No. 24-60395

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPUBLICAN NATIONAL COMMITTEE; MISSISSIPPI REPUBLICAN PARTY; JAMES PERRY; MATTHEW LAMB,

Plaintiffs – Appellants

v.

JUSTIN WETZEL, in his official capacity as the clerk and registrar of the Circuit Court of Harrison County; TONI JO DIAZ, in their official capacities as members of the Harrison County Election Commission; BECKY PAYNE, in their official capacities as members of the Harrison County Election Commission; BARBARA KIMBALL, in their official capacities as members of the Harrison County Election Commission; CHRISTENE BRICE, in their official capacities as members of the Harrison County Election Commission; CAROLYN HANDLER, in their official capacities as members of the Harrison County Election Commission; MICHAEL WATSON, in his official capacity as the Secretary of State of Mississippi,

Defendants – Appellees

VET VOICE FOUNDATION; MISSISSIPPI ALLIANCE OF RETIRED AMERICANS,

Intervenor Defendants – Appellees

LIBERTARIAN PARTY OF MISSISSIPPI,

Plaintiff – Appellant

v.

JUSTIN WETZEL, in his official capacity as the clerk and registrar of the Circuit Court of Harrison County; TONI JO DIAZ, in their official capacities as members of the Harrison County Election Commission; BECKY PAYNE, in their official capacities as members of the Harrison County Election Commission; BARBARA KIMBALL, in their official capacities as members of the Harrison County Election Commission; CHRISTENE BRICE, in their official capacities as members of the Harrison County Election Commission; CAROLYN HANDLER, in their official capacities as members of the Harrison County Election Commission; MICHAEL WATSON, in his official capacity as the Secretary of State of Mississippi,

Defendants – Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi, Nos. 1:24-cv-25 and 1:24-cv-37 (Guirola, J.)

REPLY BRIEF OF APPELLANT LIBERTARIAN PARTY OF MISSISSIPPI

T. Russell Nobile
Counsel of Record
JUDICIAL WATCH, INC
P.O. Box 6592
Gulfport, MS 39506
(202) 527-9866

Eric W. Lee
Robert D. Popper
JUDICIAL WATCH, INC
425 Third Street SW, Suite 800
Washington, D.C. 20024

September 16, 2024

Counsel for Plaintiff-Appellant Libertarian Party of Mississippi

CERTIFICATE OF INTERESTED PARTIES

Case No. No. 24-60395

Undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. Plaintiffs-Appellants Libertarian Party of Mississippi, Republican National Committee, the Mississippi Republican Party, James Perry, and Matthew Lamb.
2. Defendants-Appellees Justin Wetzel, Toni Jo Diaz, Becky Payne, Barbara Kimball, Christene Brice, and Carolyn Handler, in their official capacities as members of the Harrison County Election Commission, and Secretary of State Michael Watson, in his official capacity.
3. Intervenor-Defendants Vet Voice Foundation and Mississippi Alliance for Retired Americans.
4. Amicus Curiae Disability Rights Mississippi, League of Women Voters of Mississippi, and Democratic National Committee.
5. T. Russell Nobile, Robert Popper, Eric W. Lee, Spencer Mark Ritchie, Tim C. Holleman, Rex M. Shannon, III, Wilson D. Minor, Christopher D. Dodge, Elizabeth C. Frost, Michael Brandon Jones, Paloma Wu, Richard

Alexander Medina, Robert B. McDuff, Tina Meng Morrison, Greta K. Martin, Joshua F. Tom, and David W. Baria.

September 16, 2024

s/ Russ Nobile
T. Russell Nobile

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ARGUMENT

Plaintiff-Appellant Libertarian Party of Mississippi ("Plaintiff") respectfully submits this reply brief in response to Defendants-Appellees Harrison County Circuit Clerk Justin Wetzel, members of the Harrison County Election Commission (Toni Jo Diaz, Becky Payne, Barbara Kimball, Christene Brice, and Carolyn Handler), and Secretary of State Michael Watson (together "Defendants" or "State"), and Intervenor-Defendants-Appellees Vet Voice Foundation and Mississippi Alliance for Retired Americans ("Vet Voice" or "Intervenors") and in further support of Plaintiff's request that the judgment of the district court be reversed and the matter remanded for remedial proceedings.

