't swear them
4 in, just said three officers in the command can
5 create a ballot box or suitable receptacle for
6 votes and collect the votes of the soldiers
7 with little further formality. Those military
8 officers then would mail those ballots in, and
9 they would be counted, whether they arrived on
10 Election Day or after.

11 What do we do with Rhode Island, that
12 simply directed soldiers to deliver a written
13 or printed ballot with the name of the person
14 voted for to the officer commanding the
15 regiment to which he belonged? That officer
16 wasn't sworn in as a state official either, and
17 receipt could happen thereafter.

18 So it's not -- yes, many states
19 believed, as they did at the time, that voting
20 had to be in person, that voting had to be
21 not -- it had to be by voice instead of by
22 paper. Lots of states had lots of beliefs
23 about what a proper election should look like.
24 But how do we deal with the outliers? Or you
25 just want to ignore them?

1 MR. CLEMENT: No, I don't want to
2 ignore the outliers. I actually think Rhode
3 Island and Nevada help me and my side of this
4 case, and I think that's because they did
5 designate somebody -- they might not have given
6 them an oath, but they designated somebody as
7 an official to receive the boats -- the votes.
8 And they had to come in --

9 JUSTICE SOTOMAYOR: So there -- here,
10 what's the difference between the post office
11 and a common carrier? It's the official.

12 MR. CLEMENT: No.

13 JUSTICE SOTOMAYOR: You want an
14 individual person, is that it?

15 MR. CLEMENT: Well, I -- I want
16 somebody who's cloaked with government
17 authority, so that's one difference. But
18 there's a critical second difference.

19 JUSTICE SOTOMAYOR: But it's not state
20 authority, meaning you're now expanding what
21 you're saying as government authority.

22 MR. CLEMENT: So what I would say is
23 it was government authority, and I would say
24 that my understanding of the history is that
25 all those federal officers voluntarily accepted

1 the responsibility, whether they took an oath
2 or not. And I think that's quite --

3 JUSTICE SOTOMAYOR: So could a
4 neighbor and so could anybody else. I'm not
5 moved. The point is that it permitted someone
6 else to deliver the item, a final cast vote, to
7 deliver it and be received after.

8 Under your theory of this case -- and
9 I think you and the government disagree on
10 this -- you believe that absentee voting by the
11 military and overseas voters, the various laws,
12 that federal laws under which states have
13 proceeded with respect to those votes are
14 illegal?

15 MR. CLEMENT: No, I don't --

16 JUSTICE SOTOMAYOR: Or -- or -- or
17 they're not saying what everybody has
18 understood them to say, that states can accept
19 absentee ballots after the election?

20 MR. CLEMENT: So I --

21 JUSTICE SOTOMAYOR: Military and
22 overseas ballots?

23 MR. CLEMENT: I don't think any vote
24 is unlawful. Let me -- let me try to address
25 how I think you would reconcile UOCAVA with the

1 Election Day statutes. And, to start, I think
2 it's important to recognize that UOCAVA is not
3 limited to the federal general election.

4 So UOCAVA applies to primary
5 elections, to run-off elections and special
6 elections, and federal general elections. The
7 Election Day statutes only apply to the general
8 federal election.

9 So the way I would reconcile the two
10 is to say that all the references in UOCAVA to
11 state deadlines are perfectly fine, not
12 preempted at all, not displaced at all, not
13 even anomalous, with respect to the primaries,
14 the run-offs, and the special elections. Then
15 the Court has a job to do in the federal
16 general election as to say, like, kind of which
17 is the specific, which is the general.

18 I think the more logical way to do it
19 would be to say that -- with the understanding
20 in this Court, if you decide in our favor, that
21 for the federal general election, the ballots
22 have to be in by Election Day, I would say --

23 JUSTICE SOTOMAYOR: Well, maybe we
24 should have another president now because
25 wasn't it in Florida that they were counting

1 military votes after receipt?

2 MR. CLEMENT: So, with all due
3 respect, that is the reddest of red herrings
4 because what happened in the 2000 election in
5 Florida is that pursuant to a consent decree
6 that was entered by a federal court because
7 Florida was violating the principal provision
8 of UOCAVA, which says you have to give the
9 ballot -- absentee ballots to the overseas
10 voters 45 days in advance, because Florida was
11 violating that, there had to be a consent
12 decree to create a remedy that was not provided
13 under --

14 JUSTICE SOTOMAYOR: There, what
15 happened was that the judge made up the
16 deadline, not the state. But I wanted to --
17 how do you deal with the Soldier Voting Act in
18 1942 that permitted ballots -- for the
19 extension of absentee ballots?

20 MR. CLEMENT: So the 1942 Act, at
21 least as I understand it, again, is not
22 addressed solely to general elections. And
23 then, with respect to general elections, it
24 says that the -- the military special SVA or
25 whatever it was, the special military ballot,

1 had to come in on the -- by the time the polls
2 closed on Election Day.

3 So I actually think the 1942 Act is
4 fully supportive of our position here.

5 JUSTICE SOTOMAYOR: So the DOJ has
6 been acting illegally when it has sued states
7 for not following the Act, the UOCAVA?

8 MR. CLEMENT: No. Again, remember
9 that the UOCAVA's principal protection is the
10 provision -- this is in 302 of the Act, not 303
11 and 304, but the 302 Act provision that says
12 that you have to get the ballots to overseas
13 voters 45 days in advance of the election.
14 And, interestingly, in the single most
15 important provision in UOCAVA, it ties the
16 deadline to the date of the election.

17 JUSTICE SOTOMAYOR: So what do we do
18 with Congress saying process in the manner
19 provided by law for absentee ballots in the
20 states involved, that's UOCAVA, and that at the
21 time the hearings were being held on it, 21 --
22 12 states were identified as counting absentee
23 ballots after Election Day?

24 So it just ignored it and decided it
25 was going to exempt out a little part of it but

1 not everything.

2 MR. CLEMENT: With respect, Justice
3 Sotomayor, that's why you have to remember that
4 UOCAVA is not focused only on the federal
5 general election, which is the only thing where
6 Congress has specified a federal deadline.

7 JUSTICE JACKSON: But, Mr. --

8 MR. CLEMENT: So it makes perfect
9 sense --

10 JUSTICE JACKSON: But does that help
11 you or hurt you, the fact that it is broader?
12 I mean, it's broader in the way that you
13 describe. It applies to all of these different
14 elections.

15 But it doesn't make the distinction
16 that you are making. It says, with respect to
17 all of them, state absentee ballot deadlines
18 should apply. You're -- you're -- you're
19 encouraging us to treat the general election
20 differently because you interpret Election Day
21 with respect to the general election statute to
22 have a defined time as of Election Day, but
23 that is not what this statute appears to be
24 doing.

25 MR. CLEMENT: So I think it helps us,

1 and I think it helps us because, to the extent
2 you're concerned with those references to state
3 election deadlines, they're inevitable. If
4 Congress is going to address anything other
5 than the general federal election, it has to
6 refer to the state deadlines for receiving
7 ballots because there are no federal deadlines
8 for any election other than the federal general
9 election.

10 JUSTICE KAGAN: Yeah, but, if that's
11 true -- if that's true, Mr. Clement, you would
12 think that Congress would say, you know, with
13 respect to the deadlines that there's no
14 separate federal requirement X rule and with
15 respect to the deadlines, that there is a
16 federal requirement Y rule, but it doesn't do
17 anything like that. It treats them all of a
18 piece.

19 And we know that for many of these
20 elections, states were setting their own
21 deadlines and Congress -- and -- and Congress
22 in passing these statutes didn't suggest any
23 kind of distinction between those elections and
24 these elections.

25 MR. CLEMENT: So, Justice Kagan, as

1 with almost every statutory question that comes
2 to this Court, Congress could have made it
3 easier. They could have done all that. And
4 they didn't. And I think you just have to --

5 JUSTICE KAGAN: Well, but you're -- so
6 what do we take from that? I mean, it seems
7 what they took from that is that they thought
8 that this state function of setting ballot
9 receipt deadlines was something that was a
10 state function.

11 And that's what they took from it, and
12 so they wrote the statutes this way, where,
13 with respect to all elections, the states were
14 setting their own receipt deadlines.

15 MR. CLEMENT: So I don't think -- I
16 don't see that in the text. That doesn't seem
17 even logical to me. I wouldn't think the one
18 place we were going to especially defer to the
19 states with respect to the federal general
20 election deadline is with overseas and military
21 voters, where the interests of the federal
22 government are probably paramount.

