

# SUPREME COURT OF THE UNITED STATES

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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. )  
- - - - -

Pages: 1 through 149  
Place: Washington, D.C.  
Date: March 23, 2026

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4   SECRETARY OF STATE,                    )

5                                    Petitioner,            )

6                                    v.                            ) No. 24-1260

7   REPUBLICAN NATIONAL COMMITTEE,        )

8   ET AL.,                                    )

9                                    Respondents.         )

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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:

2 SCOTT G. STEWART, Solicitor General, Jackson,  
3 Mississippi; on behalf of the Petitioner.

4 PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on  
5 behalf of the Respondents.

6 GEN. D. JOHN SAUER, Solicitor General, Department of  
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.

2 Congress did not adopt that  
3 destabilizing view when it simply set the  
4 Election Day. The Fifth Circuit was wrong to  
5 rule otherwise. This Court should 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 statewide 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 a -- 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, so, surely,  
16 things are happening weeks and 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 under --  
23 I want to go back to your answers to Justice  
24 Thomas. So I understand that Mississippi's  
25 particular rule says that it has to be

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

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

14 Why does your definition preclude what  
15 Justice Thomas hypothesized?

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

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

23 MR. STEWART: They -- they are  
24 impartial third parties that have a duty to  
25 deliver what they're owed without altering it.

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

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

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

23 JUSTICE BARRETT: I wouldn't rely on  
24 the history if I were you since you're telling  
25 us not to rely on the other side's history,

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

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

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

20 JUSTICE GORSUCH: Well --

21 MR. STEWART: -- third party.

22 JUSTICE GORSUCH: Well, what -- what  
23 if -- what if a state came up with a law that  
24 said so long as a notary, that's official,  
25 that's recognized, certified that you cast your

1 ballot on Election Day and it was delivered  
2 later by whatever means, common carrier or not,  
3 what -- what in your theory of the preemptive  
4 effect of this statute would preclude that law?

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

7 JUSTICE GORSUCH: Pick your best.

8 (Laughter.)

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

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

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

21 JUSTICE GORSUCH: It's pretty  
22 official.

23 (Laughter.)

24 MR. STEWART: It's -- it's pretty  
25 good, Your Honor, but I don't -- I don't think

1 it kind of hits submission to the state.

2 JUSTICE GORSUCH: Ah. Okay. Well,  
3 that -- I wanted to explore -- so -- so that's  
4 not submitted to the state? Even if it's  
5 notarized, an -- an affidavit, it was final on  
6 the day of and somebody brings it in to the  
7 state offices a week or three months later,  
8 that doesn't count, but if it goes into the  
9 mail, it does?

10 What in the statute -- what words in  
11 the statute would you have us read that into,  
12 that rule into?

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

18 JUSTICE GORSUCH: I'm asking about  
19 your view, counsel.

20 MR. STEWART: Sure. So I -- I  
21 think --

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

25 MR. STEWART: Well, I think, number

1 one, I -- I just am not -- at least as I'm  
2 understanding the hypothetical, it doesn't  
3 appear to be submission to the state, Your  
4 Honor, in the same --

5 JUSTICE GORSUCH: Oh, it gets  
6 submitted to the state three weeks later, just  
7 not by common carrier.

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

13 JUSTICE GORSUCH: Yes. Then that's  
14 okay too?

15 MR. STEWART: I --

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

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

22 JUSTICE GORSUCH: Well, the -- the  
23 state says it's official, by God, when -- when  
24 a Supreme Court justice or -- or perhaps just a  
25 notary says it's official, that's good enough

1 under your theory. It has to be, I think.

2 And if that's okay, why can't a state  
3 say: How about a time-stamped video showing  
4 that I voted on Election Day? Here I am  
5 filling out my ballot, and then -- and -- and  
6 then my brother or maybe some aggregator of  
7 ballots brings it in a week or three later.

8 MR. STEWART: And --

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

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

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

23 MR. STEWART: I mean, I -- I do -- I  
24 do -- do still have some concern that it has  
25 not been submitted through --

1 JUSTICE SOTOMAYOR: Counsel, why are  
2 you fighting the premise? In the Civil War, at  
3 least two states permitted military officers  
4 who weren't sworn state officials, they were  
5 federal officials but not sworn state  
6 officials, to accept the ballots and transmit  
7 it by mail to the state, okay? And that was in  
8 the Civil War, all right?

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

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

19 MR. STEWART: I --

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

1           MR. STEWART: I mean, I think that's  
2 possible. We're not quite asking for that,  
3 Your Honor. I really don't mean to fight the  
4 premise.

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

10           There's nothing in federal law that  
11 has prohibited it explicitly, correct?

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

14           JUSTICE SOTOMAYOR: All right.

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

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

1     okay?

2                   MR. STEWART:   Well, I think it's -- I  
3     think it's actually okay under my friend's  
4     view, Your Honor.  We're not -- we're not  
5     making that ask.

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

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

16                  JUSTICE ALITO:   Well, the Postal  
17    Service is not part of the state, and a common  
18    carrier isn't part of any government.

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

1           And they give -- in both cases,  
2           they're imbued with a duty to deliver what they  
3           receive. And, in fact, a duty that's, I -- I  
4           think, a good example -- maybe a good example  
5           is the fact that the IRS accepts tax returns,  
6           which are obviously highly consequential  
7           documents with key timeliness requirements, the  
8           IRS accepts tax returns both through the mail  
9           and through common carriers.

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

15           MR. STEWART: That's right, Your  
16           Honor.

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

23           Is it the case -- isn't it the case  
24           that some state allows -- will -- will count  
25           ballots that are received 21 days after

1 Election Day?

2 MR. STEWART: There are a couple that  
3 at the outlier it's kind of canvassing and it  
4 can go that far. I think more common is about  
5 310 --

6 JUSTICE ALITO: Well, is that okay?  
7 Is that all right?

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

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

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

1           MR. STEWART: Those are some of the  
2 limits, Your Honor. But I'd also say the  
3 federal Election Day statutes don't require  
4 states to count ballots at all. It doesn't  
5 speak to counting, period. So, I mean, if a  
6 state really didn't want to --

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

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

22          JUSTICE JACKSON: And, counsel,  
23 isn't --

24          JUSTICE SOTOMAYOR: Counsel --

25          JUSTICE JACKSON: I was just going to

1 say, isn't -- isn't your point that the  
2 line-drawing issues that have been raised are  
3 only problems to the extent that Congress  
4 thought they were problems? We're -- we're in  
5 a preemption dynamic, and so the question I  
6 think really is, what did Congress intend with  
7 its statement about Election Day? Did it mean  
8 to cabin the states so that they did not have  
9 the discretion to make these kinds of  
10 decisions?

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

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

1           MR. STEWART: Sure, Your Honor. So  
2 I -- I -- I think that's exactly right. So  
3 UOCAVA is -- is maybe the best example where  
4 Congress was told that about a dozen or so  
5 states have post-Election Day ballot receipt  
6 laws. It respected those explicitly as to a  
7 deadline for -- for ballots in -- in -- in that  
8 law. I think the United States has agreed with  
9 us on -- on that very point.

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

17           MR. STEWART: Right. And that's been  
18 the case for 180 years, Your Honor. And I  
19 think one feature that I -- you know,  
20 obviously, we're -- we're -- we're searching  
21 for what did the statutes mean at the time, but  
22 I think it's very hard for my -- my friends to  
23 explain a hundred -- the past hundred years of  
24 history and this lawmaking. The Soldier Voting  
25 Act in the 1940s was -- was another example

1 where Congress recognized and respected state  
2 deadlines. And it just -- it gets very hard to  
3 explain those things if you don't adopt the  
4 view that the federal Election Day statutes  
5 just do not set a ballot receipt deadline.

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

17 MR. STEWART: Yes.

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

25 MR. STEWART: Very good, Your Honor.

1 I think, when you put something in the mail,  
2 you're not -- I think --

3 JUSTICE GORSUCH: That's not an  
4 election official. FedEx isn't an election  
5 official.

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

10 JUSTICE GORSUCH: Sure. Of course.

11 MR. STEWART: And, right, Your Honor.  
12 And I think --

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

20 MR. STEWART: Well, I think the  
21 difference is, say, you know, sending it to  
22 your brother versus sending it to the  
23 registrar.

24 JUSTICE GORSUCH: Well, we already  
25 dealt with that. The brother turns out to be

1       okay so long as the state says so.  You --

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

4               JUSTICE GORSUCH:  It's also okay --

5               MR. STEWART:  I -- I'm a little  
6       more -- more guarded than that.

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

25              In that hypothetical, did the election

1 happen on Election Day? Oh, by the way, it  
2 swings the election.

3 (Laughter.)

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

10 JUSTICE GORSUCH: Well, just -- just  
11 first deal with my hypothetical, and then I'll  
12 deal with your statute.

13 MR. STEWART: Okay. The -- the -- the  
14 election happened on Election Day. It sounds  
15 like --

16 JUSTICE GORSUCH: Even though it  
17 changes the outcome?

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

19 JUSTICE GORSUCH: Yes has to be your  
20 answer, doesn't it?

21 MR. STEWART: I mean -- I mean, yes,  
22 Your Honor. I'm just --

23 JUSTICE GORSUCH: Okay.

24 MR. STEWART: I -- I -- I want to be  
25 clear about the --

1 JUSTICE GORSUCH: All right. And  
2 then --

3 MR. STEWART: -- we are not agreeing  
4 that the outcome can be properly changed in  
5 that circumstance.

6 JUSTICE GORSUCH: Well, hold on. It  
7 did in my circum- -- in my hypothetical. You  
8 can't change my hypothetical, counsel.

9 (Laughter.)

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

12 JUSTICE GORSUCH: It's un -- what's --  
13 what's unlaw- -- what --

14 MR. STEWART: I don't mean to  
15 disparage your hypothetical. I'm just saying  
16 that it -- that it's an unlawful circumstance  
17 because we don't allow ballot -- ballot recall  
18 in our state.

19 JUSTICE GORSUCH: Oh, in Mississippi,  
20 okay. But -- but that hypothetical could  
21 happen in another state, right?

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

1 Honor.

2 JUSTICE GORSUCH: Okay. Now you say  
3 your statute -- you're -- you're -- you're  
4 different. You admit my hypothetical could  
5 happen, but you say it can't happen in  
6 Mississippi because recall's not allowed.

7 I couldn't find that anywhere in  
8 Mississippi law. In fact, what I did see was a  
9 statute that says that you -- that the  
10 Secretary of State can promulgate rules and  
11 regulations. That's 23-15-637(3). And then I  
12 went and looked at the regulations, and Rule  
13 2.1 says that an absentee ballot is the final  
14 vote of a voter when the ballot is marked  
15 accepted. That doesn't preclude recall.