I. Mississippi's Receipt Deadline Extends the Time to Complete "the Election" Beyond the Time Set Under Federal Law.

The preliminary question remains: what is the governing Elections Clause preemption standard in this Circuit after *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1 (2013)? Though initially acknowledging that state law need only be "inconsistent" with federal law to be preempted, the State's and Vet Voice's arguments *repeatedly* veer back to suggesting that a direct conflict is required. But whether Congress "knows how" to override Mississippi's Receipt Deadline, or could have said so "explicitly," or "express[ed] an intent" to preempt, is not the standard under

Inter Tribal.[1] State Br. 34, 36, 38, and 39; and VV Br. 14, 15, 16, 17, 38, 39, 40, 42, and 43. Indeed, the State's and Vet Voice's arguments invert the relationship under the Elections Clause. "If Congress intended to permit states to so alter or modify federal election statutes […] it would have so indicated." *Fish v. Kobach*, 840 F.3d 710, 729 (10th Cir. 2016). "The Elections Clause does not require Congress to expressly foreclose such modifications by the states." *Id.*

This Court has had limited opportunities to evaluate the governing preemption standard since *Inter Tribal*. *See* LP Br. 16-17 (discussing *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773 (5th Cir. 2000) and *Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013)). Plaintiff previously described the standards adopted by the Ninth Circuit and later affirmed by *Inter Tribal* and by the Tenth Circuit in applying *Inter Tribal*. LP Br. 13-20 (discussing *Fish* and *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012)). Neither the State nor Vet Voice meaningfully respond to these cases. *See* State Br. 32 and VV Br. 16. But their repeated suggestions that Election Day statutes must "speak to" ballot receipt implies that Election Clause preemption requires a "direct conflict." That is certainly not the case after *Inter Tribal*, as the Tenth Circuit explained: "We do not finely parse the federal statute for gaps or silences into which state regulation might fit." *Fish*, 840 F.3d. at 729. That

[1] These very arguments were made to, and rejected by, the Court in *Inter Tribal*. LP Br. 14 n.8.

is because if states were "states able to build on or fill gaps or silences in federal election statutes […] they could fundamentally alter the structure and effect of those statutes."[2] *Id.* To the extent the State and Vet Voice maintain that this Court's pre-*Inter Tribal* ruling in *Bomer* requires a "direct conflict" for Election Clause preemption, they are incorrect.[3]

A. A State Law Can Be Inconsistent with A Federal Law, Even Where the Federal Law Does not "Speak to" the State Law.

Federal statutes do not need to "speak to" existing or future state law for those laws to be inconsistent and preempted. In *Inter Tribal*, the Court did not find that the National Voter Registration Act ("NVRA") "spoke to" a state requirement for documentary proof of citizenship ("DPOC"), but nonetheless found Arizona's law to be preempted. Indeed, the NVRA's text does not "speak to" states' ability to enforce citizenship requirements under their state constitution. Certainly, Congress "knew how" or could have "expressed an intent" to preempt state authority to enforce a citizenship requirement for voter eligibility when it passed the NVRA. But it did not, and that silence did not affect the outcome in *Inter Tribal*.

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[2] The Tenth Circuit subsequently reaffirmed its analysis of Election Clause preemption after *Inter Tribal*. *Fish v. Schwab*, 957 F.3d 1105, 1141 (10th Cir. 2020).

[3] The Libertarian Party agrees with the RNC that the district court erred in "strongly presum[ing]" that Mississippi's law was not preempted. RNC Br. 34; ROA.1179. Where a dispute involves Congressional exercise of its powers under the Elections and Electors Clauses, no such presumption is afforded to state law. 570 U.S. at 14-15.

Inter Tribal shows that federal law can preempt yet-to-be enacted state regulations under the Elections Clause. Thus, the question of whether Congress anticipated or had a specific "view" about post-Election Day receipt is not determinative of *whether the state law is inconsistent with federal law*. *See* VV Br. 32-33. Nothing suggests that Congress anticipated or "had a view" about other future state manner regulations courts previously held were preempted, such as Kansas' DPOC in *Fish* or Louisiana's open primary in *Foster v. Love*, 522 U.S. 67 (1997). There is nothing "absurd" or "catastrophic" about alleging that a federal law preempts a state time regulation enacted many years later. VV Br. 31 and 45; DNC Br. 16, 22, and 25; *see also* LP Br. 42.[4] That is precisely how the Elections Clause operates.