23 But I just want to be clear about
24 this. If you read the statutes different and
25 want to recognize -- reconcile them the way

1 that the SG does, we have no objection to that.
2 We just think the better way to read these two
3 statutes is to -- to reconcile them then the
4 way that we do. And that would have one
5 benefit, which is don't forget that in at least
6 20 states, they take the Election Day ballot
7 receipt deadline seriously.

8 So, if you simply say in this case
9 that that Election Day ballot receipt deadline
10 is true of all 50 states, then every oversea
11 voters, every military voter is going to be
12 treated the same, and they'll still have 45
13 days to get their ballot in.

14 And one other thing just about
15 Mississippi in particular. Mississippi has
16 provisions in its election code that
17 specifically accommodate overseas military
18 voters and overseas voters. And it's not the
19 ballot extension deadline that we have
20 challenged here.

21 There's a specific provision that says
22 for UOCAVA voters and UOCAVA voters only, they
23 can e-mail their ballots in. So, like, the
24 idea that anybody is going to be
25 disenfranchised here when the oversea voters

1 and only the overseas voters have the option of
2 e-mailing in the absentee ballot that they get
3 from Mississippi seems to me to completely
4 miss -- be misplaced. And the concern should
5 really be the heartland cases, and, remember as
6 Justice Alito alluded to, you have eight states
7 that don't even require a postmark.

8 And there is nothing in Mississippi's
9 theory that turns on the existence or the
10 non-existence of a postmark. And that's
11 probably a good thing because the Postal
12 Service has made clear that they don't even
13 postmark all of the mail.

14 And postmarks have their own problems.
15 I mean, the main mailbox, post box in -- post
16 office, rather, in Chicago stays open 24/7.
17 So, when all the other polls close in Illinois
18 or every other state at 8 p.m., the post box --
19 the -- the -- the post office is still open
20 until midnight.

21 Now I'm not here to say that there
22 could ever be voting fraud in Chicago --

23 (Laughter.)

24 MR. CLEMENT: -- but -- but the
25 possibility that there's a four-hour window

1 where people could go get their ballots --
2 absentee ballots postmarked after all of the
3 returns are in and they know that, oh, this --
4 this is the election where these things could
5 turn the result, that does not seem entirely --

6 JUSTICE JACKSON: So is your argument
7 that we --

8 JUSTICE BARRETT: Counsel, can I ask
9 a -- can I ask you a question about the offer
10 to vote and the vote? So, historically, it
11 seems like the offer to vote was then you had
12 to adjudicate the voter's qualifications and
13 then, if the qualifications were met, then
14 the -- the official received the vote and then
15 it was put into the ballot box.

16 And as I understand it, Mississippi
17 still has sort of a similar system because they
18 have to adjudicate voter qualifications as well
19 as accept the vote. So you sometimes say, I
20 know you and the United States, when the ballot
21 box closes and you sometimes say receipt, are
22 those two different things and do the voters'
23 qualifications have to be adjudicated by
24 Election Day as well?

25 MR. CLEMENT: I don't -- I don't think

1 they're exactly the same thing. I mean, in
2 some sense, I think the ballot box closing is a
3 nice kind of common-sense capture for the idea
4 that the election ends on Election Day.

5 Now I think, with respect to the
6 voter -- the -- you know, the candidate -- the
7 qualifications challenge, rather, most of that
8 is solved in the current system by registration
9 requirements which they didn't have
10 historically.

11 So we think the critical thing is
12 there are two things that have always been
13 absolutely indispensable in elections, and
14 that's the casting but also the receipt into
15 official custody.

16 And one thing I want to make clear
17 about this is Mississippi still takes receipt
18 into official custody very seriously, and it is
19 indispensable. They just have a different
20 deadline. They have a five-day deadline.

21 And we've had a lot of discussion
22 about the possibility of recall, and I think
23 that is a problem for Mississippi, but they
24 have an even bigger problem in my mind, which
25 is the November 11 problem, which is to say, as

1 Justice Kavanaugh pointed out, if the ballot
2 arrives six business days late, Mississippi
3 doesn't count it, it's a nullity, and under the
4 state statute, they destroy it. SO --

5 JUSTICE BARRETT: But -- but let me
6 return you to the adjudication question because
7 that's really -- you know, the Mississippi
8 local officials brief says that they do not
9 adjudicate the qualifications of all ballot --
10 all ballots received even by Election Day
11 because it takes them more time to compare the
12 signatures and process them.

13 And -- and I'll just get -- cut to the
14 chase. The heart of my concern is that
15 historically, it seemed like both of those
16 things happened on Election Day, whether we're
17 talking about Civil War voting on the field, et
18 cetera.

19 But I understand that under your
20 theory, we can separate those and say that only
21 receipt matters, but adjudication can, in fact,
22 happen afterwards, is that correct?

23 MR. CLEMENT: I mean, that's the
24 position we're taking in this case. I mean, I
25 haven't -- to be -- you know, I've spent enough

1 time studying the Civil War history on ballot
2 receipt, so I haven't studied everything about
3 that election qualification.

4 My -- my -- my sort of first cut
5 answer standing here is that can be understood
6 as part of the canvassing process and that can
7 take place after.

8 JUSTICE BARRETT: But I guess why can
9 you separate out if historically those two went
10 hand in hand, that the qualifications, there
11 was the offer to vote and vote?

12 It seems to -- it seems odd to say
13 that the election is concluded by receipt when,
14 historically, both of those things happened at
15 the same time. So why is that one piece of
16 history plucked out?

17 MR. CLEMENT: So two things. One,
18 like, maybe I have another challenge that I
19 haven't thought of, you know, so I don't want
20 to, like, utterly foreclose that, but the
21 reason I'm focused on ballot receipt is, A,
22 it's what's directly at issue here, but also,
23 B, it's the thing that to this day every state
24 considers indispensable.

25 No state -- Washington is the one that

1 lets 21 days go by, but no state says that you
2 don't have to have a receipt, ballot receipt
3 deadline at all. And under Mississippi law,
4 it's not -- despite what they want to tell you,
5 the ballot is not final when it's submitted.
6 The ballot is final when it's received by
7 election officials within five days.

8 And you can have all the
9 certifications that this was before Election
10 Day and I have it notarized. And if it comes
11 in on the sixth business day -- this is the
12 November 11th problem -- what the state does is
13 they treat it as a nullity and, under the state
14 statute, they direct it to be destroyed.

15 So the ballot doesn't become final
16 just when it's submitted. The ballot becomes
17 final when it is submitted and, under
18 Mississippi law, it is received into official
19 custody by the registrar within five business
20 days. That's finality under Mississippi law.

21 And our humble submission is finality
22 should take place on Election Day.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas, anything further?

1 Justice Alito?

2 JUSTICE ALITO: We have lots of
3 phrases that involve two words, the last of
4 which, the second of which is day, Labor Day,
5 Memorial Day, George Washington's birthday,
6 Independence Day, birthday, and Election Day.

7 And they're all particular days. So,
8 if we start with that, if I have nothing more
9 to look at than the phrase Election Day, I
10 think this is the day in which everything is
11 going to take place and -- or almost
12 everything. And then we have three points in
13 time: 1844, 1872, 1914.

14 And we can ask, what would people have
15 thought on those days is meant by this phrase
16 Election Day? Which -- which of those should
17 we choose? Which of those days -- dates should
18 we choose?

19 MR. CLEMENT: Well, I think you could
20 choose any of the three. I mean, honestly, I
21 think the single best one, if you're just going
22 to choose one, is 1872. And the reason I say
23 that is because 1914 is the latest in time, but
24 that's the one that Congress gave the least
25 thought to because they -- it was right after

1 the Seventeenth Amendment, and they said, yeah,
2 whatever the rule is for the -- for the House
3 of Representatives, we'll use that for the
4 Senate.

5 JUSTICE ALITO: Okay. So in 1872,
6 someone sees Election Day and they start with
7 the idea, okay, it's a particular day, and then
8 they say: But I remember the Civil War, and a
9 big exception was made. There were -- there
10 were different practices in the Civil War. It
11 wasn't everybody going to a particular polling
12 place and -- and voting.

13 So what, then, can we -- we take from
14 that? Should we -- should we just take from
15 that, well, this was an incredible national
16 emergency where extraordinary measures had to
17 be taken? What should we take from that? What
18 would an ordinary person have thought Election
19 Day meant in 1872?

20 MR. CLEMENT: I -- I think they would
21 have say that's the day by which, at a bare
22 minimum, the ballots have to be cast and
23 received into official custody. And I think
24 they would have -- to the extent they were
25 thinking about the Civil War history, I think

1 the thing that would have impressed them is
2 that even at a time of great national
3 emergency, every one of the states insisted
4 that the ballots be received into official
5 custody by Election Day, whether by proxy or by
6 field voting.