16 MR. STEWART: And --

17 JUSTICE GORSUCH: In fact, that allows  
18 recall.

19 MR. STEWART: -- I -- I don't -- I  
20 respectfully don't agree with that, Your Honor.  
21 I mean, what --

22 JUSTICE GORSUCH: Where -- where does  
23 it say recall is not permitted? I couldn't  
24 find that anywhere in your statutes or the  
25 rules.

1           MR. STEWART: And I think, by  
2 providing that ballots are final when cast  
3 under our statute itself --

4           JUSTICE GORSUCH: No, it doesn't. It  
5 says they're final when marked accepted.

6           MR. STEWART: That's the regulation,  
7 Your Honor.

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

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

10          JUSTICE GORSUCH: It's your  
11 regulation, and it allows recall.

12          MR. STEWART: It does -- respectfully,  
13 it does not allow recall, Your Honor. The  
14 ballot is final when cast.

15          JUSTICE GORSUCH: Show me where it --  
16 would you read to me the provision that  
17 precludes it?

18          MR. STEWART: It's -- it's subsection  
19 (3) of the statute that my friends have  
20 challenged.

21          JUSTICE GORSUCH: I read you  
22 subsection (3) that says the Secretary of State  
23 can make rules.

24          MR. STEWART: And --

25          JUSTICE GORSUCH: And then I read you

1 the rule.

2 MR. STEWART: To ensure that the  
3 ballots are final when cast. They -- the --  
4 the key thing --

5 JUSTICE GORSUCH: But the rule says --

6 MR. STEWART: -- is that ballots are  
7 final when cast.

8 JUSTICE GORSUCH: It says -- no.  
9 Votes promulgated by an absentee ballot with  
10 the absentee ballot -- person's absentee vote  
11 is final. You can make rules about when  
12 they're final, and what the rule says it is  
13 final when marked accepted.

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

22 JUSTICE BARRETT: Mr. Stewart, I just  
23 want to ask a clarifying point to this. Is it  
24 possible for a portion of Mississippi's statute  
25 to be unlawful, not -- just -- just go with me

1 here -- a portion of Mississippi's statute to  
2 be unlawful insofar as it potentially permits  
3 recall, but still that, you know, would not  
4 address whether Mississippi's statute was  
5 unlawful insofar as it allowed ballot receipt  
6 after Election Day?

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

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

25 MR. STEWART: Your Honor, I mean,

1 maybe -- you know, I'm not sure if I answered  
2 the earlier thing as crisply as I could. I'm  
3 not comfortable with the neighbor piece. I do  
4 have serious concerns about that. I -- I --

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

10 MR. STEWART: I think it's the  
11 finality of the choice that has to be done by  
12 Election Day. And --

13 JUSTICE BARRETT: Okay.

14 MR. STEWART: -- my -- my concern is  
15 that if you're not sending it by mail or common  
16 carrier --

17 JUSTICE SOTOMAYOR: You're getting  
18 caught up, counsel, again. Could you go back  
19 to the question? Justice Barrett is not  
20 arguing with you.

21 MR. STEWART: Fair, Your Honor.

22 JUSTICE SOTOMAYOR: What she's saying  
23 and what you said earlier is -- and you believe  
24 that under your adversary's -- the opposing  
25 counsel's theory, you can give it to the RNC

1     operative, you can give it to anybody, and so  
2     long as it's received on Election Day by the  
3     state, that's okay. That's what you're saying  
4     your opposing counsel's saying. And you're  
5     saying the only question before us is, if they  
6     can designate an appropriate vehicle to  
7     transmit the votes, then that's okay.

8             MR. STEWART: I think I was saying  
9     the lat -- the latter part, yes, Your Honor.

10            JUSTICE SOTOMAYOR: Mm-hmm.

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

17            JUSTICE SOTOMAYOR: Right.

18            MR. STEWART: And we're trying to hew  
19     more closely not just to the text but also the  
20     historical hundred-year-long you can submit it  
21     by mail.

22            JUSTICE SOTOMAYOR: Okay.

23            CHIEF JUSTICE ROBERTS: Thank you --

24            JUSTICE SOTOMAYOR: So -- but the  
25     bottom line is that states can choose when the

1 final vote has to be counted?

2 MR. STEWART: States have discretion  
3 over counting.

4 JUSTICE SOTOMAYOR: Exactly.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Justice Thomas, anything further?

8 JUSTICE THOMAS: Just as a point of  
9 clarification, without looking at the  
10 subsequent history, what do you think the  
11 federal law required as far as the Election  
12 Day?

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

19 JUSTICE THOMAS: And you don't have to  
20 formalize that choice?

21 MR. STEWART: You do by submit -- by  
22 parting with your ballot and submitting it to  
23 the state.

24 JUSTICE SOTOMAYOR: Have we had any --

25 CHIEF JUSTICE ROBERTS: Justice --

1 Justice --

2 JUSTICE SOTOMAYOR: I'm sorry.

3 CHIEF JUSTICE ROBERTS: -- Alito?

4 JUSTICE ALITO: Your position does  
5 require some difficult line-drawing problems,  
6 and maybe that's inevitable, but one is the  
7 degree of confidence that one must have in the  
8 entity or person who transmits the ballot to  
9 the state. We've talked about that. One is  
10 how long after the Election Day vote -- votes  
11 must be -- votes can be received. A third is  
12 whether it has to be postmarked.

13 Are there -- aren't there quite a --  
14 aren't there eight states that do not require a  
15 postmark for late ballots?

16 MR. STEWART: There are a number of  
17 states that don't require that, Your Honor. I  
18 think postmarking is -- is good evidence that  
19 something has been timely submitted. That's  
20 kind of borne out in the tax context.

21 I -- I think, you know, if -- if  
22 somebody were challenging a law like that, it  
23 would potentially be a very different kind of a  
24 challenge. They'd have to make sort of factual  
25 showings to challenge that ballots were not

1 cast by Election Day but surely not this case.

2 JUSTICE ALITO: Well, maybe these --  
3 maybe it's inevitable that some sort of  
4 line-drawing decisions like these have to be  
5 made, unless the rule is anything goes, you  
6 know, states can do anything they want in this  
7 area.

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

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

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

1 making final choices and the distortions, the  
2 fraud, the risks that -- that that had.

3 And when everybody's making a final  
4 choice on the same day, even if some individual  
5 choices are made before then, you're honoring  
6 the statutes, and I think -- you know, I think,  
7 Justice Alito, you made this observation, you  
8 know, not a lot to go on because the statutes  
9 are just not very -- there's not a lot of  
10 prolixity there.

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

18 JUSTICE ALITO: Do you think it's  
19 legitimate for us to take into account  
20 Congress's desire -- Congress's passage of the  
21 Election Day statutes for the purpose of  
22 combatting fraud or the appearance of fraud and  
23 will and some of the briefs have argued that  
24 confidence in election outcomes can be  
25 seriously undermined if the apparent outcome of

1 the election at -- on the day after the polls  
2 close is radically flipped by the acceptance  
3 later of a big stash of -- of ballots that flip  
4 the election or -- yeah.

5 MR. STEWART: I think --

6 JUSTICE ALITO: You've got ballots  
7 that are delivered by somebody -- by -- you  
8 know, by a neighbor and they're received a  
9 month after the election and they don't have  
10 postmarks.

11 MR. STEWART: I -- I think the best  
12 way to do it is to honor the statute's purpose  
13 by -- but doing so by respecting the statute's  
14 text and animating context.

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

1           You could have potential fraud.  
2       People went across state lines and voted, or  
3       you could have the appearance of that sort of  
4       fraud even if it didn't actually happen, like  
5       people just said, oh, my gosh, they voted for  
6       that person, I -- you know, big turnout.

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

10          I do think it's -- it's notable that  
11       my -- my friends with the United States, you  
12       know -- you know, obviously, they -- they --  
13       they've sounded the antifraud theme. They  
14       haven't cited a single example of fraud from  
15       post-Election Day ballot receipt in this  
16       century.

17                 JUSTICE ALITO: All right. Okay.  
18       Thank you. I'll let my colleagues have a  
19       chance.

20                 MR. STEWART: Thank you.

21                 CHIEF JUSTICE ROBERTS: Justice  
22       Sotomayor?

23                 JUSTICE SOTOMAYOR: Has there been any  
24       history of voter recall in the mails in -- in  
25       Mississippi? You say the law doesn't permit

1 it, but has there been any history of it?

2 MR. STEWART: None that I've ever  
3 heard of, Your Honor. I mean, this isn't  
4 something that was raised until the appellate  
5 reply briefs. And nobody cited a single  
6 example in history of it.

7 JUSTICE SOTOMAYOR: All right. And I  
8 understand Justice Alito's questions about the  
9 policy questions of what will create discomfort  
10 or not. But the Constitution vests the issue  
11 of elections in the states unless superseded by  
12 Congress, correct?

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

15 JUSTICE SOTOMAYOR: So, if there is a  
16 policy question to be had, the entities to  
17 decide that are the states and Congress, not  
18 the courts, correct?

19 MR. STEWART: That's right, Your  
20 Honor.

21 JUSTICE SOTOMAYOR: And absent a law  
22 in federal law that suggests that absentee  
23 ballots must be received by a certain time,  
24 there's no explicit requirement of that,  
25 correct?

1           MR. STEWART: Right, Your Honor, or  
2 even implicit.

3           JUSTICE SOTOMAYOR: And -- and the  
4 implicit, we have the military acts that since  
5 World War II at least and the Civil War -- I  
6 should go back that far -- have permitted  
7 absentee ballots to be received long past  
8 Election Day, correct?

9           MR. STEWART: We have a very long  
10 history of that, Your Honor.

11          JUSTICE SOTOMAYOR: Exactly. So the  
12 people who should decide this issue are not the  
13 courts but Congress, correct?

14          MR. STEWART: Right, Your Honor.  
15 And I -- I think what --

16          JUSTICE SOTOMAYOR: The states and  
17 Congress.

18          MR. STEWART: That's right, Your  
19 Honor. And as I -- as I was mentioning in my  
20 colloquy with, I believe, Justice Alito  
21 earlier, that's kind of the structure of our  
22 system. States go first. If Congress doesn't  
23 like it, it overrides.

24          And, as I think Justice Scalia said  
25 for the Court in Arizona Inter Tribal, we

1 respect what Congress said as far as it went  
2 but no farther. And that's kind of the history  
3 of voting and election law in the country to  
4 begin with.

5 JUSTICE SOTOMAYOR: One last question.  
6 With respect to history, history is informative  
7 of what's been permitted by Congress because  
8 what we're looking for is what understanding  
9 Congress had with respect to elections,  
10 correct?

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

13 JUSTICE SOTOMAYOR: All right. And it  
14 doesn't talk about the receipt of absentee  
15 ballots after elections at all, so we look to  
16 the history of whether Congress has accepted  
17 it, correct?

18 MR. STEWART: I think that does help  
19 here, Your Honor.

20 JUSTICE SOTOMAYOR: All right. But  
21 the attempt by some of the amici here to  
22 Bruenize this inquiry and say that history  
23 tells us how elections must be held and on what  
24 date and when receipt can happen or not happen,  
25 why is that not an acceptable way to look at

1 this?