B. The State's and Vet Voice's Definitions of "the Election" Fail to Account for the "Combined Actions" of Voters and Officials Under *Foster*.

How the Court defines "election" will determine whether Mississippi's Receipt Deadline statute is inconsistent with federal law and preempted. Citing the "combined actions of voters and officials meant to make the final act of selection" referenced in *Foster*, Plaintiff previously explained that an "election" occurs under federal Election Day statutes when the final ballot is received by the proper state election official on Election Day. LP Br. 22. In their responses, the State argued that "election" means the "conclusive choice of an officer," State Br. 17, while Vet

[4] *See* LP Br. 58 (discussing other state manner regulations that Congress "long tolerated" until the courts intervened).

Voice defined it as the "day by which voters must make their 'choice.'" VV Br. 18. Both definitions prioritize dictionaries consulted by the Supreme Court in *Foster*—rather than the Court's *actual* holding—and an older ruling in *Newberry v. United States*, 256 U.S. 232, 250 (1921). Neither proposed definition fully accounts for the "*combined* actions of voters and officials" referenced in *Foster*. Rather, in the State's and the Intervenors' view, it is the *unilateral* choices of voters that is the critical component, which largely ignores the actions of the "officials" emphasized by the Supreme Court in *Foster*. But voter choices alone (not made known to election officials until days or weeks later) are not "combined actions of voters and officials" that constitutes an "election" under *Foster*.

With respect to the State, it is not obvious what it means by "conclusive," or whether that is different from the "final choice" it references elsewhere. State Br. 14 and 45. Regardless, both "conclusive choice" and "final choice" suggest that *Foster*'s reference to "combined actions" was superfluous and that involvement by election officials is not required except beyond, possibly, offering ballots and an electoral system whereby a voter may express his or her choice. State Br. 28. But a choice must be made known to be counted and, though it is critical of Plaintiff's view that the "combined actions" include ballot receipt, the State never clearly articulates how the phrase "conclusive choice" squares with *Foster*'s "combined actions." State Br. 28-29.

Vet Voice argues that "the election" is the day by which ballots must be "cast," contrasting this with Plaintiff's view (as Vet Voice sees it) as the day for both "casting and receipt." VV Br. 17. As one *amicus* points out, there are "various ways to define how to cast a vote" including as "expression of choice by or through a ballot, or by outcry or any other particular means by which the choice of the voter may be lawfully made known or communicated to others in the given instance." *See* DNC Br. 9, n.3 (quoting *Bourland v. Hildreth*, 26 Cal. 161, 194 (1864)). This definition shows the unilateral nature of the State's and Vet Voice's proffered definitions. Unlike their definitions, it accounts for the actions of officials referenced in *Foster*. Indeed, it largely tracks Plaintiff's definition that a federal election occurs when the final ballot (*i.e.*, expression of choice) is received (*i.e.*, made known) by the proper state election official on Election Day.

Casting a vote involves the "expression of choice by the voter [*i.e.*, marking a ballot]" that is "made known or communicated to others [*i.e.*, received by officials] in the given instance." *See Bourland*, 26 Cal. at 194. Under federal law, that "given instance" is on or before Election Day. Stated simply, casting a vote is the expression of choice made known to officials on or before Election Day. The State claims that under the Election Day statutes "c*asting* a ballot is [] materially different from

receipt of a ballot." State Br. 18.[5] But *Bourland* and historical practice shows "the election" requires that the "conclusive choice" must be made known on or before Election Day.

Plaintiff largely agrees with the United States that in the ordinary course states can implement manner regulations wherein they "determine for themselves whether a vote is considered cast when it is mailed rather than when election officials receive it." United States Br. 5 and 22. That is especially true regarding early voting received pre-Election Day. But state discretion is limited by the timing regulations established by Congress. States may not institute manner regulations that attempt to alter or modify federal timing requirements. *Fish*, 840 F.3d at 729. For example, states may not implement a mailbox rule that circumvents federal time requirements by presuming something occurred at a time when it did not, in fact, occur. That is the type "gap-" and "silence-" filling power the Tenth Circuit says cannot be done. *Fish*, 840 F.3d at 729.[6]

[5] The State cites *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423 (2020) for this point. However, that case involved a preliminary remedial order related to a federal *primary*. Federal Election Day statutes apply to general elections.