7 Nobody said, well, you know, it's a
8 Civil War; let's give them a month. Nobody
9 said that. And people literally went into
10 harm's way in order to do field voting, to --
11 and they all did it by Election Day.

12 That seems to me to powerfully
13 reinforce the idea that in 1872, if you told
14 anybody, hey, all this means is you got to cast
15 your ballot but the state can receive it for up
16 to 21 days later with or without a postmark, I
17 think they would have thought that you were
18 talking about a different country.

19 JUSTICE ALITO: Well, let's take the
20 last of the days, 1914. My understanding is
21 that Maryland departed from your position a
22 couple of years after that. Did anybody say at
23 that time, wow, Maryland is -- is violating the
24 Election Day statute?

25 MR. CLEMENT: I mean, I -- I -- I

1 don't know that they did in 1918. I don't know
2 all the details of that. I think, actually,
3 the first couple of these statutes that my
4 friends try to count really are something
5 different, which is they really allowed you to
6 sort of vote in one district by Election Day
7 and then have that election official give it to
8 another election official. So I don't think
9 some of those count.

10 What I would say, though, is in 1944,
11 there was -- Montana passed an extraordinary
12 law that tried to extend the ballot deadlines
13 and -- for ballot receipt, and they did it in
14 World War II, and they did it for the best of
15 intentions. And in the Maddox case, which the
16 parties cite in the briefs, it's this kind of
17 extraordinary case, where the Republican Party
18 and the Democratic Party of Montana both joined
19 forces to go to the Montana Supreme Court and
20 said, is this law lawful? And the Montana
21 Supreme Court said it's not lawful; it violates
22 state law. But they also said it violates the
23 federal law specifying Election Day.

24 JUSTICE ALITO: Okay. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: But the rule of
3 decision was based on state law in Maddox,
4 wasn't it?

5 MR. CLEMENT: I disagree. I mean, you
6 can all read it for yourself. I mean, I know
7 my friends on the other side say that. I've
8 read the case like seven times --

9 JUSTICE SOTOMAYOR: You know, in D.C.,
10 I vote by going to a ballot box. That's on the
11 city streets, all over the city streets. Is
12 that receipt by a state official? I just go to
13 the ballot box. It's locked. I don't know and
14 don't remember if it's time stamped or not.
15 But the city -- I don't even know if it picks
16 it up before Election Day. It certainly picks
17 it up at some point. Is that legal under your
18 theory?

19 MR. CLEMENT: I -- I think that's
20 compliant with the federal election law
21 statute.

22 JUSTICE SOTOMAYOR: Why? There's no
23 state official who has received it. A ballot
24 box has received it.

25 MR. CLEMENT: It's -- it's official

1 state custody. And I think it's important to
2 remember that when ballots come into official
3 state custody -- and this is true under
4 Mississippi law as well -- at that point, the
5 state treats it very seriously and establishes
6 a chain of custody. I mean, if you want to
7 look at, in the -- in the Petition Appendix, at
8 Mississippi statutes, the -- the provision that
9 we're --

10 JUSTICE SOTOMAYOR: So it's different
11 -- it's different for you in kind because a
12 military officer, like Rhode Island and Nevada
13 during the Civil War, even though they were
14 federal officers, not sworn in in the state,
15 they were official enough? Is that it?

16 MR. CLEMENT: It was official --

17 JUSTICE SOTOMAYOR: An empty -- empty
18 -- a ballot box with no person next to it is
19 official enough --

20 MR. CLEMENT: So --

21 JUSTICE SOTOMAYOR: -- but the Postal
22 Service is not?

23 MR. CLEMENT: The Postal Service is
24 not. I don't know all the details about what
25 Nevada and Rhode Island did. I -- I'm actually

1 not even sure the Nevada statute was ever
2 implicated because Nevada didn't become a state
3 until the Civil War was basically over.

4 But in all events, I -- I think the
5 statute that's at issue here is worth reading.
6 If you look at 89a of the Petition Appendix, I
7 mean, they go to -- Mississippi -- once it's in
8 the ballot box, and this is true of the
9 absentee ballots that are received within five
10 days, they -- they go into lockdown. The --
11 the -- the registrar is told to record the
12 number of ballots in the box at the end of
13 every day, they are specifically treated
14 essentially as to have a chain of custody to
15 ensure that if somebody alleges there was
16 monkey business in this election, they have a
17 clear record of chain of custody that can show,
18 no, there was not. There's nothing like that
19 when you drop it in the mailbox. There's
20 nothing like that when you use FedEx.

21 And I don't know -- like, I mean, you
22 know, they say it's illegal to recall your
23 ballot. But the post office allows you to do
24 that. The -- FedEx allows you to do that. As
25 Justice Gorsuch indicated, I don't think

1 there's any way --

2 JUSTICE SOTOMAYOR: We have --

3 MR. CLEMENT: -- the state would even
4 know it happened.

5 JUSTICE SOTOMAYOR: We have a state
6 government official, lawyer, telling us on
7 behalf of the state how to read their laws.
8 Where are we, on an issue that was forfeited
9 below and not raised below, are going to assume
10 to the contrary now?

11 MR. CLEMENT: It was raised below.
12 This was raised in the reply brief in the court
13 of appeals. When my friend referred to it not
14 being raised to the -- until the reply brief, I
15 assume he was referring to in the Fifth
16 Circuit.

17 JUSTICE SOTOMAYOR: They can correct.

18 MR. CLEMENT: But it's in the Fifth
19 Circuit decision, so it's properly before this
20 Court.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: Mr. Clement, I'm
23 wondering what you make of the 2022 amendment,
24 because that pretty clearly suggests that
25 voting can take place not just on a day, but in

1 a period.

2 And what are we to make of the fact
3 that Congress, just a few years ago, said
4 there's a period of voting, and we are fine
5 with that?

6 MR. CLEMENT: So to me the most sort
7 of striking thing, if we're talking about the
8 -- the -- the same statute, the Electoral Count
9 Reform Act, ECRA, or whatever it is, to me the
10 most striking thing is there's one change to
11 the federal Election Day statute in particular,
12 and it creates a possible exception for force
13 majeure events, ten I would view that as the
14 only exception that Congress created when it
15 looked at this.

16 JUSTICE KAGAN: Yeah, but that the
17 exception for force majeure events assumes a
18 baseline of a period of voting. It talks about
19 a state modifying the period of voting for
20 those special events. But the baseline is that
21 the state has a period of voting, which it then
22 modifies for force majeure events.

23 So -- so I think that this is not like
24 some special exception. It's -- it's -- it's
25 an exception in the statute that assumes that a

1 state is going to have not a day of voting but
2 very likely a period of voting.

3 MR. CLEMENT: So I would think that
4 the most the period of voting would refer to is
5 the practice of early voting, which we're not
6 taking issue with here, and as I said, that has
7 a distinct history.

8 But I don't think they were saying the
9 period of voting could last until after the
10 election because if that's what they had in
11 mind, there would be no reason to create an
12 exception for force majeure events. And it'd
13 just be part of the period.

14 JUSTICE KAGAN: And could you tell me,
15 going back to this we're not taking issue with
16 early voting, how it is that you're not taking
17 issue with early voting? Because every time I
18 -- I sort of try to state what your rule is, it
19 seems to me it's a rule that prevents early
20 voting, because you're basically saying there
21 are two things that have to happen and they
22 have to happen on Election Day. And it's the
23 voting and -- you know, the casting of the
24 vote, and the receipt of the vote, and both of
25 those things have to be on Election Day. And

1 just like a normal person says, okay, well,
2 when I early-vote, I'm not doing that on that
3 first Tuesday.

4 MR. CLEMENT: So I -- I get why an
5 ordinary person would think that. And for what
6 it's worth, like, a couple ordinary people read
7 your Foster versus Love decision and thought,
8 whoa, this gets rid of early voting, and they
9 brought challenges in the Ninth Circuit and
10 they brought challenges in the Sixth Circuit.
11 And all those challenges were rejected.

12 They -- they did it right in the wake
13 of --

14 JUSTICE KAGAN: Well, let me suggest
15 to you that they were rejected because it just
16 seems inconceivable that on the basis of this
17 kind of evidence, we would reject these
18 practices that are so entrenched in 30 states.

19 But the problem still remains, is that
20 your theory would have us reject them.

21 MR. CLEMENT: No, I -- I don't think
22 it would. And I mean, you know, it's my
23 theory, so I'll tell you what it is. These
24 things have to be consummated by Election Day.
25 That's -- I'm not making that word up. That's

1 not the word I would make up if I were making
2 up words. But it's the word that this Court
3 used in Foster against Love.