2 MR. STEWART: Well, I -- I think the  
3 difference between Bruen and here, Your Honor,  
4 is that Bruen -- in Bruen, the Court -- the --  
5 the question at issue, you know, whether a  
6 restriction on firearms is consistent with our  
7 historical tradition of firearm regulation,  
8 there's a rich history addressing precisely  
9 that issue, sometimes through analogy, but very  
10 much, I mean, Bruen itself, I believe, I want  
11 to say 40 pages of history just analyzing those  
12 things.

13 We don't have anything like that, a  
14 rich history suggesting that Congress was even  
15 thinking about locking in Election Day ballot  
16 receipt or anything like it. It was addressing  
17 different things.

18 JUSTICE SOTOMAYOR: All right. Thank  
19 you, counsel.

20 MR. STEWART: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: I guess, Mr. Stewart,  
23 your answers to Justice Sotomayor's questions  
24 leave me unsure about what you think about  
25 these appeals to history.

1           I mean, you've said that there's not a  
2 lot of text here. I agree with that. I think  
3 that the way this case has been argued all  
4 around suggests that that's so. So -- so then  
5 we're left with history. Or are we left with  
6 history? You seem to appeal to history  
7 sometimes -- Justice Barrett said this -- but  
8 then repudiate the appeals to history at other  
9 times.

10           And I guess I want to know what we're  
11 supposed to be doing when we're looking at this  
12 statute and deciding this question with respect  
13 to all this historical evidence, scant or not  
14 scant as it may be.

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

23           As I tried to highlight in my opener,  
24 it was one thing, in-person, on-the-spot  
25 qualification checks by fellow voters, ballots

1 were naturally received on Election Day, all  
2 those features. As soon as Congress had a  
3 reason to alter the methods by which a choice  
4 was made, it did so.

5 But the one constant is that the  
6 voters, in a popular government, it's most  
7 critically the voters, the constant is that the  
8 voters make a final choice of officers by  
9 Election Day.

10 So I think history shows that election  
11 administration is dynamic. States have wide  
12 leeway. They just have to make sure that the  
13 voters make a choice by Election Day.

14 JUSTICE KAGAN: Thank you.

15 MR. STEWART: Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Gorsuch?

18 JUSTICE GORSUCH: Almost done,  
19 Mr. Stewart.

20 You -- you emphasized to Justice Kagan  
21 and many others that the -- the final choice at  
22 least has to be done on Election Day and so  
23 recall would be a problem for you if -- if it  
24 could happen. But you say that -- that that  
25 doesn't happen in Mississippi, that that's --

1 that's your position, right?

2 MR. STEWART: Right. It's not  
3 permitted.

4 JUSTICE GORSUCH: If recall could  
5 happen, that would be a problem for your  
6 position?

7 MR. STEWART: I think there --  
8 potentially. I think there's a --

9 JUSTICE GORSUCH: Because then it  
10 wouldn't be a final decision on Election Day,  
11 right?

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

14 JUSTICE GORSUCH: Okay.

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

20 JUSTICE GORSUCH: No, I understand.  
21 But, if it could happen, that would be a  
22 problem for your theory because the final  
23 choice wouldn't have happened on Election Day,  
24 right?

25 MR. STEWART: Fair, yeah.

1 JUSTICE GORSUCH: Okay. So you -- you  
2 say Mississippi prohibits it. We -- we've --  
3 we've been through whether that's the case or  
4 not.

5 MR. STEWART: Very good.

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

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

24 I take the point about proof problems,  
25 but, I mean, gosh, Justice Gorsuch, I mean,

1 violating state election laws in a state that  
2 really is antifraud and really takes wide  
3 measures to enforce its laws, that would be  
4 quite a thing for a voter to do.

5 JUSTICE GORSUCH: Well, in my  
6 hypothetical, which, you know, you say is  
7 unlikely to swing an election and all of that  
8 on recall, but as soon -- you know, if -- if  
9 history teaches anything, scant or not scant,  
10 it's that as soon as something's allowed, it  
11 will happen eventually, right?

12 And, you know, so -- so somebody -- my  
13 hypothetical happens and everybody recalls  
14 their ballots. I'm just not sure what recourse  
15 the state would have against people who  
16 violated its anti-recall law.

17 MR. STEWART: I mean, if people are,  
18 say, recalling things through a common carrier,  
19 there's going to be some record that they  
20 recalled those things. A state could --

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

23 MR. STEWART: I mean, I think the  
24 same -- the same way it would find --

25 JUSTICE GORSUCH: It's going to go --

1 you're going to go prosecute individuals?

2 MR. STEWART: I mean, Your Honor, I'd  
3 say, like, if somebody is lying in an affidavit  
4 that they're not going to recall something, I  
5 mean, if -- if people are doing that with  
6 impunity, we have quite a problem, but it is a  
7 problem that the state can address and  
8 enforce --

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

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

18 JUSTICE GORSUCH: Thank you.

19 MR. STEWART: Thank you, Justice  
20 Gorsuch.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Kavanaugh?

23 JUSTICE KAVANAUGH: When did  
24 Mississippi switch to this method?

25 MR. STEWART: 2020. In 2024, it added

1 common carriers.

2 JUSTICE KAVANAUGH: And why?

3 MR. STEWART: It was first because of  
4 the pandemic. I have -- I don't know that  
5 there's necessarily an answer about why as to  
6 the 2024 one in a clear -- in a clear way.

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

16 How are we supposed to think about  
17 that?

18 MR. STEWART: I mean, I think it's the  
19 same way to think about, I -- I think, the  
20 broader history of election law, is, when --  
21 when states have kind of seen a problem,  
22 they've adapted and adjusted in -- often in --  
23 in the direction of allow -- making sure more  
24 votes can be counted. I mean, that was  
25 obviously a big thing when absentee voting

1 started to become a prominent thing. You know,  
2 certainly, we cared for much about our history  
3 of people showing up in person, but we realized  
4 that was very difficult for people away from  
5 home and that we wanted to, you know, kind of  
6 widen the tent and make it -- make it so that  
7 people could vote.

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

17           JUSTICE KAVANAUGH: Would you say that  
18 the states that require receipt by Election Day  
19 are disenfranchising voters?

20           MR. STEWART: No, you're not --  
21 they're not, Your Honor. I mean, a reasonable  
22 ballot deadline does not do that. I would  
23 asterisk just there are the practical barriers  
24 for those overseas military voters.

25           JUSTICE KAVANAUGH: But, for the

1 citizens who are not within that class, you  
2 would not use the term "disenfranchisement" to  
3 say it has to be received by Election Day,  
4 November 3rd, rather than -- I guess it would  
5 be five business days -- November 10th? You  
6 would not use that term to describe that,  
7 correct?

8 MR. STEWART: I would not. Correct,  
9 Your Honor.

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

22 And my question is -- my questions,  
23 one, is that a real concern? Two, does that  
24 factor into how we think about how to resolve  
25 the scant text and the maybe conflicting or

1 evolving history here?

2 MR. STEWART: I think -- I certainly  
3 respect the perception. I think one thing  
4 notable in this case and I think helpful is  
5 that there -- there -- there has not been  
6 much -- much of a showing about actual fraud  
7 from post-Election Day ballot receipt itself.  
8 I mean, that was --

9 JUSTICE KAVANAUGH: Well, I think  
10 Justice Alito referred to and I think this  
11 quote refers to the appearance of fraud. And  
12 is that a real concern? Is that something we  
13 should be thinking about, confidence in the  
14 election process? Just -- just curious how we  
15 factor that in here.

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

25 I think, you know, obviously, people

1 can be, you know, unhappy when a -- a result  
2 flips. I think Congress may be able to take  
3 measures to address that. But I think there's  
4 no good evidence that Congress was doing that  
5 beyond preventing double-voting in this  
6 context.

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

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

25 But there's also a question of, when

1 do I vote? You know, I'm not sure. You know,  
2 do I need to do it 7, you know, whatever it is?  
3 Whereas, you know, if somebody wants to get all  
4 the information possible, they like voting on  
5 Election Day, you have a pretty nice, clear,  
6 simple rule, and that seems to dovetail quite  
7 well with the --

8 JUSTICE KAVANAUGH: Well, the simple  
9 rule, but, if it arrives on November 11th,  
10 you're out.

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

17 JUSTICE KAVANAUGH: The risks would  
18 seem the same no matter whether it's  
19 November 3rd or November 10th, in other words,  
20 that it could take longer than a week for the  
21 mail to get there.

22 MR. STEWART: The risk is there, but  
23 I -- I think, if you have Election Day ballot  
24 receipt -- and I -- I think what we're  
25 addressing, I think, are more -- the way I

1 might frame the issues are these are policy  
2 points. The question is, did Congress wall off  
3 states from debating these policy points? I  
4 think the answer is no.

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

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

19           JUSTICE KAVANAUGH: Well, I take your  
20 point, but it really goes to just thinking  
21 about what Election Day or day of election  
22 means. But I -- I take your point. Thank you.

23           MR. STEWART: Thank you, Your Honor.

24           CHIEF JUSTICE ROBERTS: Justice  
25 Barrett?

1           JUSTICE BARRETT: So I want to be  
2 clear about what your definition of finality  
3 requires. Would it require finality if the  
4 vote arrives by Election Day as well?

5           So let's -- let's imagine an absentee  
6 ballot that's put in the mail or sent by common  
7 carrier well in advance of Election Day and  
8 does -- is received and put in the ballot box  
9 by Election Day.

10           Does that one have to be final? Or,  
11 in other words, would it be a problem for you  
12 that the U.S. Postal -- Postal Service permits  
13 recall for those ballots that are sent in  
14 advance?

15           I guess what I'm asking is, do you  
16 have the same problem either way? You've --  
17 you've taken a lot of questions, and I have  
18 those questions, about what the effect of this  
19 recall ability is. And I guess my question is,  
20 I want to understand what your definition of  
21 finality is and whether it applies to the  
22 earlier absentee ballots as well. Do they have  
23 to be final such that it would be illegal to  
24 recall them pursuant to whatever regulation the  
25 post office has?

1           MR. STEWART: Right. I think I got  
2 it, Justice Barrett. Let me see if I can do  
3 my -- my best on it.

4           I mean, I think, in theory, if  
5 Election Day has not passed, there could be a  
6 window for somebody to --

7           JUSTICE BARRETT: So it would be okay?  
8 It wouldn't be illegal for somebody to recall a  
9 ballot before Election Day? I guess I don't  
10 understand why --

11          MR. STEWART: Well, I mean, if a state  
12 allowed that, Your Honor. I mean, we don't --  
13 we don't allow it.