[6] As Plaintiff previously explained, viewing Mississippi's Receipt Deadline as a mailbox rule illustrates this point and is a tacit admission the State knows it needs to, but cannot, comply with the text of the Election Day statutes. LP Br. 20; *see also* DNC Br. 3, 27, 28; ROA.970 (United States' Statement of Interest). The whole purpose of a mailbox rule is to create a legal fiction about the timing of an event. The very fact that states enact mailbox rules to establish ballot receipt before the time of actual receipt shows that states are trying to assume the "power to alter"

Receipt deadlines unquestionably affect the timing of federal elections, extending the election past Election Day. As a matter of common sense, if state election officials have received but not yet counted all ballots, *there has been an election*, even though the result is not yet known. But if election officials are still receiving ballots, then the election is still ongoing. In the first case, the result is fixed but unknown. In the second case, the result is undetermined, because live ballots are still being received. Simply put, the election is not yet over. This is what distinguishes ballot receipt from ministerial actions such as counting and certification, which apply to elections that *have* definitively ended. A state regulation that requires federal elections to conclude prior to Election Day (*Foster*) or after Election Day (Mississippi) affects the "time" of the federal election and is preempted.

The fact that since 1845 states have experimented with new manner regulations, such as vote by mail, that now bifurcate "expression of choice by the voter" from when it is "made known or communicated" to election officials, *see Bourland*, 26 Cal. at 194, does not mean that "the given time" can be extend past Election Day. The "expression of choice" needs to be "made known" to election officials by the

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federal regulations. *Fish*, 840 F.3d at 726. There is no federal statute or common law basis for an electoral mailbox rule. LP Br. 20. Neither the State or Vet Voice can point to any text that suggests that "Congress intended to permit states to so alter or modify federal election statutes[.]" *Id.* at 729. States cannot enact a statute that fictionalizes compliance with Election Day statutes. That power was necessarily displaced as explained in *Inter Tribal*.

"given time." A marked ballot only memorializes the expression of choice. Placing a marked ballot in the mail may start the process of making known to officials that choice, but until it is received by state election officials it us unknown and state law cannot constructively presume that knowledge by the creation of a mailbox rule in order to avoid federal time restrictions.

That is why the manner regulations under common law and during the Colonial, early Republic, Civil War, and Reconstruction eras are helpful. LP Br. 31-35. Under v*iva voice*, bean, or ticket voting the expression of a voter's choice was immediately known. These events occurred concurrently.[7] While states are free to bifurcate the expression of choice and when it is made known, both must still happen on or before Election Day. States, of course, are still largely free to enact innovative manner regulations to promote voter participation, but they are not free to alter or modify federal time regulations.[8] *Fish*, 840 F.3d at 729.

[7] The State waives this off by arguing that "[t]here is a difference between what is *required* under historical practice and what *happened to occur* under that practice." State Br. 42. But its own argument requires the "conclusive choice." If that is indeed true then, as discussed *infra*, a marked and mailed ballot (*i.e.*, expression of choice) is not conclusive or "made known" because a voter can recall his mailed ballot up until the point of delivery. Receipt is required to be conclusive.

[8] Proxy voting shows that the colonies understood that a voter and his or her ballot occasionally needed to be in two different locations at the same time. LP Br. 32 n.25. But the voter's expression of choice needed to be "made known or communicated" by Election Day.

It trivializes the importance of a national election day to suggest preemption "freeze[s] state election practices in time." VV Br. 32. That same dismissive reasoning could equally have been applied to Louisiana's open primary system that was struck down in *Foster*. States simply cannot extend the casting of ballots several days beyond Election Day. And states cannot come up with rules to circumvent the strict timing regulations imposed by Congress. *Foster* emphasized the combined, not unilateral, actions of voters and officials. Plaintiff's definition of "the election" is true both to *Foster* and to the original public understanding – the expression of choice and making it known must both be completed on or before Election Day.