4 JUSTICE KAGAN: So that's where the
5 theory comes from? It comes from the word that
6 this Court used in Foster?

7 MR. CLEMENT: Yes. And -- and -- and
8 that was a word that's --

9 JUSTICE KAGAN: I mean, don't look so
10 -- you know, because a word that we used in
11 Foster is the premise for your being able to
12 separate what -- Mississippi's law from every
13 early voting law in the world, even though your
14 basic theory should say that the early voting
15 laws are also verboten?

16 MR. CLEMENT: No, no. With respect, I
17 mean, I said two things when I first answered
18 this question. The differential history, and I
19 -- I -- you know, I -- I think it's worth
20 reading Judge Kleinfeld's opinion on this --
21 it's the Kiesling case in the Ninth Circuit --
22 because he goes through this in quite some
23 detail, and he admits there's actually a pretty
24 good argument, based on the text and -- and --
25 and Foster that early voting is problematic.

1 But he nonetheless, even though he
2 thinks it's a pretty good argument, comes to
3 the conclusion, not because he thought it was
4 crazy but because the history is different,
5 which was marshalled in that case in
6 particular, and Foster talks about everything
7 needing to be consummated by Election Day.

8 And I don't think it was just a random
9 word. It's trying to explain the unanimous
10 decision in Foster against Love, which says,
11 you know, there, there was -- there was voting
12 and there was receipt of ballots and the
13 problem was it all happened a month too early.

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 JUSTICE GORSUCH: On early voting, I
18 just want to see if I've got it right. Both
19 sides agree that there needs to be a final
20 decision by the voter and receipt by Election
21 Day, correct?

22 MR. CLEMENT: Well, I -- I -- I don't
23 think so. I think -- I think --

24 JUSTICE GORSUCH: Well -- well --
25 well --

1 MR. CLEMENT: I don't think they agree
2 with receipt by Election Day.

3 JUSTICE GORSUCH: -- receipt by
4 somebody by Election Day.

5 MR. CLEMENT: Okay. If you're going
6 to --

7 JUSTICE GORSUCH: I'm going to do
8 that.

9 MR. CLEMENT: The -- the reason I trip
10 up on that --

11 JUSTICE GORSUCH: I know. I know.
12 But just work -- work -- work --

13 MR. CLEMENT: Okay. Okay. Sorry.

14 JUSTICE GORSUCH: This is -- this
15 is -- I'm just trying to make sure I
16 understand. There needs to be some final
17 decision by the voter and receipt by somebody
18 by Election Day. On that, I think you two
19 agree.

20 I think the disagreement is receipt by
21 whom. And for you, it's an election official.
22 And for your friend on the other side, it -- it
23 could be my neighbor. Is -- is that a fair
24 summary of -- of your -- of your views?

25 Because it seems to me you both agree

1 that the final decision needs to be made by
2 Election Day, which both would -- both of you,
3 therefore, would permit early voting.
4 Thoughts?

5 MR. CLEMENT: So I don't disagree
6 much.

7 JUSTICE GORSUCH: Okay.

8 MR. CLEMENT: But what I would say is
9 my friend's position is a little bit more
10 nuanced than that because he thinks that sort
11 of selection and submission to the "somebody"
12 is a -- before Election Day is a necessary
13 condition. But it's not sufficient because
14 Mississippi law cares very much about receipt
15 by the registrar.

16 And if the vote is submitted to the
17 "somebody" before Election Day, but it's not
18 received by the registrar until the sixth day,
19 it's a nullity.

20 JUSTICE GORSUCH: No, I --

21 MR. CLEMENT: So that's just the --
22 the subtlety that I wanted to add.

23 JUSTICE GORSUCH: I -- no, I
24 appreciate that because, at -- at least as I
25 read Mississippi law, you're right, that --

1 that it isn't accepted until an election
2 official marks it accepted. That's its own
3 rule.

4 But it seems to be running away from
5 that here by saying -- at least as I -- I'm
6 understanding it, and I might be
7 misunderstanding it, but at least as I
8 understand it, because they're saying no, once
9 it goes into FedEx or to my neighbor or
10 whomever, it's -- it's received effectively on
11 Election Day.

12 MR. CLEMENT: See, I don't think
13 they've quite gone that far because, you know,
14 they can try to quibble about the -- the sort
15 of receipt in -- rule in the reg, but the
16 statute itself absolutely requires receipt by
17 the registrar within five days.

18 JUSTICE GORSUCH: Yeah.

19 MR. CLEMENT: And then the statute
20 itself goes on to say that if it's not received
21 by the registrar within five days, even though
22 it was submitted --

23 JUSTICE GORSUCH: It's a nullity.

24 MR. CLEMENT: -- even though it went
25 to FedEx, it's a nullity and it must be

1 destroyed.

2 I mean, Mississippi takes receipt
3 deadlines so seriously that if you miss their
4 receipt deadline, your ballot is destroyed.

5 JUSTICE GORSUCH: If we were to rule
6 against you, is there anything that would limit
7 states from allowing receipt by election
8 officials up until the day of the next
9 Congress?

10 MR. CLEMENT: Oh, the slippery slope
11 problem on the other side, I don't think
12 there's anything that would stop that. And,
13 you know, maybe -- maybe -- you know, maybe the
14 next state can figure out a way to have an
15 election without anybody receiving anything. I
16 don't know, but that seems to me to be a large
17 reason for why Election Day should mean
18 Election Day and election should mean casting
19 and receipt into official custody to stop that
20 slippery slope.

21 JUSTICE GORSUCH: On -- on time. And
22 how about means? Do you see any principled way
23 we could draw a line on -- on means and say,
24 okay, common carriers are different than Bob?

25 MR. CLEMENT: See, I think it's

1 tricky, especially because all of these
2 statutes purport to be time regulations, not
3 manner regulations. And the thing to keep in
4 mind is that under Article II, the
5 congressional power is limited to time
6 regulations.

7 Manner is left to the states under
8 Article II's election clause or Electors
9 Clause. So it's a little different than
10 Article I, where -- where Congress, if it
11 wanted to, could correct the means.

12 And so that's why I think it's either
13 all or nothing in terms of their position, and
14 they have no basis for distinguishing the
15 states that say -- like Illinois, that say 14
16 days with or without a postmark.

17 JUSTICE GORSUCH: By anybody?

18 MR. CLEMENT: By anybody.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh?

21 JUSTICE KAVANAUGH: Can I follow up on
22 General Stewart's who decides argument? I
23 think, if you were looking at the text in
24 isolation, day for the election, your first
25 instinct might be in-person voting on that day

1 is what that text literally meant.

2 But, of course, you acknowledge early
3 voting, you acknowledge absentee voting are
4 consistent with the statute. And then we have
5 obviously a range of historical practices that
6 deviate from that text if you thought literally
7 it meant in person voting on that day.

8 And then what General Stewart says is,
9 well, given all that history, you can't read it
10 literally. And I think Professor Morley's
11 amicus brief says this as well. And you have
12 to take account of that historical practice.

13 And, really, it's up to Congress to
14 fix this if they think there's a policy problem
15 which -- going on under the states. I think
16 that's a summary of some of what he's saying.
17 Leave it up to Congress for all these policy
18 concerns.

19 I just want to get your response to
20 how we think about the historical practice and
21 the text and then the who decides.

22 MR. CLEMENT: Sure. So, on the
23 historical practice, the thing that I think is
24 remarkable is this unbroken historical
25 tradition, at least from 1845 to 1914, there is

1 no example of somebody -- of an election with a
2 state having a ballot receipt deadline
3 that's -- that's other than by the Election
4 Day.

5 So nothing. I mean, they cobble
6 together one state at a time to get them
7 starting in 1918, and I think some of those
8 statutes are distinguishable, but it's common
9 ground that there's nothing during the whole
10 time that these statutes are enacted where you
11 don't have ballot receipt by Election Day.

12 So, to me, if we're going to do
13 original public meaning and then, yeah,
14 Congress could fix this either way. However
15 you decide this case, you're not going to have
16 the last word. Congress is going to have the
17 last word.

18 But, if we're going to take original
19 public meaning seriously, I think the reason
20 Congress hasn't revisited this is because it
21 doesn't have to. It's already fixed this
22 problem.

23 Now, in the Morley brief, you know,
24 I -- I would take the bitter with the sweet on
25 that, which is what he says is, you know, I

1 don't think the text gets you all the way
2 there. I beg to differ. I think the text,
3 original public meaning, gets you all the way
4 there. But what he says should be the
5 tie-breaker is, what rule does a better job
6 with dealing with actual or perceived fraud?