14          JUSTICE BARRETT: So it would be okay  
15 for the state -- I know you don't allow it.

16          MR. STEWART: Right.

17          JUSTICE BARRETT: But I guess what I'm  
18 under -- I guess I'm struggling because, if  
19 your definition of the election or the vote or  
20 casting the vote requires finality, I'm trying  
21 to understand why that would be different  
22 before the election -- when I'm saying before  
23 the election, I'm talking about receipt -- for  
24 earlier-sent absentee ballots and for  
25 later-sent. It seems like the same rule should

1 apply regardless. But it seems like you're  
2 not -- you're saying something different.

3 MR. STEWART: Yeah, I -- I -- I'm  
4 having a -- I guess I'm having a hard time  
5 conceiving kind of a dual-track rule in --  
6 in -- in that circumstance.

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

16 Because you can't consider them final.  
17 All these questions that you've been taking are  
18 about whether you could really consider the  
19 ballot to be final if you could recall it. So  
20 I'm asking whether that same finality test  
21 applies for the earlier ballots.

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

1 JUSTICE BARRETT: And that's true no  
2 matter when you send it.

3 MR. STEWART: I think, I mean,  
4 certainly, in our state, and I think -- I think  
5 that's right, Your Honor.

6 JUSTICE BARRETT: But I mean as a  
7 matter of the federal law. It just seems to me  
8 that your definition has to be consistent, and  
9 it sounds like you're changing it for the  
10 earlier absentee ballots and saying finality  
11 has some kind of different force for the  
12 later-received absentee ballots.

13 MR. STEWART: Right. Well, I -- I  
14 think a state has to do whatever it would need  
15 to do to guarantee that on Election Day, all  
16 ballots -- you know, every -- every cast vote  
17 is final and cannot be recalled.

18 I -- I -- I'm having --

19 JUSTICE BARRETT: But it doesn't have  
20 to be final at the time it's sent because it's  
21 okay to recall it. If you send it two weeks in  
22 advance and you change your mind, that's not a  
23 problem.

24 MR. STEWART: I -- I --

25 JUSTICE BARRETT: Okay. I'll

1 withdraw.

2 MR. STEWART: Yeah, I guess I'm having  
3 trouble seeing how --

4 JUSTICE BARRETT: Okay.

5 MR. STEWART: -- the federal Election  
6 Day statute itself would necessarily allow  
7 that, Your Honor.

8 JUSTICE BARRETT: Well, it's about  
9 your definition of election. It's about your  
10 definition of what it means to cast a vote, but  
11 let's put that aside.

12 Obviously, there's a lot of talk about  
13 history in this case. Well, the Electoral  
14 Count Reform Act was passed in 2022, and for  
15 the first time, it defined Election Day.  
16 Should that matter?

17 So should we be looking at how  
18 Congress understood Election Day to mean in the  
19 period of voting, what it thought in 2022, or  
20 should we be looking at the late 19th century  
21 and the Civil War practices?

22 MR. STEWART: I think most vitally it  
23 still remains 1845 is the key date, especially  
24 given that we have statutes that are trying to  
25 manifestly achieve uniformity and what is

1 required of all federal offices. So I -- I do  
2 think 1845 is the key date. And I --

3 JUSTICE BARRETT: So Congress carried  
4 over in 2022 the same understanding of Election  
5 Day that had persisted throughout?

6 MR. STEWART: I think that's right,  
7 final choice of an officer.

8 JUSTICE BARRETT: Okay. Thank you.

9 MR. STEWART: Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Jackson?

12 JUSTICE JACKSON: So let me just  
13 clarify. This case is not about a Mississippi  
14 practice or policy related to recalling  
15 ballots, is that right?

16 MR. STEWART: That's right, Your  
17 Honor.

18 JUSTICE JACKSON: So I -- I guess I'm  
19 a little confused about those kinds of policy  
20 questions, and I guess -- I think that the  
21 Constitution's allocation of responsibility  
22 here actually makes this case about who  
23 decides.

24 I mean, there are a lot of policy  
25 questions. Justice Alito ran through several

1 of them, who gets to receive the ballot, how  
2 long after can they be submitted, does it have  
3 to be postmarked. I suppose we can add is  
4 recall allowed, et cetera, et cetera.

5 But the question, I think, is whether  
6 Congress has precluded the states from making  
7 those calls, drawing those lines, and your  
8 position as I understand it is no.

9 MR. STEWART: That's correct, Your  
10 Honor.

11 JUSTICE JACKSON: That the -- that the  
12 scantness of Election Day in the federal  
13 statutes actually is a point in your favor  
14 because it indicates that Congress was leaving  
15 it to the states to draw the various lines that  
16 might arise in this circumstance.

17 Is that right?

18 MR. STEWART: That's right, Your  
19 Honor. And that's reinforced, for example,  
20 by -- by the 1866 statute, which shows that  
21 when Congress wanted to be really prescriptive  
22 in this area, it was very prescriptive. It  
23 described this is what the states have to do  
24 and so forth.

25 JUSTICE JACKSON: So, if we were

1 focused, really focused on what we're asked to  
2 answer here, which is, is the -- are the states  
3 preempted by federal law from having  
4 post-Election Day ballot deadlines, you would  
5 say no?

6 MR. STEWART: No. No. Congress just  
7 didn't decide that.

8 JUSTICE JACKSON: Let me ask you about  
9 the history with respect to Bruen. I -- I -- I  
10 guess I'm not sure I understood your answer to  
11 Justice Sotomayor because it seems to me that  
12 Bruen is not even the right methodology by  
13 which to be thinking about this.

14 Bruen applied to the Second Amendment  
15 because the Second Amendment incorporated a  
16 preexisting right. And the point of the  
17 history and tradition test was to try to  
18 evaluate the contours of that right.

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

1           MR. STEWART: I think that's right,  
2 Your Honor. I think the other thing -- I think  
3 the point I'd emphasize is that the idea of  
4 embodying a preexisting right confirms that  
5 there's something very much unchanging. And  
6 the thing that we know about election  
7 administration, it has very much been changing  
8 throughout the course of our country.

9           JUSTICE JACKSON: It's been changing  
10 throughout the course in a way that undermines  
11 the notion that there was one consistent  
12 practice, first of all, or that Congress's law,  
13 the meaning of Election Day in the federal  
14 statutes, somehow was tied to what the states'  
15 practices were about that.

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

24           MR. STEWART: That's right, Your  
25 Honor. And, I mean, the only way to explain

1 all of these changes is to read them in line  
2 with plain text and the limits of history,  
3 which is to say election is a final choice.

4 I mean, otherwise, you have to do what  
5 my -- my friends have to do, which is, hey,  
6 look, we're going to pick out the one practice  
7 from these eight -- 19th century codes that we  
8 like, ballot receipts, say that's what an  
9 election is, and just ignore in-person voting,  
10 qualification check on the spot by fellow  
11 voters, and that's just not sound history.

12 JUSTICE JACKSON: Can I ask you one  
13 final thing about the amicus brief from the  
14 Society For the Rule of Law Institute, because  
15 I found it very interesting, and I didn't  
16 really know what your view of it was.

17 That amicus brief focused on the  
18 Electoral College and Congress's setting it up,  
19 you know, back in 1787 with the understanding  
20 that the casting of votes can happen on a  
21 particular day and the receipt of those votes  
22 by election officials can happen on a different  
23 day.

24 And, in fact, the way the Electoral  
25 College is set up, I think, at the time,

1 Congress permitted in nine -- in 1792 about a  
2 month to elapse between the casting of votes,  
3 which, by the way, it called Election Day, and  
4 the receipt of the votes by the -- the electors  
5 submitted them to the president of the Senate  
6 up to a month after.

7           So I -- I think that to the extent  
8 we're worried or thinking about historical  
9 evidence, that seems to me to be pretty  
10 significant and compelling historical evidence  
11 of Congress's understanding of what was  
12 required by Election Day versus the receipt of  
13 those ballots at some subsequent point,  
14 correct?

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

24           And that's why that sort of thing is  
25 allowed, that the key thing is --

1 JUSTICE JACKSON: And the choice is  
2 made when you cast your vote under the  
3 electoral process system, when the electors  
4 cast their vote, right?

5 MR. STEWART: Right.

6 JUSTICE JACKSON: And that is  
7 distinguished -- I'm just trying to make clear  
8 that the casting of the vote and the receiving  
9 of the votes historically have been conceived  
10 of as two different things that can actually  
11 happen at different times, right?

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

13 JUSTICE JACKSON: Thank you.

14 MR. STEWART: Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Mr. Clement.

18 ORAL ARGUMENT OF PAUL D. CLEMENT

19 ON BEHALF OF THE RESPONDENTS

20 MR. CLEMENT: Mr. Chief Justice, and  
21 may it please the Court:

22 All agree that elections for federal  
23 office have to end on the day of the election  
24 specified by Congress, and all agree that you  
25 can't have an election unless you receive

1 ballots, and there must be some deadline for  
2 ballot receipt. Nonetheless, Mississippi  
3 insists that ballots can trickle in days or  
4 even weeks after Election Day.

5 That position is wrong as a matter of  
6 text, precedent, history, and common sense.  
7 Mississippi all but concedes that the original  
8 public meaning of election included both  
9 offering to vote and the receipt of that vote  
10 or ballot by election officials.

11 And, of course, the key distinction  
12 between voting and an election is an election  
13 involves the combined action of voters and  
14 election officials, as this Court underscored  
15 in its decision against Foster against Love.

16 And, of course, Mississippi insists  
17 that at the time these statutes were passed,  
18 ballot receipt and the -- the casting of the  
19 ballot were so inextricably intertwined no one  
20 would have thought of one without the other.

21 That seems to me to be a damning  
22 admission, but it also ignores the advent of  
23 field and proxy voting in the Civil War and the  
24 enormous efforts that states went to to ensure  
25 that all of the ballots, whether by proxy or by

1 field vote, were received by Election Day. In  
2 the state's view, all of those herculean  
3 efforts were for naught or were entirely  
4 gratuitous.

5 Now the state's position actually  
6 works even worse as a matter of common sense.  
7 If somebody in Gulfport the day after the  
8 election asks is the election over, the common  
9 sense answer is no, it's not. The ballots are  
10 still coming in. And if somebody asks who won,  
11 the truthful answer is we don't know yet.  
12 The ballots are still coming in, and they may  
13 trickle in for weeks or months. And, in fact,  
14 they may trickle in for weeks or months with or  
15 without a postmark in differing ways in  
16 differing states.

17 That reality gives the lie to the idea  
18 that we have a uniform national Election Day.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: How would you define  
21 the day of election?

22 MR. CLEMENT: I would say that the day  
23 of the election is the day when -- it's the  
24 last day in which all the ballots are cast and  
25 they are received into official custody.

1                   JUSTICE THOMAS: So how would you  
2                   treat early voting as compared to late  
3                   reception of votes?

4                   MR. CLEMENT: So I would say, I mean,  
5                   you know, I think the best place to look for a  
6                   treatment of early voting is the Kreisling --  
7                   the Keisling decision by Judge Kleinfeld in the  
8                   Ninth Circuit because, after Foster against  
9                   Love, there was a suggestion in Foster against  
10                  Love that maybe early voting is a problem.