Though neither characterize it at as such, the State's and Vet Voice's discussion of *Maddox v. Bd. of State Canvassers*, 149 P.2d 112, 115 (Mont. 1944) raises the question about the degree to which a state manner regulation can affect a federal time regulation without being preempted. State Br. 25-27; VV Br. 17-21 (discussing manner regulation "decisions" "left to the states"). In effect, they argue that Mississippi's Receipt Deadline is a permissible state manner regulation and, therefore, not preempted because, again, it is not expressly forbidden.[9] *Id.* While it is true states have authority to enact manner regulations under both Article I and II, *Inter Tribal*

[9] The only instance where Congress "indicated" that states had the power to "alter or modify" federal timing regulations is the *force majeure* provision in 3 U.S.C. § 21. *See Fish*, 840 F.3d at 729. Neither the State nor Intervenors contend that Mississippi ballot Receipt Deadline was enacted pursuant to this authority.

made clear that the exercise of such authority can be preempted if inconsistent with federal law.[10]

Plaintiff previously discussed the State's and Vet Voice's failure to adequately answer the district court's questions about the lack of limiting principle under their definitions of "the election." LP Br. 21. Only the State attempted to address this question on appeal, State Br. 47, arguing that certification and inauguration deadlines in the Constitution and Title 2 and 3 effectively limit post-Election Day receipt. *Id.* But neither the Constitution nor the statutes the State cites "speak to" ballot receipt. If the Court adopts the State's and Vet Voice's preemption reasoning, then provisions about certification and inauguration cannot be limits because they too are silent as to receipt. The State and Vet Voice cannot claim both that Mississippi's Receipt Deadline survives because it does Election Statutes do not speak to receipt and that other federal laws, which similarly do not speak to receipt, provide a limit.

[10] The Supreme Court rejected Arizona's argument against preemption notwithstanding the fact that states have substantially more authority to regulate voter qualifications versus regulating the timing of federal elections. *See Inter Tribal*, 570 U.S. at 16; *see also* U.S. CONST. art. I, §2, cl. 1 (providing that state law determines the qualifications of congressional voters); *see also ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) (providing that the Election Day statutes are federal time, rather than manner, regulations).

C. Mailed Ballots Cannot Be A "Conclusive Choice" Because They Can Be Recalled and Changed.

The State contends that Mississippi voters cannot change their mailed after Election Day. State Br. 23. Vet Voice goes further claiming that once a ballot is mailed it is "beyond the voter's custody and control" and "there is no opportunity for the voter to change his or her mind after election day[.]" VV Br. 13, 18-19, 28.[11] According to U.S. Postal Service's Domestic Mail Manual ("DMM"), that does not appear to be accurate.[12]

The USPS has long allowed senders to recall letters. *See generally Guardian Nat'l Bank v. Huntington Cty. State Bank*, 187 N.E. 388, 390 (Ind. 1933); and *Ellis v. United States*, 2020 U.S. Claims LEXIS 179 (Fed. Cl. Feb. 19, 2020). This practice, now called "Intercept," is still in effect. *See* Domestic Mail Manual, § 507.5.0 through § 507.5.4, and § 703.8.0 through § 703.8.4.3 available at https://bit.ly/4dbbXvt; and Postal Bulletin 22329, Jan. 26, 2012 at 20 (available at https://bit.ly/3XpUg5g). Other than international UOCAVA ballots, *see* DMM § 507.5.1.3(a), domestically mailed ballots can be recalled even after Election Day. If so, then a mailed ballot is not a conclusive or final choice. There is no such ability

[11] *See also* United States Br. 11 ("irrevocably making their choice") and 22 ("out of the voter's control"); DNC Br. 28 ("postmarking" shows final choice, which voter "cannot change");

[12] The DMM is incorporated by reference into Postal Service Regulations. *See* 39 C.F.R. § 111.1 and 39 C.F.R. § 211.2.

to recall a ballot once it is dropped in a drop box (DNC Br. 40) or handed to an election official during early voting or on Election Day. If a voter can withdraw and cancel his or her mailed ballot, it is not cast when mailed.

D. Other Federal Statutes Provide Little Context That Would Assist in Determining the Meaning of "Election" Under the Election Day Statutes.

The State's preemption analysis further relies on statutory context to define the term "election." State Br. 32-34. It cites to UOCAVA, as amended by the MOVE Act in 2009, among other statutes. *Id.* To be fair, the Supreme Court did consider statutory context (or "neighboring" statutes) in *Inter Tribal*, 570 U.S. at 11. But, unlike the NVRA provisions at issue there, most of which came from a single congressional enactment in 1993, the "neighboring" statutes this Court is being asked to consider for context were enacted by different Congresses in different centuries and were not part of the Presidential Election Day Act in 1845 or the Electoral County Act in 1887. *See* LP Br. 3. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960) (citation omitted); *see also United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (explaining that the views of one Congress as to the construction of a statute adopted many years before by another Congress have little, if any, significance).