7 And one of the things I found striking
8 in that brief is he quotes Senator Atherton
9 from 1844 debate leading to the 1845 statute.
10 And Atherton says in -- in -- in response to
11 some argument that, oh, well, you haven't
12 proved all the fraud or whatever that was going
13 on in the pipelaying scandals and all of those
14 other things, because it wasn't just crossing
15 lines, and he says real or perceived, it
16 doesn't make a difference because even
17 perceptions of fraud are going to make a huge
18 difference in undermining public confidence in
19 the elections.

20 And you, I think, quoted from
21 Professor Pildes, who I think got this exactly
22 right. I mean, if you have an election and the
23 election is going to turn on late-arriving
24 ballots in a way that means what everybody kind
25 of thought was the result on Election Day ends

1 up being the opposite a week later, 21 days
2 later, the losers are not going to accept that
3 result. Full stop. They won't.

4 And that is bad for our system. And
5 so, if you think there's a little bit of
6 ambiguity and we're in a post-Chevron world, so
7 you have to resolve it, I would resolve it in
8 the favor of reading the statute to eliminate
9 fraud or perceived fraud in election, and that,
10 I think, would cause you to rule in our favor.

11 JUSTICE KAVANAUGH: Why have so many
12 states allowed this then?

13 MR. CLEMENT: So states have only
14 allowed it relatively recently, as one of your
15 questions, you know, averted to. I think one
16 reason that they've done it is some states do
17 want to accommodate overseas or military
18 voters.

19 I do think that there are other ways
20 to do that than the ballot deadline, as I've
21 talked about. And I think Mississippi's voted
22 with their feet. I don't think anybody's going
23 to be disenfranchised in Mississippi if -- when
24 you can vote, if you're -- only if you're
25 overseas, you can vote by e-mail. So I think

1 Mississippi solved that in a much more targeted
2 way.

3 So I think, you know, that's at least
4 kind of part of the way that I would think
5 about why states have done it. And then,
6 really, the other -- there was -- there was an
7 uptick in COVID, as sort of a one-time
8 accommodation for COVID. And a lot of states
9 did it for COVID and then sort of retreated.
10 Mississippi for whatever reason stuck with what
11 they did for the first time in COVID.

12 JUSTICE KAVANAUGH: You were asked
13 about the 2000 election. I don't think you
14 were able to finish that answer. Do you have
15 more you want to say about that?

16 MR. CLEMENT: Yeah. I -- I mean, I
17 just want to be emphatic that that is the
18 reddest of red herrings because what happened
19 in 2000 was that the voting deadline was
20 extended pursuant to a consent decree.

21 And the reason there was a consent
22 decree is that Florida had violated the
23 principal protection of UOCAVA, which is
24 getting the absentee ballots to the voters
25 overseas well in advance of the election. And

1 so having blown that deadline, there was a
2 consent decree that extended the -- the --
3 the -- the receipt date.

4 We don't have any quarrel with that.
5 You know, federal courts have the authority to
6 remedy violations of UOCAVA. And I don't think
7 extending the deadline is off the table as a
8 judicial remedy, though, actually, I think, in
9 2026, as opposed to 2000, maybe the judicial
10 remedy would be to let the UOCAVA voters vote
11 by e-mail, even in a state unlike Mississippi
12 that doesn't allow it.

13 We looked at -- a majority of states
14 allow overseas voter either fax or e-mail
15 voting, so I think that would probably -- in
16 2026, that would be the better remedy, but in
17 2020, pursuant to consent decree, that was
18 perfectly permissible. So anybody who tells
19 you the 2000 election came out different is not
20 looking at the facts of that Harris case and
21 the consent decree.

22 JUSTICE KAVANAUGH: Last one, if you
23 were to prevail here and, say, our decision was
24 issued in June, Purcell issues with the state
25 -- states for the upcoming fall elections?

1 MR. CLEMENT: I don't -- I don't think
2 so. I think this issue, because it really sort
3 of just deals with the state and the receipt of
4 the ballots, I think June would give them
5 plenty of time. And, remember, it only affects
6 the -- this -- this issue only affects the
7 general election. It doesn't affect primaries.

8 So, like, the only thing I can even
9 think of that would raise, like, a lurking
10 problem is you wouldn't want the states -- if
11 this Court decides in our favor, you wouldn't
12 want a state absentee ballot that's misleading
13 about the receipt deadline. But those
14 deadlines -- those ballots have to go out 45
15 days before the general election. So what's
16 that, like mid-September or something? So
17 there's plenty of time. I don't think there's
18 a Purcell problem.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: So I'm trying to
23 figure out how to think about the history, and
24 you said a moment ago that what we have is the
25 original public meaning of Election Day, at the

1 time in the late 19th century and 1917, et
2 cetera, was ballot receipt. And you invoke the
3 various state laws that required receipt by
4 Election Day.

5 But we don't have, to my knowledge --
6 so this is what I want you to correct me if I'm
7 wrong -- a rich history of original public
8 meaning in the way that we often think of it,
9 of people saying or expressing views that, yes,
10 this is what it means to elect, this is what
11 Election Day means, stripped down to its
12 essence, it means the taking of the ballot into
13 official custody.

14 What we have is state practices. I
15 think there are a lot of really good policy
16 reasons to require -- and we've talked about
17 some of those this morning -- lots of good
18 policy reasons to require all the ballots to be
19 in by Election Day. Do we have evidence either
20 of people saying, like, this is what we
21 understand Election Day to require as opposed
22 to treatises that are summarizing some of the
23 cases?

24 And is there any reason to think that
25 these laws were adopted because of a concern

1 about preemption by federal law, as opposed to
2 just this is a really good policy, this is how
3 elections should run?

4 MR. CLEMENT: So we're in the realm of
5 congressional actions under the Elections
6 Clause and the Electors Clause. So everything
7 they're doing is preemptive. And that's
8 particularly obvious in the context of trying
9 to get a uniform national Election Day for the
10 general election.

11 So I think we're, like, in the
12 absolute epicenter of intertribal here because
13 not only is it, like, sort of preemptive by its
14 very nature, but it's Congress trying to create
15 uniformity across state lines. So it was --
16 you know, it was -- Congress was sort of
17 appalled by what had happened with the
18 staggered deadlines and disparate deadlines in
19 the states. So I think the preemption part of
20 that is kind of relatively straightforward.

21 Now, on the history, you know, this is
22 where I just think the Civil War practice is so
23 powerful because my friend says, well, when
24 they were first, you know, passed, like, the
25 difference between casting and receiving the

1 ballot into official custody hadn't ripened.
2 But the Civil War ripened it, and the one thing
3 every state, including Rhode Island and Nevada,
4 did is they said it has to be in some kind of
5 official custody by Election Day.

6 JUSTICE BARRETT: And I agree with you
7 that's striking. But what I -- and maybe I
8 didn't -- maybe I wasn't clear before. I agree
9 with you that that's striking, but do we have
10 any reason to think that they did that because
11 they thought, well, it has to happen on
12 Election Day or by Election Day, which is a
13 deviation from the what the text says, right?
14 But do we have any reason that -- any reason to
15 think that they did it because they thought
16 they had to, as opposed to this is really good
17 policy, so we should do it this way?

18 MR. CLEMENT: No, I -- I think we -- I
19 mean, to me, like, you know, can I connect --

20 JUSTICE BARRETT: Yeah.

21 MR. CLEMENT: -- the dots precisely?
22 No, but they did it because they thought that's
23 what an election means, and that's what an
24 Election Day means. They thought it would just
25 be unthinkable, would no longer be an election

1 or an Election Day, it wouldn't be happening on
2 Election Day, if it could take place, if ballot
3 receipt could place -- take place some other
4 time. So --

5 JUSTICE BARRETT: Isn't that true of
6 early voting too? And then I guess this goes
7 back to Justice Kagan's question. I mean, it
8 seems to me if you look at historical practice,
9 what an election meant was showing up in person
10 and casting your vote and being qualified as
11 the voter on that same day. And then they were
12 deviations for war, essentially.

13 But why would absentee voting in a
14 widespread way by civilians -- or early voting,
15 why is that permissible because if we're just
16 going to say that historically it needs to look
17 like it always looked, how come those features
18 fall out?

19 MR. CLEMENT: I -- I would say they
20 probably fall out because nobody thinks they're
21 essential, which is to say, you know, if a
22 state wanted to have, like, early voting but,
23 like, no voting on Election Day, maybe that
24 would be a hard case.

25 But, you know, those, I think, have

1 been understood and there's a different history
2 for those because if a state wants to say you
3 can come in and you can mark your ballot and
4 put it into official custody a week early, that
5 doesn't sort of vitiate the whole idea of an
6 Election Day; whereas if you can still have
7 ballots being received after Election Day, I
8 think that vitiates the whole notion of
9 Election Day.

