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 FOR 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; CRISTENE 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, 1:24-cv-37 (Guirola, J.)

REPLY BRIEF OF APPELLANTS REPUBLICAN NATIONAL COMMITTEE, MISSISSIPPI REPUBLICAN PARTY, JAMES PERRY, AND MATTHEW LAMB

Spencer M. Ritchie
Forman Watkins & Krutz LLP
210 East Capitol Street, Ste. 2200
Jackson, MS 39201
(601) 960-3172
spencer.ritchie@formanwatkins.com

Thomas R. McCarthy
Gilbert C. Dickey
Conor D. Woodfin
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com
gilbert@consovoymccarthy.com
conor@consovoymccarthy.com

Dated: September 16, 2024

Counsel for Appellants Republican National Committee, Mississippi Republican Party, James Perry, and Matthew Lamb

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

The parties agree that this case concerns Congress's power over the "Time" of federal elections. They agree that the election-day statutes place some limit on state election procedures. And they agree that this case turns on the meaning of "election" in the election-day statutes. *See* Sec'y Br. 17. In their opening brief, the Plaintiffs describe a clear rule grounded in text and history: at the time Congress enacted the election-day statutes, the "day for the election" meant the day that ballots were received by election officials.

In response, the Defendants offer competing theories on the meaning of "election." But the Defendants use the word "election" differently than Congress used it. When the Defendants speak of an election, they mean something like a "voter's election of a candidate." But "the day for the election" that Congress refers to more closely means the "State's election that will occur on a particular day." In other words, the Defendants describe a lone voter's act of *electing*, while the statutes refer to the process of facilitating voting in an *election*. The election-day statutes require some part of that process to end on the "day for the election."

History informs what that process required, and it cuts through this linguistic debate. When Congress enacted the election-day statutes, States universally required ballots to be received on election day. When States first had the opportunity to deviate from that practice, they stuck to it. Even while permitting soldiers to mark and relinquish custody of their ballots before election day, States still required those ballots to be received by election officials on election day. In fact, they went to great pains to require that—amending state laws, deciding lawsuits, swearing in soldiers as election

officials, and facilitating transport of ballots to arrive at the polling place by election day. For nearly a century after Congress enacted the election-day statutes, that was the uniform understanding.

Each of the Defendants' counterarguments is an attempt to overcome that original public meaning. They say Congress could have been clearer about setting an election-day deadline; that Congress has acquiesced to States setting post-election deadlines; that Congress has implied in different statutes that it approves of post-election receipt; and that this Court should reject history in favor of various policy arguments. At best, each of those arguments requires drawing inferences about the text's meaning from the practices of a modern Congress passing different laws—or passing no laws at all. But more accurately, those arguments just override the original public meaning of the election-day statutes.

The Defendants' remaining arguments don't absolve this Court from reaching the merits. The Defendants ignore that this Court and the Supreme Court have allowed voters to enforce the election-day statutes through 42 U.S.C. §1983. And the *Purcell* principle is not an issue because the Plaintiffs are not demanding injunctive relief from this Court. For these reasons, the Court should reverse the district court's judgment.

ARGUMENT

I. The original public meaning of the election-day statutes required ballot receipt on election day—and that meaning controls today.

Defendants agree that the proper preemption standard is whether state law is "inconsistent with" the federal election-day statutes. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 15 (2013); *see* Sec'y Br. 31; Interv. Br. 16-17. But Defendants still

suggest that preemption requires "words from Congress saying that States may not receive ballots after election day." Sec'y Br. 42; *see also* Interv. Br. 17. The Supreme Court rejected that argument in *Foster v. Love*, 522 U.S. 67 (1997).

If Defendants' magic-words test were correct, the Supreme Court would have held that Louisiana's open-primary statute was not preempted because "[n]othing in [the election-day statutes'] text says anything about" open primaries. Interv. Br. 17. And it was undisputed that "Louisiana [held] its general election on the federal election day." *Love v. Foster*, 90 F.3d 1026, 1030 (5th Cir. 1996), *aff'd*, 522 U.S. 67 (1997). Nevertheless, the Court concluded that "Louisiana's system squarely 'conflicts with the federal statutes that establish a uniform federal election day.'" *Foster*, 522 U.S. at 70. It did so by examining the meaning of "election." Like *Foster*, this case requires the Court to interpret the meaning of "election."