Plaintiff previously addressed Vet Voice's argument regarding 52 U.S.C. § 20304, which directs the Secretary of Defense to develop a program to deliver military ballots to state officials "not later than the date by which an absentee ballot must be received in order to be counted in the election." LP Br. 45-46; *see also* State Br. 34; United States Br. 30; DNC Br. 11. Vet Voice cites this to argue that Congress "incorporate[d] state-law ballot receipt deadlines into the federal statutory scheme." VV Br. 42. But that language was needed to account for the fact that many states had long required absentee ballots to be received before Election Day. LP Br. 46. Thus, Congress had to adopt *that* language, rather than specifying Election Day, because otherwise it might have directed the Secretary of Defense to deliver ballots too late in certain states, possibly disenfranchising military voters in those states.[13] While the practice of *pre*-Election Day receipt deadlines have become less common, the chart provided by Vet Voice shows that as many ten states required it in 1942. VV Br. 37.

Vet Voice's other UOCAVA argument is that a ruling for the Plaintiff's "would preclude" equitable relief to remediate UOCAVA violations. VV Br. 42-43. That is not true. UOCAVA clearly provides that the "Attorney General may bring a civil action in an appropriate district court for such *declaratory or injunctive relief*

[13] The same risk posed by pre-Election Day receipt requirements in some states explains similar language contained in 52 U.S.C. § 20303. State Br. 33; VV Br. 41; United States Br. 29-30; DNC Br. 10.

as may be necessary to carry out this chapter." 52 U.S.C. § 20307. Plaintiff previously responded to this argument.[14] LP Br. 44-46; ROA.1065. This case is about preemption of *state* authority to extend receipt deadlines, not *Congress*' authority under Article I or II or the authority of the *federal judiciary* under Article III.[15] Vet Voice continues to misapprehend this point.

E. History Shows That Timely Ballot Receipt by Election Officials Helped Motivate State Adoption of Absentee Voting.

Plaintiff previously acknowledged that in the 179 years since Congress first established a federal Election Day some of the 50 states briefly experimented with post-Election Day receipt. LP Br. 39-41. While some of these regulations may have been "*passed* a century ago," United States Br. 24, most statutes today are of recent

[14] Notably, *the* Attorney General referenced in 52 U.S.C. § 20307 does not make this same argument. United States Br. 31.

[15] There is a big difference between Congressional preemption under the Elections Clause (Article I) and Electors Clause (Article II) versus judicial authority under Article III. The Libertarian Party previously explained why the district court erred in citing to *Harris v. Florida Elections Comm'n*, 235 F.3d 578, 579 (11th Cir. 2000), aff'g *Harris v. Florida Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1324–25 (N.D. Fla. 2000). LP Br. 45. It is erroneous to rely on the ruling from *Harris* in preemption analysis.

For that same reason, the State's reliance on Justice Kavanaugh's concurrence in *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020) (denial of application to vacate stay) is not well placed. State Br. 21, 24, and 41. That application came before the Court from a consolidated actions wherein a district court granted preliminary remedial relief enjoining state manner regulations during the COVID-19 crisis. *See Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776 (W.D. Wis. 2020). Like *Harris*, the claims did not involve preemption claims.

vintage.[16] *See* LP Br. 40, n. 36 (discussing Nebraska and California repeals). Many of the other arguments made in support of post-Election Day receipt fail t acknowledge the difference between absentee practices and post-Election Receipt practices. *See, e.g.*, DNC Br. 14-15. The various state experiments identified by proponents of post-Election Day receipt do not show that Mississippi's law is "consistent" with federal law.