10 And if you're interested in Professor
11 Morley or Justice Kavanaugh's tiebreakers,
12 there's not the same concerns about fraud,
13 about the losers not being able to accept the
14 outcomes, when it comes to early voting, but
15 there's a distinct problem with voting -- with
16 ballots that come in and particularly if
17 they're going to tip an election, and as
18 Justice Gorsuch indicated, like, maybe it's
19 happened, maybe it hasn't, but it will. And at
20 that point, there's just no way the loser is
21 going -- whoever it is, is going to accept that
22 outcome, and the supporters aren't going to
23 accept the outcome. And so that's something
24 that I don't think is implicated by early
25 voting.

1 JUSTICE BARRETT: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Jackson?

4 JUSTICE JACKSON: Except people
5 accepted the possibility of that outcome for
6 100-plus years now because this idea of the
7 votes being cast by Election Day and counted
8 after Election Day has been around, right?

9 MR. CLEMENT: Well --

10 JUSTICE JACKSON: I mean, it's not
11 like we're talking about a brand-new thing from
12 Mississippi from the standpoint of no one ever
13 had a post-Election Day ballot deadline before.

14 And so I guess I'm just concerned
15 about the various conclusions that you would
16 have us draw from these historical practices
17 because it seems to me that we have a very long
18 history of states having a variety of different
19 ballot receipt -- receipts deadlines, to
20 include after Election Day.

21 MR. CLEMENT: So kind of three points
22 about that. I mean, one is I don't think it's
23 true that there was this 100-year sort of
24 pattern and nobody raised an objection. I
25 think the Maddox case in 1944 is a powerful

1 example that the idea that Election Day means
2 Election Day is not something that only
3 occurred to lawyers in the post-COVID world.

4 The second thing I would say is, as a
5 practical matter, you know, if one or two
6 states at one time in the 1920s had a law that
7 deviated, maybe that's not something that
8 really makes that big a difference, but in a
9 world where some states essentially have all of
10 the voting be absentee, lots of states have
11 gone to no excuse absentee voting, it may be
12 that a lurking problem has just become much
13 more obvious because of the magnitude of what's
14 going on in the present day and --

15 JUSTICE JACKSON: I guess I don't
16 understand why that isn't, the variety you're
17 describing, isn't a strike against your view
18 that Congress has precluded this.

19 I mean, others of my colleagues have
20 looked at or talked about Congress legislating
21 in this area. They are obviously aware that
22 there are states that are doing this. And they
23 have not spoken to it. They have not
24 specifically precluded it.

25 Now, you say that maybe that's because

1 they assumed that Election Day in the federal
2 statutes that we're examining from 100 years
3 ago does the work. But Congress is today
4 considering an election-related statute that
5 would specifically prohibit this, which means
6 that Congress probably didn't understand its
7 existing legislation to do this.

8 MR. CLEMENT: I mean, I haven't
9 studied the current legislation. I think it
10 probably does quite a bit more than this and
11 probably affects other elections, like primary
12 elections. I don't know for sure, though. And
13 I haven't studied it, but --

14 JUSTICE JACKSON: But it does address
15 this. It addresses -- specifically addresses,
16 and we're talking about the Make Elections
17 Great Again Act, specifically addresses the
18 idea of preempting state post-Election Day
19 ballot deadlines.

20 And so if that's true, then it seems
21 like -- as though Congress doesn't believe that
22 its current legislation has done this -- this
23 work.

24 MR. CLEMENT: Well, Congress probably
25 doesn't know how this Court is going to decide

1 this case. So it -- it probably can legislate
2 against that veil of ignorance one way or
3 another --

4 JUSTICE JACKSON: Right. The worry is
5 that you want this Court to decide the case
6 rather than have Congress do it.

7 MR. CLEMENT: No. And -- and that's
8 -- I mean, two things I think are important.
9 However this Court decides this case, Congress
10 has the power to revisit it. That's, I think,
11 common ground among the parties.

12 The second thing that's common ground
13 among the parties is that the federal Election
14 Day statutes preempt something. And so the
15 only question is what do they preempt? Do they
16 just preempt casting ballots and giving it to,
17 you know, the mail service, as my friend
18 suggests, which, as Justice Gorsuch elucidated,
19 leads to a huge slippery slope problem? Or
20 does it require both submitting and receipt
21 into official custody?

22 JUSTICE JACKSON: And how do you --

23 MR. CLEMENT: Ever -- everybody agrees
24 it preempts something.

25 JUSTICE JACKSON: How do you respond

1 to the notion that when we look, as the Society
2 For Rule of Law Institute suggests that we do,
3 at historical practices with respect to
4 electors and specifically Congress in 1787
5 adopting a resolution establishing that "the
6 day fixed for the election of the President,"
7 that that's the day on which the election --
8 electors will vote and transmit their votes,
9 and that the president of the Senate would
10 receive their votes at a later date.

11 So the concept of casting one's vote
12 versus the receipt of the vote was very early
13 on distinguished.

14 MR. CLEMENT: Yeah, but I actually
15 think that example works in our favor because
16 what's going on there is there are essentially
17 two separate sort of elections, if you will, or
18 processes that are being adjudicated or
19 overseen by different sovereigns.

20 So what happens first is the states
21 address the appointment of the electors in that
22 state, and then, later, that has to be received
23 and certified in the Senate because then, in
24 the Senate, they're going to figure out who won
25 the national election. So -- so --

1 JUSTICE JACKSON: Yes, I appreciate
2 that. But I guess I'm -- I'm just talking
3 about this notion that receipt and casting have
4 always been completely intertwined such that it
5 would be inconceivable for someone to think
6 that the Election Day is the date in which the
7 votes are cast --

8 MR. CLEMENT: See, I --

9 JUSTICE JACKSON: -- versus the day in
10 which they're received by elections officials.

11 MR. CLEMENT: So I don't dispute that
12 if you have two really separate elections, that
13 you can then, have you -- having bifurcated the
14 elections, you can bifurcate the idea of
15 casting and receiving.

16 I mean, you know, like, obviously --

17 JUSTICE JACKSON: Right, but the --

18 MR. CLEMENT: -- it'll go through the
19 Speaker of the House. That's --

20 JUSTICE JACKSON: -- but Congress
21 could have -- Congress could have had them on
22 both the same day if that's what an election
23 is. I mean, your argument is rooted in this
24 notion that as a common-sense matter, as a
25 general matter, if we're going to have an

1 Election Day, that's the day when everything is
2 supposed to happen.

3 And this demonstrates that whether you
4 call it two elections or not, the casting of
5 the votes can happen temporally separately from
6 the receiving of the votes for the purpose of
7 saying who won the election. That's -- that's,
8 I think, pretty clear in the historical record.

9 So it seems odd to me that we are to
10 assume that when Congress set an Election Day,
11 it necessarily precluded the states from
12 saying, in our state, we're going to consider
13 Election Day to be the date of casting the
14 votes and that we will, as Mississippi has
15 done, continue to receive them up to a certain
16 period afterwards.

17 MR. CLEMENT: So I still think you're
18 eliding -- with all due respect, you're eliding
19 that there are kind of two separate elections
20 there. And in all the states, when they
21 elected the electors for the President
22 election, they cast the ballots and received
23 the ballots instantaneously in that state.

24 Then there's a separate process for
25 getting the results from the states to the

1 national election and figuring out how it was
2 all processed. I don't think in 1792 that
3 could have happened instantaneously.

4 I think it took a while to get from
5 Georgia to the seat of government in order for
6 that to -- to happen, and so Congress
7 understandably provided an interval there.

8 But I think, for the elect -- the
9 election of the electors in the states, the
10 casting and the receipt would have been
11 simultaneously. They might well have been
12 doing it by putting beans in a bowl back in
13 1792, but I think, as the parties agree, by
14 about 1845, certainly, by 1872, the process of
15 voting by ballot had been well established and
16 those were cast and received instantaneously.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 General Sauer.

21 ORAL ARGUMENT OF GEN. D. JOHN SAUER

22 FOR THE UNITED STATES, AS AMICUS CURIAE,

23 SUPPORTING THE RESPONDENTS

24 GENERAL SAUER: Mr. Chief Justice, and
25 may it please the Court:

1 As the argument so far reflects,
2 Mississippi's theory of election is so general
3 and permissive that it would authorize statutes
4 that Congress could not possibly have approved
5 in the 19th century.

6 Defining election as merely private
7 choice alone would authorize statutes where the
8 voters mark their ballots and give them to a
9 private party such as a ballot harvester or a
10 party operative or even hand them in three
11 weeks later and just say or attest that they
12 made the decision on Election Day.

13 Official receipt is at the
14 definitional heart of election. A resource
15 from the 1840s onward that addresses this
16 specific question treats official receipt as
17 essential to an election.