11                  He rejected that claim based on two  
12                  things. One is the distinct history of early  
13                  voting, and the second is the idea that was  
14                  explicit in this Court's decision in Foster  
15                  against Love that Election Day is the date of  
16                  consummation.

17                  So I would say, under our theory,  
18                  early voting is permissible largely because it  
19                  has a different history and because of this  
20                  idea that the Election Day is the date where  
21                  the election is consummated.

22                  JUSTICE THOMAS: Would you spend a few  
23                  more minutes on or at least a little bit more  
24                  time on the voting during Civil War? There was  
25                  some suggestion that that's an example of late

1 reception of votes.

2           And I think, in your intro, and this  
3 was my thinking, that it was not, that proxy  
4 voting was a way to make sure that the vote  
5 occurred on Election Day as opposed to  
6 afterwards.

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

16           Now that's an incredibly inconvenient  
17 thing that was done in the Civil War to ensure  
18 the ballots were received by Election Day. And  
19 under the state's view, they didn't need to do  
20 that.

21           Now it's really no different in the  
22 context of field voting because there were,  
23 like, maybe a dozen states -- if you're not  
24 going to count the Confederate states, there  
25 were about a dozen states that did field

1 voting. Again, every one of those ensured that  
2 the ballots were received into official custody  
3 by Election Day.

4 And, of course, most of the states  
5 went to enormous efforts to replicate the  
6 machinery of the ballot box and everything else  
7 in the field and -- but -- and some variation  
8 in that. But the one thing that didn't vary at  
9 all was that the ballots had to be received  
10 into official custody by Election Day.

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

21 But the issue ripened in the Civil  
22 War, and the issue ripened in such a way that  
23 every state required the ballot to be received  
24 into official custody by Election Day. And  
25 then that certainly informs what Congress is

1 thinking in 1872 when they extend the  
2 presidential Election Day deadline to the  
3 congressional realm.

4 JUSTICE SOTOMAYOR: Mr. Clement, what  
5 do I do with the two states during the Civil  
6 War, Rhode Island and Nevada? You say five  
7 favor you. At least two don't.

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

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

24 So it's not -- yes, many states  
25 believed, as they did at the time, that voting

1 had to be in person, that voting had to be  
2 not -- it had to be by voice instead of by  
3 paper. Lots of states had lots of beliefs  
4 about what a proper election should look on.  
5 But how do we deal with the outliers? Or you  
6 just want to ignore them?

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

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

18 MR. CLEMENT: No.

19 JUSTICE SOTOMAYOR: You want an  
20 individual person, is that it?

21 MR. CLEMENT: Well, I -- I want  
22 somebody who's cloaked with government  
23 authority, so that's one difference. But  
24 there's a critical second difference.

25 JUSTICE SOTOMAYOR: But it's not state

1 authority, meaning you're now expanding what  
2 you're saying as government authority.

3 MR. CLEMENT: So what I would say is  
4 it was government authority, and I would say  
5 that my understanding of the history is that  
6 all those federal officers voluntarily accepted  
7 the responsibility, whether they took an oath  
8 or not. And I think that's quite --

9 JUSTICE SOTOMAYOR: So could a  
10 neighbor and so could anybody else. I'm not  
11 moved. The point is that it permitted someone  
12 else to deliver the item, a final cast vote, to  
13 deliver it and be received after.

14 Under your theory of this case -- and  
15 I think you and the government disagree on  
16 this -- you believe that absentee voting by the  
17 military and overseas voters, the various laws,  
18 that federal laws under which states have  
19 proceeded with respect to those votes are  
20 illegal?

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

22 JUSTICE SOTOMAYOR: Or -- or -- or  
23 they're not saying what everybody has  
24 understood them to say, that states can accept  
25 absentee ballots after the election?

1 MR. CLEMENT: So I --

2 JUSTICE SOTOMAYOR: Military and  
3 overseas ballots?

4 MR. CLEMENT: I don't think any vote  
5 is unlawful. Let me -- let me try to address  
6 how I think you would reconcile UOCAVA with the  
7 Election Day statutes. And, to start, I think  
8 it's important to recognize that UOCAVA is not  
9 limited to the federal general election.

10 So UOCAVA applies to primary  
11 elections, to run-off elections and special  
12 elections, and federal general elections. The  
13 Election Day statutes only apply to the general  
14 federal election.

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

24 I think the more logical way to do it  
25 would be to say that -- with the understanding

1 in this Court, if you decide in our favor, that  
2 for the federal general election, the ballots  
3 have to be in by Election Day, I would say --

4 JUSTICE SOTOMAYOR: Well, maybe we  
5 should have another president now because  
6 wasn't it in Florida that they were counting  
7 military votes after receipt?

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

20 JUSTICE SOTOMAYOR: There, what  
21 happened was that the judge made up the  
22 deadline, not the state. But I wanted to --  
23 how do you deal with the Soldier Voting Act in  
24 1942 that permitted ballots -- for the  
25 extension of absentee ballots?

1           MR. CLEMENT: So the 1942 Act, at  
2           least as I understand it, again, is not  
3           addressed solely to general elections. And  
4           then, with respect to general elections, it  
5           says that the -- the military special SVA or  
6           whatever it was, the special military ballot,  
7           had to come in on the -- by the time the polls  
8           closed on Election Day.

9           So I actually think the 1942 Act is  
10          fully supportive of our position here.

11          JUSTICE SOTOMAYOR: So the DOJ has  
12          been acting illegally when it has sued states  
13          for not following the Act, the UOCAVA?

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

23          JUSTICE SOTOMAYOR: So what do we do  
24          with Congress saying process in the manner  
25          provided by law for absentee ballots in the

1 states involved, that's UOCAVA, and that at the  
2 time the hearings were being held on it, 21 --  
3 12 states were identified as counting absentee  
4 ballots after Election Day? So it just ignored  
5 it and decided it was going to exempt out a  
6 little part of it but not everything.

7 MR. CLEMENT: With respect, Justice  
8 Sotomayor, that's why you have to remember that  
9 UOCAVA is not focused only on the federal  
10 general election, which is the only thing where  
11 Congress has specified a federal deadline.

12 JUSTICE JACKSON: But, Mr. --

13 MR. CLEMENT: So it makes perfect  
14 sense --

15 JUSTICE JACKSON: But does that help  
16 you or hurt you, the fact that it is broader?  
17 I mean, it's broader in the way that you  
18 describe. It applies to all of these different  
19 elections.

20 But it doesn't make the distinction  
21 that you are making. It says, with respect to  
22 all of them, state absentee ballot deadlines  
23 should apply. You're -- you're -- you're  
24 encouraging us to treat the general election  
25 differently because you interpret Election Day

1 with respect to the general election statute to  
2 have a defined time as of Election Day, but  
3 that is not what this statute appears to be  
4 doing.

5 MR. CLEMENT: So I think it helps us,  
6 and I think it helps us because, to the extent  
7 you're concerned with those references to state  
8 election deadlines, they're inevitable. If  
9 Congress is going to address anything other  
10 than the general federal election, it has to  
11 refer to the state deadlines for receiving  
12 ballots because there are no federal deadlines  
13 for any election other than the federal general  
14 election.

15 JUSTICE KAGAN: Yeah, but, if that's  
16 true -- if that's true, Mr. Clement, you would  
17 think that Congress would say, you know, with  
18 respect to the deadlines that there's no  
19 separate federal requirement X rule and with  
20 respect to the deadlines that there is a  
21 federal requirement Y rule.

22 But it doesn't do anything like that.  
23 It treats them all of a piece. And we know  
24 that for many of these elections, states were  
25 setting their own deadlines and Congress --

1 and -- and Congress, in passing these statutes,  
2 didn't suggest any kind of distinction between  
3 those elections and these elections.

4 MR. CLEMENT: So, Justice Kagan, as  
5 with almost every statutory question that comes  
6 to this Court, Congress could have made it  
7 easier. They could have done all that. And  
8 they didn't. And I think you just have to --

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

15 And that's what they took from it, and  
16 so they wrote the statutes this way, where,  
17 with respect to all elections, the states were  
18 setting their own receipt deadlines.

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

1 government are probably paramount.

2           But I just want to be clear about  
3 this. If you read the statutes different and  
4 want to recognize -- reconcile them the way  
5 that the SG does, we have no objection to that.  
6 We just think the better way to read these two  
7 statutes is to -- to reconcile them then the  
8 way that we do. And that would have one  
9 benefit, which is don't forget that in at least  
10 20 states, they take the Election Day ballot  
11 receipt deadline seriously.

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

18           And one other thing just about  
19 Mississippi in particular. Mississippi has  
20 provisions in its election code that  
21 specifically accommodate overseas military  
22 voters and overseas voters. And it's not the  
23 ballot extension deadline that we have  
24 challenged here. There's a specific provision  
25 that says for UOCAVA voters and UOCAVA voters

1       only, they can e-mail their ballots in.

2               So, like, the idea that anybody is  
3 going to be disenfranchised here when the  
4 oversea voters and only the overseas voters  
5 have the option of e-mailing in the absentee  
6 ballot that they get from Mississippi seems to  
7 me to completely miss -- be misplaced, and the  
8 concern should really be the heartland cases,  
9 and, remember as Justice Alito alluded to, you  
10 have eight states that don't even require a  
11 postmark.

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

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

25               Now I'm not here to say that there

1 could ever be voting fraud in Chicago --

2 (Laughter.)

3 MR. CLEMENT: -- but -- but the  
4 possibility that there's a four-hour window  
5 where people could go get their ballots --  
6 absentee ballots postmarked after all of the  
7 returns are in and they know that, oh, this --  
8 this is the election where these things could  
9 turn the result, that does not seem entirely --

10 JUSTICE JACKSON: So is your argument  
11 that we --

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

20 And as I understand it, Mississippi  
21 still has sort of a similar system because they  
22 have to adjudicate voter qualifications as well  
23 as accept the vote. So you sometimes say, I  
24 know you and the United States, when the ballot  
25 box closes and you sometimes say receipt. Are

1 those two different things and do the voters'  
2 qualifications have to be adjudicated by  
3 Election Day as well?

4 MR. CLEMENT: I don't -- I don't think  
5 they're exactly the same thing. I mean, in  
6 some sense, I think the ballot box closing is a  
7 nice kind of common-sense capture for the idea  
8 that the election ends on Election Day.

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

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

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

25 And we've had a lot of discussion

1 about the possibility of recall, and I think  
2 that is a problem for Mississippi, but they  
3 have an even bigger problem in my mind, which  
4 is the November 11 problem, which is to say, as  
5 Justice Kavanaugh pointed out, if the ballot  
6 arrives six business days late, Mississippi  
7 doesn't count it, it's a nullity, and under the  
8 state statute, they destroy it. So --

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

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

23 But I understand that under your  
24 theory, we can separate those and say that only  
25 receipt matters, but adjudication can, in fact,

1 happen afterwards, is that correct?