Throughout much of its brief, Vet Voice responds to arguments Plaintiff did not make. VV Br. 28 ("Under Appellants' hyper-literal reading of *Foster*, however, all these activities […] must occur on election day. That would require officials to arbitrarily stop counting ballots at the stroke of midnight on election day, upending election administration in all fifty states."). Their strawman approach crests in their discussion of historical and civil war voting practices. VV Br. 32 ("If that were the case, state would essentially be prohibited from modernizing their elections by adopting new practices not contemplated in 1872."). Plaintiff's actual arguments concerned state election officials deputized to receive Civil War ballots in the field. LP Br. 35-38. Vet Voice emphasizes that soldiers' votes "were not added to the full count until conveyed back to their home states for a canvass." VV Br. 33-34, n.11 (arguing that "mere receipt" was "not enough" "actual transmission, tallying, and

[16] Indeed, most of the post-Election Day receipt deadlines in effect today were enacted by states following the introduction of provisional ballots under the Help America Vote Act of 2002. LP Br. 41-42.

certification" were "every bit of as much a part of the process as 'receipt[.]'"). Vet Voice waives away Plaintiff's point that election officials were deputized in the field to receive ballots as a "distinction without a difference." VV Br. 34. This is just not so. The creation of poll sites in the field and the deputizing of soldiers as "civil officers" (*i.e.*, state election officials) was vital to satisfying legal concerns about absentee voting. *See* Josiah Henry Benton, VOTING IN THE FIELD, 15-17 (1915), available at https://bit.ly/3p4OQaq. "Civil officers," and not just anyone, could "open a poll or present the box to the soldier for his vote" and return it to the State to be counted. *Id.* at 17.

F. No Circuit Has Addressed the Merits of Whether Federal Election Day Statutes Preempt State Post-Election Day Receipt Deadlines.

Vet Voice cites cases, which it contends "uniformly rejected Appellants' preemption theories." VV Br. 9-10. That is not accurate.

In *Donald J. Trump for President, Inc. v. Way*, the District Court analyzed preemption under the Supremacy Clause standard, and *never* cited the correct standard under *Inter Tribal*. 492 F. Supp. 3d 354, 365 (D.N.J. 2020) ("*Way I*"). *All* parties before this Court seemingly agree that, under *Inter Tribal*, preemption under the Supremacy Clause differs from preemption under the Elections Clause. Moreover, preliminary ruling, like the one in *Way*, are not rulings on the merits. *Jonibach Mgmt. Tr. v. Wartburg Enters.*, 750 F.3d 486, 491 (5th Cir. 2014).

Plaintiff previously addressed the vacated ruling from *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336 (3d Cir. 2020), cert. granted, vacated as moot sub nom. *Bognet v. Degraffenreid*, 141 S.Ct. 2508 (2021). LP Br. 26-27. Few cases in the last four years have been misapplied more than the Third Circuit's ruling in *Bognet*. Aside from its dubious value as vacated precedent, and aside from the fact that it primarily addressed standing, a careful reading of *Bognet* reveals that the plaintiffs there did not raise a preemption claim before the Third Circuit and specifically disclaimed any dispute that post-Election Day receipt statutes could be enacted by the Pennsylvania general assembly. LP Br. 26-27. Stated differently, they conceded the very claims before this Court.

All the other cases were dismissed on standing. *See Bost v. Ill. State Bd. of Elections*, No. 23-2644, 2024 U.S. App. LEXIS 21142 (7th Cir. Aug. 21, 2024); *Splonskowski v. White*, No. 1:23-cv-123, 2023 U.S. Dist. LEXIS 169811 (D.N.D. Sep. 15, 2023); and *Republican Nat'l Comm. v. Burgess*, No. 3:24-cv-198-MMD-CLB, 2024 U.S. Dist. LEXIS 126371 (D. Nev. July 17, 2024).[17]

[17] The trial court in *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720 (N.D. Ill. 2023) relied extensively on *Bognet*, which the Seventh Circuit did not have to address when it affirmed the dismissal for lack of jurisdiction. The district court below in the instant case relied on both *Bognet* and the *Bost* trial court's analysis of *Bognet*. ROA.1178-80.

II. Mississippi's Receipt Deadline Violates Plaintiff's First and Fourteenth Amendment Rights.

The State and Vet Voice argue that Plaintiff's First and Fourteenth Amendment constitutional rights are not infringed by operation of an unconstitutional Ballot Receipt Deadline in Mississippi. State Br. at 48-49; VV Br. at 44-47. These arguments fail.