18 Mississippi cites a few definitions
19 that are too general to address the question,
20 but they cite no authorities holding that a
21 vote can be perfected by anything other than
22 official receipt.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: General Sauer, what
25 effect would your approach have on early

1 voting?

2 GENERAL SAUER: We agree with both
3 sides that early voting is still acceptable and
4 we agree, in particular, that Mr. Clement said
5 that early voting has two things in favor of
6 it, a distinct historical pedigree that really
7 starts, I think, as he emphasized there, in --
8 in those Civil War practices that were before
9 the 1872 Congress, and also, as all the courts
10 of appeals who addressed this, the -- the three
11 cases that addressed this around just after
12 2000.

13 After Foster, all concluded that that
14 is what this Court was referring to when it
15 talked about consummation in Footnote 4. The
16 Court left open the possibility that does have
17 this better historical pedigree that there can
18 be a process where ballots are being received
19 earlier, but that ballot box has to close on
20 Election Day.

21 CHIEF JUSTICE ROBERTS: I'm not sure I
22 understand exactly how that answer is
23 responsive to the point that if the Election
24 Day is the voting and taking, that has to be
25 that day. So maybe -- maybe I just missed it.

1 But it seems to me maybe you're not
2 saying anything other than, well, that's
3 different.

4 GENERAL SAUER: It's a challenging
5 question, but I point the challenge is even
6 greater for Mississippi. I mean, Judge
7 Kleinfeld does wrestle with this in Keisling.
8 He thinks it's a really tough question, and he
9 does come out, as every court does, in favor of
10 early voting. It's a much tougher problem
11 conceptually for Mississippi because
12 Mississippi's definition is it's all private
13 action.

14 The private action occurs when you
15 mark that ballot, when you put it in the
16 mailbox or give it to a common carrier. And,
17 of course, that obviously extends over many
18 days. So they can't handle the word "day" in
19 the election statute.

20 We think that conceptualizing it as,
21 you know, the courts of appeals cases do as
22 there's a process, that process is consummated,
23 it's finalized, it's perfected is the term they
24 use in the Congressional Record in 1844, it's
25 perfected on Election Day, the ballot box

1 closes, and we think that's the best way to
2 address early voting.

3 JUSTICE KAGAN: But, General, if I
4 might, I think the reason it's a tougher
5 question for you is for the exact -- is because
6 you started off by phrasing the question this
7 way.

8 You said elect -- the -- those
9 election rules are not ones Congress could
10 possibly have conceived of or approved. That's
11 not their question. That's your question, that
12 you're saying we have to go back to the
13 mid-19th century and say could Congress have
14 possibly conceived of this kind of rule.

15 And Congress couldn't have conceived
16 of the kind of early voting we have now. It
17 couldn't have conceived of a thousand other
18 ways in which we administer elections now.

19 And so -- so I think it really is a
20 problem for you as to how you draw this line
21 and say, well, this is across the line, but all
22 these other things that we do differently now
23 from the way we used to do them in 19 -- in the
24 19th century, those don't worry about.

25 GENERAL SAUER: I disagree with that,

1 and the reason I disagree with it is the Civil
2 War practices. Proxy voting has this aspect of
3 the private choice happening earlier. So early
4 voting is already in the forefront of the mind,
5 forms of early voting at least are already in
6 the forefront of the mind of Congress in --

7 JUSTICE KAGAN: Well, if you said to
8 Congress, do you think that the Civil War
9 provides a precedent for early voting generally
10 among the civilian population, I think they
11 would have laughed at you.

12 They saw early voting as, like,
13 something you did for soldiers in the field,
14 not as like, oh, this is going to be great
15 precedent for, you know, any old citizen
16 getting her ballot three weeks ahead of time
17 and mailing it in.

18 GENERAL SAUER: I strongly -- I
19 strongly agree with that in the sense that, you
20 know, repeating what Mr. Clement said, which is
21 that you have a practice that involves early
22 voting, but you also have states taking these
23 herculean extraordinary efforts to make sure
24 that the ballot boxes, the votes are received
25 and the ballot box closes on Election Day,

1 whether it's soldiers, like, going in the front
2 and giving their votes over to, you know, de
3 jure election officials who are actually
4 commanding officers or whether or not it's
5 submitting them in that proxy voting practice.

6 What happens in proxy voting is --
7 JUSTICE KAGAN: Yeah. I -- I guess
8 you're sort of not really quite grasping, maybe
9 it's my fault, like, what my question is. It's
10 like, why this practice but no other practices?

11 And, you know, for example,
12 Mr. Clement was asked about verification
13 practices. Do those too have to happen on
14 Election Day? And I think Mr. Clement credibly
15 enough said not my case, kind of maybe they do.
16 I mean, once we go down this road, once we say
17 that these statutes which don't say anything
18 actually have some significant preemptive
19 effect, where are we going to end up?

20 GENERAL SAUER: I think my answer to
21 that is that the ordinary indicators of
22 original public meaning from the 19th century
23 do grapple repeatedly, surprisingly repeatedly
24 grapple with the question of whether or not
25 receipt is essential to election.

1 So LeRoy against Foley describes it as
2 the essential thing in election is casting and
3 receipt. So we've cited 11 cases, you know,
4 three treatises, five dictionaries. Whenever
5 they get to the point of considering whether
6 casting and receipt are required, they
7 unanimously -- there's this impressive
8 consensus -- they all say casting and receipt.

9 Mississippi has no 19th century
10 source, no source of anytime prior to 1918 that
11 says a vote is cast by anything less than
12 official receipt. So there actually is a
13 surprising consensus in the 19th century
14 authorities that cuts in our direction. And
15 that's reinforced by the -- the efforts the
16 states took in -- during the Civil War to
17 ensure that receipt occurred on Election Day.

18 So you put those two together and you
19 come up with a very -- you come to, I think, a
20 very powerful place and really surprisingly
21 powerful evidence of original public meaning on
22 this specific discrete question even though no
23 one had done it yet. In all these other
24 contexts where, really, you see the 19th
25 century authorities, they have to pare to the

1 definitional bone really.

2 For example, in the Steinwehr case, a
3 voter comes into the polls and he's got three
4 votes folded together and he gets qualified and
5 he tries to put them in the ballot box and they
6 stop him right there and they say, well, that
7 looks a little thick, and they open it up and
8 there's three and he's indicted because he's
9 trying to stuff the ballot box right there.

10 And he says I never voted because it
11 never went in the ballot box. And the courts
12 grapple with that. They take that argument
13 very seriously. Where they come down is
14 official receipt, when you've made the offer to
15 vote and you give it to the election official,
16 that constitutes voting. So you have the early
17 -- the -- the 19th-century sources looking at
18 stuff that's very, very similar in the sense of
19 the detail of the issue presented here, and
20 every single one of them comes up with casting
21 and receipt are required for voting.

22 JUSTICE JACKSON: Yes, but since
23 then --

24 GENERAL SAUER: Voting is not --

25 JUSTICE JACKSON: -- since then, we

1 have many states that have departed from that,
2 to include Mississippi. And since we're
3 talking about preemption and Congress's ability
4 to make this determination, it just seems very
5 odd that in the period of time since when these
6 statutes were passed and today, we now have
7 pretty common practice among many states to
8 allow for absentee voting in this way, early
9 voting, all these other things, but in
10 particular, post-ballot receipt, post-Election
11 Day ballot receipt deadlines. And Congress has
12 not indicated, at least thus far, that it
13 intended ever to preempt this, that it intended
14 not to have the states make this determination.
15 As far as I know, this kind of challenge hasn't
16 even been brought. This has just been
17 accepted.

18 So how is it that we focus in, home
19 in, right in the 19th century and that's the
20 relevant practice that you want us to consider,
21 and not the more recent practices, the
22 practices of everybody understanding what
23 Election Day means to include this kind of
24 thing?

25 GENERAL SAUER: Mississippi admits

1 that every single one of those examples occurs
2 after the relevant period when all these
3 statutes are enacted, so they are not --

4 JUSTICE JACKSON: But I guess I'm
5 asking you why is that the relevant period? I
6 mean, we have lots of statutory interpretation
7 scenarios in which Congress passes statutes.
8 And I think it's rare that we interpret those
9 statutes relative to the practices of the
10 people who were affected by them at the time.
11 I -- I thought we normally do things like
12 textualism. We look at the statute and we --
13 some of us, you know, think about the
14 legislative history and what Congress's intent
15 was when we're interpreting the statute.

16 I -- I don't recall, and maybe we
17 have, but I'm just, you know, curious about
18 this really heavy reliance on the 19th-century
19 understanding of the word "Election Day,"
20 especially when we have a more recent
21 understanding that has been implemented and
22 Congress hasn't said anything about it.