2 MR. CLEMENT: I mean, that's the  
3 position we're taking in this case. I mean, I  
4 haven't -- to be -- you know, I've spent enough  
5 time studying the Civil War history on ballot  
6 receipt, so I haven't studied everything about  
7 that election qualification.

8 My -- my -- my sort of first-cut  
9 answer standing here is that can be understood  
10 as part of the canvassing process and that can  
11 take place after.

12 JUSTICE BARRETT: But I guess why can  
13 you separate out -- if historically those two  
14 went hand in hand, that the qualifications --  
15 there was the offer to vote and vote. It seems  
16 to -- it seems odd to say that the election is  
17 concluded by receipt when, historically, both  
18 of those things happened at the same time. So  
19 why is that one piece of history plucked out?

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

1 B, it's the thing that to this day every state  
2 considers indispensable.

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

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

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

24 And our humble submission is finality  
25 should take place on Election Day.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Thomas, anything further?

4 Justice Alito?

5 JUSTICE ALITO: We have lots of  
6 phrases that involve two words, the last of  
7 which, the second of which is day, Labor Day,  
8 Memorial Day, George Washington's birthday,  
9 Independence Day, birthday, and Election Day,  
10 and they're all particular days.

11 So, if we start with that, if I have  
12 nothing more to look at than the phrase  
13 "Election Day," I think this is the day in  
14 which everything is going to take place and --  
15 or almost everything. And then we have three  
16 points in time: 1844, 1872, 1914.

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

22 MR. CLEMENT: Well, I think you could  
23 choose any of the three. I mean, honestly, I  
24 think the single best one, if you're just going  
25 to choose one, is 1872. And the reason I say

1 that is because 1914 is the latest in time, but  
2 that's the one that Congress gave the least  
3 thought to because they -- it was right after  
4 the Seventeenth Amendment, and they just said,  
5 yeah, whatever the rule is for the -- for the  
6 House of Representatives, we'll use that for  
7 the Senate.

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

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

23 MR. CLEMENT: I -- I think they would  
24 have said that's the day by which, at a bare  
25 minimum, the ballots have to be cast and

1 received into official custody. And I think  
2 they would have -- to the extent they were  
3 thinking about the Civil War history, I think  
4 the thing that would have impressed them is  
5 that even at a time of great national  
6 emergency, every one of the states insisted  
7 that the ballots be received into official  
8 custody by Election Day, whether by proxy or by  
9 field voting.

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

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

22 JUSTICE ALITO: Well, let's take the  
23 last of the days, 1914. My understanding is  
24 that Maryland departed from your position a  
25 couple of years after that. Did anybody say at

1 that time, wow, Maryland is -- is violating the  
2 Election Day statute?

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

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

1 federal law specifying Election Day.

2 JUSTICE ALITO: Okay. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Sotomayor?

5 JUSTICE SOTOMAYOR: But the rule of  
6 decision was based on state law in Maddox,  
7 wasn't it?

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

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

21 Is that legal under your theory?

22 MR. CLEMENT: I -- I -- I think that's  
23 compliant with the federal Election Day  
24 statute.

25 JUSTICE SOTOMAYOR: Why? There's no

1 state official who has received it. A ballot  
2 box has received it.

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

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

20 MR. CLEMENT: It was official --

21 JUSTICE SOTOMAYOR: An empty --  
22 empty -- a ballot box with no person next to it  
23 is official enough --

24 MR. CLEMENT: So it --

25 JUSTICE SOTOMAYOR: -- but the Postal

1 Service is not?

2 MR. CLEMENT: The Postal Service is  
3 not. I don't know all the details about what  
4 Nevada and Rhode Island did. I -- I'm actually  
5 not even sure the Nevada statute was ever  
6 implicated because Nevada didn't become a state  
7 until the Civil War was basically over.

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

25 And I don't know -- like, I mean, you

1 know, they say it's illegal to recall your  
2 ballot. But the post office allows you to do  
3 that. The -- FedEx allows you to do that. As  
4 Justice Gorsuch indicated, I don't think  
5 there's any way --

6 JUSTICE SOTOMAYOR: We have --

7 MR. CLEMENT: -- the state would even  
8 know it happened.

9 JUSTICE SOTOMAYOR: We have a state  
10 government official, lawyer, telling us on  
11 behalf of the state how to read their laws  
12 where we, on an issue that was forfeited below  
13 and not raised below, are going to assume to  
14 the contrary now?

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

21 JUSTICE SOTOMAYOR: They can correct.

22 MR. CLEMENT: But it's in the Fifth  
23 Circuit decision, so it's properly before this  
24 Court.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 JUSTICE KAGAN: Mr. Clement, I'm  
2 wondering what you make of the 2022 amendment  
3 because that pretty clearly suggests that  
4 voting can take place not just on a day but in  
5 a period.

6 And what are we to make of the fact  
7 that Congress just a few years ago said there's  
8 a period of voting and we're fine with that?

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

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

1           So -- so I think that this is not like  
2           some special exception. It's -- it's -- it's  
3           an exception in the statute that assumes that a  
4           state is going to have not a day of voting but  
5           very likely a period of voting.

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

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

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

1 it's the voting and -- you know, the casting of  
2 the vote and the receipt of the vote, and both  
3 of those things have to be on Election Day.  
4 And just like a normal person says, okay, well,  
5 when I early vote, I'm not doing that on that  
6 first Tuesday.

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

16 They -- they did it right in the wake  
17 of --

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

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

25 MR. CLEMENT: No, I -- I don't think

1 it would. And, I mean, you know, it's my  
2 theory, so I'll tell you what it is. These  
3 things have to be consummated by Election Day.  
4 That's -- I'm not making that word up. That's  
5 not the word I would make up if I were making  
6 up words. But it's the word that this Court  
7 used in Foster against Love.

8 JUSTICE KAGAN: So that's where the  
9 theory comes from? It comes from the word that  
10 this Court used in Foster?

11 MR. CLEMENT: Yes. And -- and -- and  
12 that was a word that's --

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

20 MR. CLEMENT: No, no. With respect, I  
21 mean, I said two things when I first answered  
22 this question. The differential history -- and  
23 I -- I -- you know, I think it's worth reading  
24 Judge Kleinfeld's opinion on this -- it's the  
25 Keisling case in the Ninth Circuit -- because

1 he goes through this in quite some detail, and  
2 he admits there's actually a pretty good  
3 argument based on the text and -- and -- and  
4 Foster that early voting is problematic.

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

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

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Gorsuch?

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

1 MR. CLEMENT: Well, I -- I -- I don't  
2 think so. I think -- I think --

3 JUSTICE GORSUCH: Well -- well --  
4 well --

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

7 JUSTICE GORSUCH: -- receipt by  
8 somebody by Election Day.

9 MR. CLEMENT: Okay. If you're going  
10 to --

11 JUSTICE GORSUCH: I'm going to do  
12 that.

13 MR. CLEMENT: The -- the reason I trip  
14 up on that --

15 JUSTICE GORSUCH: I know. I know.  
16 But just work -- work -- work --

17 MR. CLEMENT: Okay. Okay. Sorry.

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

24 I think the disagreement is receipt by  
25 whom. And for you, it's an election official.

1 And for your friend on the other side, it -- it  
2 could be my neighbor. Is -- is that a fair  
3 summary of -- of your -- of your views?

4 Because it seems to me you both agree  
5 that the final decision needs to be made by  
6 Election Day, which both would -- both of you,  
7 therefore, would permit early voting.  
8 Thoughts?

9 MR. CLEMENT: So I don't disagree  
10 much.

11 JUSTICE GORSUCH: Okay.

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

20 And if the vote is submitted to the  
21 "somebody" before Election Day, but it's not  
22 received by the registrar until the sixth day,  
23 it's a nullity.

24 JUSTICE GORSUCH: No, I --

25 MR. CLEMENT: So that's just the --

1 the subtlety that I wanted to add.

2 JUSTICE GORSUCH: I -- no, I  
3 appreciate that because, at -- at least as I  
4 read Mississippi law, you're right, that --  
5 that it isn't accepted until an election  
6 official marks it accepted. That's its own  
7 rule.

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

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

22 JUSTICE GORSUCH: Yeah.

23 MR. CLEMENT: And then the statute  
24 itself goes on to say that if it's not received  
25 by the registrar within five days, even though

1 it was submitted --

2 JUSTICE GORSUCH: It's a nullity.

3 MR. CLEMENT: -- even though it went  
4 to FedEx, it's a nullity and it must be  
5 destroyed.

6 I mean, Mississippi takes receipt  
7 deadlines so seriously that if you miss their  
8 receipt deadline, your ballot is destroyed.

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

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

25 JUSTICE GORSUCH: On -- on time. And

1     how about means? Do you see any principled way  
2     we could draw a line on -- on means and say,  
3     okay, common carriers are different than Bob?

4             MR. CLEMENT: See, I think it's  
5     tricky, especially because all of these  
6     statutes purport to be time regulations, not  
7     manner regulations. And the thing to keep in  
8     mind is that under Article II, the  
9     congressional power is limited to time  
10    regulations.

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

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

21            JUSTICE GORSUCH: By anybody?

22            MR. CLEMENT: By anybody.

23            CHIEF JUSTICE ROBERTS: Justice  
24    Kavanaugh?

25            JUSTICE KAVANAUGH: Can I follow up on

1 General Stewart's who decides argument? I  
2 think, if you were looking at the text in  
3 isolation, day for the election, your first  
4 instinct might be in-person voting on that day  
5 is what that text literally meant.

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

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

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

23 I just want to get your response to  
24 how we think about the historical practice and  
25 the text and then the who decides.

1           MR. CLEMENT: Sure. So, on the  
2 historical practice, the thing that I think is  
3 remarkable is this unbroken historical  
4 tradition, at least from 1845 to 1914, there is  
5 no example of somebody -- of an election with a  
6 state having a ballot receipt deadline  
7 that's -- that's other than by the Election  
8 Day.

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

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

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

1 problem.

2           Now, in the Morley brief, you know,  
3 I -- I would take the bitter with the sweet on  
4 that, which is what he says is, you know, I  
5 don't think the text gets you all the way  
6 there. I beg to differ. I think the text,  
7 original public meaning, gets you all the way  
8 there. But what he says should be the  
9 tie-breaker is, what rule does a better job  
10 with dealing with actual or perceived fraud?

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

24           And you, I think, quoted from  
25 Professor Pildes, who I think got this exactly

1 right. I mean, if you have an election and the  
2 election is going to turn on late-arriving  
3 ballots in a way that means what everybody kind  
4 of thought was the result on Election Day ends  
5 up being the opposite a week later, 21 days  
6 later, the losers are not going to accept that  
7 result, full stop. They won't.