Vet Voice argues at length that Plaintiff failed to meet its burden under *Anderson-Budick*.[18] But the district court did not apply the *Anderson-Burdick* test to Plaintiff's constitutional claims. This is because where the action only involves a challenge to the constitutionality of a state law and the denial of the right to vote is not at issue, courts have not applied the *Anderson-Burdick* test. *See Tully v. Okeson*, 977 F.3d 608, 616 n.6 (7th Cir. 2020) (declining to apply *Anderson-Burdick* "where only the claimed right to vote by mail is at issue"). *Foster* was decided after the Court's *Anderson-Burdick* decisions and the Supreme Court ignored the *Anderson-*

[18] *Anderson-Burdick* is the test the Supreme Court developed for voting cases that concern violations of a candidate's or a voter's First and Fourteenth Amendment rights. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). A court evaluating a regulation under the *Anderson-Burdick* test "weigh[s] the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (citations omitted). However slight the injury is, "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

Burdick test, striking down Louisiana's electoral regulation as preempted by the federal Election Day statutes. 522 U.S. at 74. The plaintiffs in *Foster* were four Louisiana voters challenging the constitutionality of Louisiana's statute for violating their rights under 42 U.S.C. § 1983. *Love v. Foster*, 90 F.3d 1026, 1027 (5th Cir. 1996). *Foster*, like here, did not involve claims alleging the denial of the electoral franchise. Vet Voice's own case law suggests a departure from the *Anderson-Burdick* test in these situations. *See Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 144 n.6 (5th Cir. 2020) (finding the Secretary of State prevailed under either *Anderson-Burdick* or under *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969) since absentee voting regulations "are not laws that '*themselves* deny [voters] the exercise of the franchise'" (quoting *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 415 (5th Cir. 2020) (Ho, J., concurring))).[19] The district court here properly declined to apply *Anderson-Burdick*.

[19] Vet Voice claims that *Anderson-Burdick* is the proper test under § 1983 since the statute "is not itself a source of substantive rights; it merely provides a method for vindicating already conferred federal rights." VV Br. at 45 n.15 (citing *Fennell v. Marion Ind. Sch. Dist.*, 804 F.3d 398, 412 (5th Cir. 2015)). While this may be true for § 1983 actions, it does not explain why *Anderson-Burdick* is the proper substantive test in this instance. Many voting cases employ § 1983 for rights conferred under the First and Fourteenth Amendment without employing the *Anderson-Burdick* framework. *See e.g., Foster*, 522 U.S. at 70; *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam).

For their part, the State does not suggest *Anderson-Burdick* applies to Plaintiff's claims. Rather, the State claims that Plaintiff's First and Fourteenth Amendment claims would fail even without a finding of preemption, since Mississippi's Receipt Deadline is a timing regulation and does not dilute anyone's vote or impair their right to stand for office. *See* State Br. at 48-49. But this argument makes the same mistake the district court made below. If the challenged regulation is unlawful and unconstitutional under the U.S. Constitution, it is immaterial whether the regulation restricts a candidate's appearance on the ballot or an individual's right to cast a vote. The burden associated with Plaintiff's candidates' compliance with an unlawful state electoral regulation exceeds any interest proffered by the state. *See Ill. State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Forcing that candidate to expend resources to campaign against an unlawful regulation burdens their rights to stand for office, in violation of the First and Fourteenth Amendments.

As for voters, they "cannot legally submit new votes after election day." *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1186-1187, 1192 (9th Cir. 2021). Enforcing an unconstitutional state statute that allows additional time for certain voters to cast their ballot burdens the lawful and timely votes submitted by Plaintiff's members.

CONCLUSION

Plaintiff respectfully requests this Court reverse the district court order granting summary judgment for Defendants and enter an order granting summary judgment for Plaintiff. This matter should be remanded to the district court for further remedial proceedings.

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s/ Russ Nobile

T. Russell Nobile (MS Bar 100682)
JUDICIAL WATCH, INC.
Post Office Box 6592
Gulfport, Mississippi 39506
Phone: (202) 527-9866
Rnobile@judicialwatch.org

Robert D. Popper
Eric W. Lee
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, DC 20024
Phone: (202) 646-5172
rpopper@judicialwatch.org
elee@judicialwatch.org

CERTIFICATE OF SERVICE

I, T. Russell Nobile, certify that I electronically filed this brief with the Clerk of the Court, using the electronic filing system, which sent notification of such filing to all counsel of record.

September 16, 2024 s/ Russ Nobile
T. Russell Nobile

CERTIFICATE OF COMPLIANCE

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September 16, 2024

/s/ Russ Nobile
T. Russell Nobile