23 GENERAL SAUER: I would say the
24 19th-century evidence of meaning is the best
25 evidence of the original public meaning of the

1 statutes at the time they were adopted, 1845,
2 1872.

3 JUSTICE JACKSON: And you're saying
4 that governs? We have to -- we have to
5 interpret Election Day -- notwithstanding that
6 Congress may have wanted states to experiment,
7 that states have experimented and done other
8 things, we are bound, you say, by exactly what
9 Election Day -- people thought it meant at the
10 time these statutes were enacted?

11 GENERAL SAUER: By its original public
12 meaning. And, of course, Congress was very
13 concerned when it passed these statutes 1844 --
14 or 1845 and 1872, about the exact thing that
15 Mississippi or almost the exact thing
16 Mississippi would allow, which is staggered
17 ballot receipt deadlines.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas?

21 Justice Alito?

22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: Tell me what the
24 act is that you think has to be done by
25 Election Day by the official?

1 GENERAL SAUER: All --

2 JUSTICE SOTOMAYOR: Received or
3 accepted?

4 GENERAL SAUER: Received. All ballots
5 have to be received and the ballot box has to
6 close on Election Day.

7 JUSTICE SOTOMAYOR: The ballot box has
8 to close.

9 GENERAL SAUER: Yeah, the proverbial
10 ballot box.

11 JUSTICE SOTOMAYOR: But what do we do
12 -- and I know you did this -- and I'm a little
13 upset -- not a little, a lot upset, by many of
14 the statements in your brief quoting historical
15 sources out of context. But the -- Paine's
16 Treatise on the Law of Elections, the public
17 officers, you claim had a traditional rule, was
18 that the legal votes duly offered at the polls
19 but not actually deposited in the ballot box
20 cannot be counted.

21 But I looked to that treatise, and it
22 says in some of the states that is the rule,
23 but that in others, and also for the House,
24 U.S. House of Representatives, the rule was the
25 opposite. As Paine wrote, "it was in 1888 an

1 established rule of the House of
2 Representatives of the United States that a
3 vote duly offered and unlawfully rejected," so
4 it wasn't accepted at the polls, "will be
5 counted in a contest even if not accepted by
6 officials on Election Day."

7 And we have another source you cite,
8 the American and English Encyclopedia of Law.
9 You selectively quote from that snippet that
10 the "act of voting was not complete until the
11 ballot was deposited in the -- in the box."
12 But it made very clear that that was only the
13 rule in Alabama, while noting that other states
14 allowed votes to be counted even if the officer
15 may neglect to deposit the ballot in the box
16 until after the close of election -- of polls.

17 So it seems as if your rule is already
18 historically destroyed at the time of these
19 examples that you quote to us.

20 GENERAL SAUER: I respectfully
21 disagree, and I stand by exactly how we
22 characterized those sources and all the
23 historical sources in our brief. If you go to
24 the Paine treatise -- and I think we refer to
25 this in the very next sentence in our brief --

1 the Paine treatise says the traditional rule s
2 it has to actually be deposited, but then it
3 notes, later in the 19th century, some
4 authority says, well, you know, if they
5 challenged your qualifications and -- and they
6 were wrong, as long as they received it, either
7 way it's official. Receipt is what matters.
8 The state has it in its custody.

9 And of course the use --

10 JUSTICE SOTOMAYOR: Now -- now you're
11 changing the definition.

12 Thank you, counsel.

13 GENERAL SAUER: Well, we've said
14 receipt. "Receipt" is the word that we've
15 used. We've used that consistently. And that
16 Payne treatise points out that, either way,
17 whether it's got to actually be in the ballot
18 box or officially received, official receipt is
19 essential to an election. And so do all -- all
20 three of the treatises, all the five of the
21 legal dictionaries, including the one you
22 referred to.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 Justice Gorsuch?

25 Justice Kavanaugh?

1 Justice Barrett?

2 Justice Jackson?

3 Thank you, counsel.

4 GENERAL SAUER: Thank you.

5 CHIEF JUSTICE ROBERTS: Rebuttal,
6 Mr. Stewart?

7 REBUTTAL ARGUMENT OF SCOTT G. STEWART

8 ON BEHALF OF THE PETITIONER

9 MR. STEWART: Thank you, Mr. Chief
10 Justice.

11 I'd like to do my best to make three
12 points. First, there was a concession by
13 Mr. Clement that I was surprised about because
14 it seemed to be different from what he said in
15 his brief. He said he'd have no objection to
16 doing what the U.S. Solicitor General proposes
17 on UOCAVA. I just want to briefly make clear,
18 as we've said in our briefs, that if this Court
19 agrees with the Solicitor General on UOCAVA,
20 that means vacatur would be required because
21 the Fifth Circuit did not allow state laws
22 allowing UOCAVA votes to arrive after Election
23 Day.

24 Second, I want to try to tie together
25 some points that go back to Justice Barrett's

1 questions, Justice Kagan's questions, Justice
2 Sotomayor's questions, some other questions
3 about 19th-century history here. My friend
4 Mr. Clement emphasized, the Solicitor General
5 did as well, hey, you know, those show that you
6 needed ballot receipt. I think the key point
7 to recognize there is that ballot receipt was
8 not possible in the 19th century without
9 somebody showing up in person and undergoing an
10 on-the-spot qualifications check. If you need
11 ballot receipt, you need those other things as
12 well. And that's quite critical to the plain
13 meaning in this case.

14 I think the better view is that, hey,
15 when people were holding elections in person at
16 the time, naturally they were going to be
17 receiving ballots on Election Day. That
18 doesn't mean that that was required or baked
19 into an election any more than in-person voting
20 or on-the-spot qualification checks by feller
21 -- fellow voters is baked into an election.

22 I -- I would -- I would add, Justice
23 Sotomayor, you mentioned some things, Paine
24 treatise and otherwise. I -- I would also say
25 if you look at the Solicitor General's sources,

1 they emphasized not just voter choice, but they
2 also emphasized that at the time the method of
3 making that choice was in person, on-the-spot
4 qualification checks, those kind of things.
5 Those are not things you really see quoted or
6 cited in the Solicitor General's brief, but
7 they bear out what we said about Mr. Clement's
8 19th-century election codes.

9 I'd that say also this history
10 explains the Civil War receipt of absentee
11 ballots. Mr. Clement alluded to the idea that
12 states went to herculean efforts to receive
13 ballots on Election Day. That's not what they
14 went to herculean efforts to do. They went to
15 herculean efforts to hold elections effectively
16 in person because that is the method of voting
17 that people used at the time. That's why field
18 voting was so dominant. And -- and -- and the
19 other thing that states were trying to do at
20 the time was to adhere to actual or perceived
21 in-person, in-district voting requirements. So
22 that's what they were doing.

23 They were holding elections where
24 people would cast ballots in person, which was
25 the common standard way. And when that's

1 happening, yes, naturally, ballots are going to
2 be received by Election Day. That did not make
3 it a ripe issue or a settled issue. It did not
4 decouple ballot receipt from ballot casting,
5 but it did not foreclose that either.

6 Last thing, I just want to refer to
7 your neighbor again, Justice Gorsuch. You
8 know, I -- I want to be clear, you know, we
9 have not made a -- you know, the argument for
10 the neighbor to be allowed to cast ballots, but
11 I will say that -- I would emphasize my friends
12 do allow the neighbor to cast your ballot. The
13 neighbor just needs to be designated, I think
14 as Mr. Clement put it, cloaked with government
15 authority.

16 You know, it's quite something for a
17 neighbor, a party boss, you know, some bad
18 actor to be able to become a ballot receiver
19 just because they're cloaked with state
20 authority. You know, if -- if that's allowed,
21 then I don't see why the historically
22 recognized, for 100 years, method of casting a
23 ballot through the mail would not be equally
24 legitimate, especially when the federal
25 government itself is perfectly fine with that

1 method and Congress has been fine with that --
2 that method for United States tax returns,
3 which, like, carry huge civil and criminal
4 consequence, also have -- are very critical on
5 deadlines.

6 I think the best way to resolve this
7 case is to come back to the text, history, and
8 precedent, which we've said many times, just
9 does not decide the key issue. This is
10 ultimately a federalism case. The question is
11 whether, as I think Justice Jackson put it, did
12 Congress in 1845 block states from adopting a
13 practice that no one had wide reason to
14 consider at the time? Congress wasn't thinking
15 about it. It didn't decide that. It didn't --
16 it didn't wall states off from doing that. We
17 ask the Court to reverse.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 The case is submitted.

22 (Whereupon, at 12:13 p.m., the case
23 was submitted.)

24

25

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