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

15 JUSTICE KAVANAUGH: Why have so many  
16 states allowed this then?

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

23 I do think that there are other ways  
24 to do that than the ballot deadline, as I've  
25 talked about. And I think Mississippi's voted

1 with their feet. I don't think anybody's going  
2 to be disenfranchised in Mississippi if -- when  
3 you can vote, if you're -- only if you're  
4 overseas, you can vote by e-mail. So I think  
5 Mississippi solved that in a much more targeted  
6 way.

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

16 JUSTICE KAVANAUGH: You were asked  
17 about the 2000 election. I don't think you  
18 were able to finish that answer. Do you have  
19 more you want to say about that?

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

25 And the reason there was a consent

1 decree is that Florida had violated the  
2 principal protection of UOCAVA, which is  
3 getting the absentee ballots to the voters  
4 overseas well in advance of the election. And  
5 so having blown that deadline, there was a  
6 consent decree that extended the -- the --  
7 the -- the receipt date.

8           We don't have any quarrel with that.  
9 You know, federal courts have the authority to  
10 remedy violations of UOCAVA. And I don't think  
11 extending the deadline is off the table as a  
12 judicial remedy, though, actually, I think, in  
13 2026, as opposed to 2000, maybe the judicial  
14 remedy would be to let the UOCAVA voters vote  
15 by e-mail, even in a state unlike Mississippi  
16 that doesn't allow it.

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

1 JUSTICE KAVANAUGH: Last one. If you  
2 were to prevail here and, say, our decision was  
3 issued in June, Purcell issues with the states  
4 for the upcoming fall elections?

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

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

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Barrett?

1           JUSTICE BARRETT: So I'm trying to  
2 figure out how to think about the history, and  
3 you said a moment ago that what we have is the  
4 original public meaning of Election Day at the  
5 time and in the late 19th century, in 1917, et  
6 cetera, was ballot receipt, and you invoked the  
7 various state laws that required receipt by  
8 Election Day.

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

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

1 to treatises that are summarizing some of the  
2 cases?

3 And is there any reason to think that  
4 these laws were adopted because of a concern  
5 about preemption by federal law as opposed to  
6 just this is a really good policy, this is how  
7 elections should run?

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

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

25 Now, on the history, you know, this is

1 where I just think the Civil War practice is so  
2 powerful because my friend says, well, when  
3 they were first, you know, passed, like, the  
4 difference between casting and receiving the  
5 ballot into official custody hadn't ripened.  
6 But the Civil War ripened it, and the one thing  
7 every state, including Rhode Island and Nevada,  
8 did is they said it has to be in some kind of  
9 official custody by Election Day.

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

22 MR. CLEMENT: No, I -- I think we -- I  
23 mean, to me, like, you know, like, can I  
24 connect --

25 JUSTICE BARRETT: Yeah.

1           MR. CLEMENT: -- the dots precisely?  
2       No, but, like, they did it because they thought  
3       that's what an election means and that's what  
4       an Election Day means. They thought it would  
5       just be unthinkable, would no longer be an  
6       election or an Election Day, it wouldn't be  
7       happening on Election Day, if it could take  
8       place -- if ballot receipt could place -- take  
9       place some other time. So --

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

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

24           MR. CLEMENT: I -- I would say they  
25       probably fall out because nobody thinks they're

1 essential, which is to say, you know, if a  
2 state wanted to have, like, early voting but,  
3 like, no voting on Election Day, maybe that  
4 would be a hard case.

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

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

1 going -- whoever it is, is going to accept that  
2 outcome, and the supporters aren't going to  
3 accept the outcome. And so that's something  
4 that I just don't think is implicated by early  
5 voting.

6 JUSTICE BARRETT: Okay. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Jackson?

9 JUSTICE JACKSON: Except people  
10 accepted the possibility of that outcome for a  
11 hundred-plus years now because this idea of the  
12 votes being cast by Election Day and counted  
13 after Election Day has been around, right?

14 MR. CLEMENT: Well --

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

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

1           MR. CLEMENT: So kind of three points  
2 about that. I mean, one is I don't think it's  
3 true that there was this hundred-year sort of  
4 pattern and nobody raised an objection. I  
5 think the Maddox case in 1944 is a powerful  
6 example that the idea that Election Day means  
7 Election Day is not something that only  
8 occurred to lawyers in the post-COVID world.

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

20           JUSTICE JACKSON: But I guess I don't  
21 understand why that isn't, the variety that  
22 you're describing isn't a strike against your  
23 view that Congress has precluded this.

24           I mean, others of my colleagues have  
25 looked at or talked about Congress legislating

1 in this area. They are obviously aware that  
2 there are states that are doing this. And they  
3 have not spoken to it. They have not  
4 specifically precluded it.

5 Now you say that maybe that's because  
6 they assumed that Election Day in the federal  
7 statutes that we're examining from a hundred  
8 years ago does the work. But Congress is today  
9 considering an election-related statute that  
10 would specifically prohibit this, which means  
11 that Congress probably didn't understand its  
12 existing legislation to do this.

13 MR. CLEMENT: I mean, I haven't  
14 studied the current legislation. I think it  
15 probably does quite a bit more than this and  
16 probably affects other elections, like primary  
17 elections. I don't know for sure, though. I  
18 haven't studied it, but --

19 JUSTICE JACKSON: But it does address  
20 this. It address -- specifically addresses --  
21 and we're talking about the Make Elections  
22 Great Again Act -- specifically addresses the  
23 idea of preempting state post-Election Day  
24 ballot deadlines.

25 And so, if that's true, then it seems

1 as though Congress doesn't believe that its  
2 current legislation has done this -- this work.

3 MR. CLEMENT: Well, Congress probably  
4 doesn't know how this Court is going to decide  
5 this case, so it -- it probably can legislate  
6 against that veil of ignorance one way or the  
7 other.

8 JUSTICE JACKSON: Right. The worry is  
9 that you want this Court to decide the case  
10 rather than have Congress do it.

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

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

1 official custody?

2 JUSTICE JACKSON: And how do you --

3 MR. CLEMENT: But everybody agrees it  
4 preempts something.

5 JUSTICE JACKSON: How do you respond  
6 to the notion that when we look, as the Society  
7 for Rule of Law Institute suggests that we do,  
8 at historical practices with respect to  
9 electors and specifically Congress in 1787  
10 adopting a resolution establishing that "the  
11 day fixed for the election of the President,"  
12 that that's the day on which the election --  
13 electors will vote and transmit their votes and  
14 that the president of the Senate would receive  
15 their votes at a later date.

16 So the concept of casting one's vote  
17 versus the receipt of the vote was very early  
18 on distinguished.

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

25 So what happens first is the states

1 address the appointment of the electors in that  
2 state, and then, later, that has to be received  
3 and certified in the Senate because then, in  
4 the Senate, they're going to figure out who won  
5 the national election. So -- so --

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

13 MR. CLEMENT: See, I --

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

16 MR. CLEMENT: So I don't dispute that  
17 if you have two really separate elections, that  
18 you can then, have you -- having bifurcated the  
19 elections, you can bifurcate the idea of  
20 casting and receiving.

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

22 JUSTICE JACKSON: Right, but the --

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

25 JUSTICE JACKSON: -- but Congress

1     could have -- Congress could have had them on  
2     both the same day if that's what an election  
3     is. I mean, your argument is rooted in this  
4     notion that as a common-sense matter, as a  
5     general matter, if we're going to have an  
6     Election Day, that's the day when everything is  
7     supposed to happen.

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

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

22            MR. CLEMENT: So I still think you're  
23    eliding -- with all due respect, you're eliding  
24    that there are kind of two separate elections  
25    there. And in all the states, when they

1       elected the electors for the President  
2       election, they cast the ballots and received  
3       the ballots instantaneously in that state.

4               Then there's a separate process for  
5       getting the results from the states to the  
6       national election and figuring out how it was  
7       all processed. I don't think in 1792 that  
8       could have happened instantaneously.

9               I think it took a while to get from  
10       Georgia to the seat of government in order for  
11       that to -- to happen, and so Congress  
12       understandably provided an interval there.

13               But I think, for the elect -- the  
14       election of the electors in the states, the  
15       casting and the receipt would have been  
16       simultaneously. They might well have been  
17       doing it by putting beans in a bowl back in  
18       1792, but I think, as the parties agree, by  
19       about 1845, certainly, by 1872, the process of  
20       voting by ballot had been well established, and  
21       those were cast and received instantaneously.

22               JUSTICE JACKSON: Thank you.

23               CHIEF JUSTICE ROBERTS: Thank you,  
24       counsel.

25               General Sauer.

1                   ORAL ARGUMENT OF GEN. D. JOHN SAUER  
2                   FOR THE UNITED STATES, AS AMICUS CURIAE,  
3                   SUPPORTING THE RESPONDENTS  
4                   GENERAL SAUER: Mr. Chief Justice, and  
5 may it please the Court:

6                   As the argument so far reflects,  
7 Mississippi's theory of election is so general  
8 and permissive that it would authorize statutes  
9 that Congress could not possibly have approved  
10 in the 19th century.

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

18                  Official receipt is at the  
19 definitional heart of election. A resource  
20 from the 1840s onward that addresses this  
21 specific question treats official receipt as  
22 essential to an election.

23                  Mississippi cites a few definitions  
24 that are too general to address the question,  
25 but they cite no authorities holding that a

1 vote can be perfected by anything other than  
2 official receipt.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: General Sauer, what  
5 effect would your approach have on early  
6 voting?

7 GENERAL SAUER: We agree with both  
8 sides that early voting is still acceptable and  
9 we agree, in particular, that Mr. Clement said  
10 that early voting has two things in favor of  
11 it, a distinct historical pedigree that really  
12 starts, I think, as he emphasized there, in --  
13 in those Civil War practices that were before  
14 the 1872 Congress, and also, as all the courts  
15 of appeals who addressed this, the -- the three  
16 cases that addressed this around just after  
17 2000, after Foster, all concluded that that is  
18 what this Court was referring to when it talked  
19 about consummation in Footnote 4.

20 The Court left open the possibility  
21 that does have this better historical pedigree  
22 that -- that there can be a process where  
23 ballots are being received earlier, but that  
24 ballot box has to close on Election Day.

25 CHIEF JUSTICE ROBERTS: I'm not sure I

1 understand exactly how that answer is  
2 responsive to the point that if the Election  
3 Day is the voting and taking, that has to be  
4 that day. So maybe -- maybe I just missed it.

5 But it seems to me maybe you're not  
6 saying anything other than, well, that's  
7 different.

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

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

24 We think that conceptualizing it as,  
25 you know, the courts of appeals cases do as

1     there's a process, that process is consummated,  
2     it's finalized, it's perfected is the term they  
3     use in the Congressional Record in 1844, it's  
4     perfected on Election Day, the ballot box  
5     closes, and we think that's the best way to  
6     address early voting.

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

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

19            And Congress couldn't have conceived  
20    of the kind of early voting we have now.  It  
21    couldn't have conceived of a thousand other  
22    ways in which we administer elections now.

23            And so -- so I think it really is a  
24    problem for you as to how you draw this line  
25    and say, well, this is across the line, but all

1 these other things that we do differently now  
2 from the way we used to do them in 19 -- in the  
3 19th century, those don't worry about.

4 GENERAL SAUER: I disagree with that,  
5 and the reason I disagree with it is the Civil  
6 War practices. Proxy voting has this aspect of  
7 the private choice happening earlier. So early  
8 voting is already in the forefront of the mind,  
9 forms of early voting at least are already in  
10 the forefront of the mind of Congress in 1872.

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

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

22 GENERAL SAUER: I strongly -- I  
23 strongly agree with that in the sense that, you  
24 know, reflect or repeating what Mr. Clement  
25 said, which is that you have a practice that

1 involves early voting, but you also have states  
2 taking these herculean, extraordinary efforts  
3 to make sure that the ballot boxes -- the votes  
4 are received and the ballot box closes on  
5 Election Day, whether it's soldiers, like,  
6 going in the front and giving their votes over  
7 to, you know, de jure election officials who  
8 are actually commanding officers or whether or  
9 not it's submitting them in that proxy voting  
10 practice.

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

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

25 GENERAL SAUER: I think my answer to

1 that is that the ordinary indicators of  
2 original public meaning from the 19th century  
3 do grapple repeatedly, surprisingly repeatedly  
4 grapple with the question of whether or not  
5 receipt is essential to election.

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

14           Mississippi has no 19th century  
15 source, no source at any time prior to 1918  
16 that says a vote is cast by anything less than  
17 official receipt. So there actually is a  
18 surprising consensus in the 19th century  
19 authorities that cuts in our direction. And  
20 that's reinforced by the -- the efforts the  
21 states took in -- during the Civil War to  
22 ensure that receipt occurred on Election Day.

23           So you put those two together and you  
24 come up with a very -- you come to, I think, a  
25 very powerful place and really surprisingly

1 powerful evidence of original public meaning on  
2 this specific discrete question even though no  
3 one had done it yet in all these other contexts  
4 where, really, you see the 19th century  
5 authorities, they have to pare to the  
6 definitional bone really.

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

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

1 with casting and receipt are required for  
2 voting --

3 JUSTICE JACKSON: Yes, but, since  
4 then --

5 GENERAL SAUER: -- voting in that  
6 election.

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

25 So how is it that we focus in, home

1 in, right in the 19th century and that's the  
2 relevant practice that you want us to consider  
3 and not the more recent practices, the  
4 practices of everybody understanding what  
5 Election Day means, to include this kind of  
6 thing?

7           GENERAL SAUER: Mississippi admits  
8 that every single one of those examples occurs  
9 after the relevant period when all these  
10 statutes are enacted, so they are not --

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

23           I -- I don't recall, and maybe we  
24 have, but I'm just, you know, curious about  
25 this really heavy reliance on the 19th century

1 understanding of the word "Election Day,"  
2 especially when we have a more recent  
3 understanding that has been implemented and  
4 Congress hasn't said anything about it.

5 GENERAL SAUER: I would say the 19th  
6 century evidence of meaning is the best  
7 evidence of the original public meaning of the  
8 statutes at the time they were adopted, 1845,  
9 1872.

10 JUSTICE JACKSON: And you're saying  
11 that governs? We have to -- we have to  
12 interpret Election Day -- notwithstanding that  
13 Congress may have wanted states to experiment,  
14 that states have experimented and done other  
15 things, we are bound, you say, by exactly what  
16 Election Day -- people thought it meant at the  
17 time these statutes were enacted?

18 GENERAL SAUER: By its original public  
19 meaning. And, of course, Congress was very  
20 concerned when it passed these statutes,  
21 1844 -- or 1845 and 1872, about the exact thing  
22 that Mississippi or almost the exact thing that  
23 Mississippi would allow, which is staggered  
24 ballot receipt deadlines.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Alito?

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: Tell me what the  
6 act is that you think has to be done by  
7 Election Day by the official.

8 GENERAL SAUER: All --

9 JUSTICE SOTOMAYOR: Received or  
10 accepted?

11 GENERAL SAUER: Received. All ballots  
12 have to be received and the ballot box has to  
13 close on Election Day.

14 JUSTICE SOTOMAYOR: The ballot box has  
15 to close?

16 GENERAL SAUER: Yeah, the proverbial  
17 ballot box.

18 JUSTICE SOTOMAYOR: So what do we  
19 do -- and I know you did this -- and I -- I am  
20 a little upset -- not a little, a lot upset, by  
21 many of the statements in your brief quoting  
22 historical sources out of context. But the --  
23 Paine's Treatise on the Law of Elections, the  
24 public officers, you claim had a traditional  
25 rule, was that the legal votes duly offered at

1 the polls but not actually deposited in the  
2 ballot box cannot be counted.

3 But I looked to that treatise, and it  
4 says, in some of the states, that is the rule  
5 but that in others, and also for the House,  
6 U.S. House of Representatives, the rule was the  
7 opposite. As Paine wrote, "it was in 1888 an  
8 established rule of the House of  
9 Representatives of the United States that a  
10 vote duly offered and unlawfully rejected," so  
11 it wasn't accepted at the polls, "will be  
12 counted in a contest even if not accepted by  
13 officials on Election Day."

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

24 So it seems as if your rule is already  
25 historically destroyed at the time of these

1 examples that you quote to us.

2 GENERAL SAUER: I respectfully  
3 disagree, and I stand by exactly how we  
4 characterized those sources and all the  
5 historical sources in our brief. If you go to  
6 the Paine treatise -- and I think we refer to  
7 this in the very next sentence in our brief --  
8 the Paine treatise says the traditional rule is  
9 it's got to actually be deposited, but then it  
10 notes, later in the 19th century, some  
11 authority says, well, you know, if they  
12 challenge your qualifications and -- and they  
13 were wrong, as long as they received it, either  
14 way it's official. Receipt is what matters.  
15 The state has it in its custody.

16 And, of course, they use --

17 JUSTICE SOTOMAYOR: Now -- now you're  
18 changing the definition.

19 All right. Thank you, counsel.

20 GENERAL SAUER: Well, we've said  
21 receipt. "Receipt" is the word that we've  
22 used. We've used that consistently. And that  
23 Paine treatise points out that, either way,  
24 whether it's got to actually be in the ballot  
25 box or officially received, official receipt is

1 essential to an election. And so do all -- all  
2 three of the treatises, all five of the legal  
3 dictionaries, including the one you referred  
4 to.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 Justice Gorsuch?

7 Justice Kavanaugh?

8 Justice Barrett?

9 Justice Jackson?

10 Thank you, counsel.

11 GENERAL SAUER: Thank you.

12 CHIEF JUSTICE ROBERTS: Rebuttal,

13 Mr. Stewart?

14 REBUTTAL ARGUMENT OF SCOTT G. STEWART

15 ON BEHALF OF THE PETITIONER

16 MR. STEWART: Thank you, Mr. Chief

17 Justice.

18 I'd like to do my best to make three  
19 points. First, there was a concession by  
20 Mr. Clement that I was surprised about because  
21 it seemed to be different from what he said in  
22 his brief. He said he'd have no objection to  
23 doing what the U.S. Solicitor General proposes  
24 on UOCAVA. I just want to briefly make clear,  
25 as we've said in our briefs, that if this Court

1 agrees with the Solicitor General on UOCAVA,  
2 that means vacatur would be required because  
3 the Fifth Circuit did not allow state laws  
4 allowing UOCAVA votes to arrive after Election  
5 Day.

6           Second, I want to try to tie together  
7 some points that go back to Justice Barrett's  
8 questions, Justice Kagan's questions, Justice  
9 Sotomayor's questions, some other questions  
10 about 19th century history here. My friend,  
11 Mr. Clement, emphasized, the Solicitor General  
12 did as well, hey, you know, those show that you  
13 need a ballot receipt. I think the key point  
14 to recognize there is that ballot receipt was  
15 not possible in the 19th century without  
16 somebody showing up in person and undergoing an  
17 on-the-spot qualifications check. If you need  
18 ballot receipt, you need those other things as  
19 well, and that's quite critical to the plain  
20 meaning in this case.

21           I think the better view is that, hey,  
22 when people were holding elections in person at  
23 the time, naturally, they were going to be  
24 receiving ballots on Election Day. That  
25 doesn't mean that that was required or baked

1 into an election any more than in-person voting  
2 or on-the-spot qualification checks by  
3 feller -- fellow voters is baked into an  
4 election.

5 I -- I would -- I would add, Justice  
6 Sotomayor, you mentioned some things, Paine  
7 treatise and otherwise. I -- I would also say,  
8 if you look at the Solicitor General's sources,  
9 they emphasize not just voter choice, but they  
10 also emphasize that at the time the method of  
11 making that choice was in person, on-the-spot  
12 qualification checks, those kind of things.  
13 Those are not things you really see quoted or  
14 cited in the Solicitor General's brief, but  
15 they bear out what we've said about  
16 Mr. Clement's 19th-century election codes.

17 I'd say that also this history  
18 explains the Civil War receipt of absentee  
19 ballots. Mr. Clement alluded to the idea that  
20 states went to herculean efforts to receive  
21 ballots on Election Day. That's not what they  
22 went to herculean efforts to do. They went to  
23 herculean efforts to hold elections effectively  
24 in person because that is the method of voting  
25 that people used at the time. That's why field

1 voting was so dominant. And -- and -- and the  
2 other thing that states were trying to do at  
3 the time was to adhere to actual or perceived  
4 in -- in-person, in-district voting  
5 requirements. So that's what they were doing.

6           They were holding elections where  
7 people would cast ballots in person, which was  
8 the common, standard way. And when that's  
9 happening, yes, naturally, ballots are going to  
10 be received by Election Day. That did not make  
11 it a ripe issue or a settled issue. It did not  
12 decouple ballot receipt from ballot casting,  
13 but it did not foreclose that either.

14           Last thing, I just want to refer to  
15 your neighbor again, Justice Gorsuch. You  
16 know, I want to be clear, you know, we have not  
17 made a -- you know, the argument for the  
18 neighbor to be allowed to cast ballots, but I  
19 will say that -- I would emphasize my friends  
20 do allow the neighbor to cast your ballot. The  
21 neighbor just needs to be designated, I think,  
22 as Mr. Clement put it, cloaked with government  
23 authority.

24           You know, it's quite something for a  
25 neighbor, a party boss, you know, some bad

1 actor to be able to become a ballot receiver  
2 just because they're cloaked with state  
3 authority. You know, if -- if that's allowed,  
4 then I don't see why the historically  
5 recognized, for a hundred years, method of  
6 casting a ballot through the mail would not be  
7 equally legitimate, especially when the federal  
8 government itself is perfectly fine with that  
9 method and Congress has been fine with that --  
10 that method for United States tax returns,  
11 which, like, carry huge civil and criminal  
12 consequence, also have -- are very critical on  
13 deadlines.

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

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 The case is submitted.

5 (Whereupon, at 12:13 p.m., the case  
6 was submitted.)

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