A. The Defendants employ a different use of the word "election" than Congress employs in the election-day statutes.

The Defendants emphasize dictionary definitions that define "election" as an act of the voter. *See* Sec'y Br. 17-18; Interv. Br. 18. But that's just one sense of the word. Webster's 1830 dictionary, for example, defines "election" as "[t]he act of choosing," but also as "the public choice of officers," and the "day of a public choice of officers." *Election*, Noah Webster, *An American Dictionary of the English Language* (1830), perma.cc/8N7A-D3VS. That is, a "voter's election" is different from a "candidate's election," which is different from a "State's election." The word "election" in each of those uses carries a different meaning: the "voter's choice," the "candidate's race," and the "State's process," respectively. Defendants adopt the first use (focusing on the

voter's choice), but when Congress established the "day for the election," it regulated when States could *conduct* elections. Defendants' emphasis on the voter's choice to the exclusion of other definitions leads them to use "election" in a narrow sense that the election-day statutes don't employ.

In other words, the Defendants read "election" as the noun form of the verb "elect." *See* Sec'y Br. 18 ("An election thus occurs when voters make their choice"). The Secretary suggests that a person has made her "election" by making her "final selection" on the ballot, irrespective of where the ballot ends up. *See id.* at 18, 23. That leads him to conclude that the "receipt of ballots" is not "essential to the election." *Id.* at 23. In essence, the Defendants read the election-day statutes to govern something like the "day for voters to make an election." But that use of the word carries a different meaning than when a State "holds an election" or "conducts an election." Those uses describe a "*process* of choosing a person or persons for office by vote." *Election*, III The Century Dictionary and Cyclopedia 1866 (1901), perma.cc/ZE3U-X8U6 (emphasis added). When an "election" is properly understood as the State's process of facilitating voting, the Secretary's view that "an election does not require ballot receipt" makes no sense. Sec'y Br. 28. Ballot receipt may not be essential for a voter to *make* an election, but it is absolutely essential for a State to *conduct* an election. And the election-day statutes changed when States *conduct* elections, not how voters do the electing. The issue in this case is identifying what part of that process must end on election-day.

The Defendants argue that the voter relinquishing custody of the ballot is the definitive act that must occur on election day. *See* Sec'y Br. 23; Interv. Br. 18-19. Their custody theory has several problems. First, it's an arbitrary line that doesn't even meet

the Defendants' own magic-words preemption standard. "Nothing" in the text of the election-day statutes "says anything about" custody or casting of ballots. Interv. Br. 17. Defendants emphasize definitions like "final selection" and "conclusive choice," as if those phrases resolve the case. *See* Sec'y Br. 18-21. But those phrases say nothing about what actions are required to make a "final selection" or "conclusive choice." The Defendants claim that marking and relinquishing the ballot is the final selection, *see* Sec'y Br. 23, but their narrow definitions more accurately suggest that marking the ballot is itself the final selection. There's no reason why the ballot must leave the voter's custody for the voter to have made an "election," as they use that word.

Second, Defendants' custody theory fails to distinguish between valid and invalid votes. A voter who hands her ballot to a friend has not yet submitted a valid vote, even though she's made her "final choice" and relinquished custody of the ballot. Recognizing this problem, the Defendants add a requirement: the voter must mark and relinquish her ballot "as required by state law." Sec'y Br. 21. But that limitation just collapses the meaning of "election" into whatever state law says it is. A State could say that a ballot is timely cast once the voter hands it over to a family member or third-party organization to deliver to the polling place. Or the State could simply require an affidavit that says, "I filled out this ballot on or before Tuesday, November 5." *Cf. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (staying injunction that extended the mail-ballot receipt deadline to one week after the election, regardless of whether those ballots were mailed or postmarked by election day). Defendants' vote-in-accordance-with-state-law theory is unhelpful, as it cannot explain whether state laws comply with the election-day statutes.

Third, references to "ballot casting" don't advance Defendants' argument. To "cast" a ballot is to "deposit (a ballot) formally or officially; to give (a vote)." *Cast*, Webster's New International Dictionary of the English Language (1923), perma.cc/5S9R-FU9H; *see also Cast*, Noah Webster, *An American Dictionary of the English Language* (1853), perma.cc/MXJ2-TH47 ("to decide by a vote that gives a superiority in numbers; as a *casting* vote"). The definitions reference the official voting process, but they don't explain what steps are required to cast a valid ballot. If anything, delivery to election officials was an essential ingredient of "casting" a ballot at that time. As the Montana Supreme Court explained, "[n]othing short of the delivery of the ballot to the election officials for deposit in the ballot box constitute[d] casting the ballot." *Maddox v. Bd. of State Canvassers*, 149 P.2d 112, 115 (Mont. 1944). The Intervenors argue that this was a matter of state law, *see* Interv. Br. 19, but the court's understanding of the process rested on the ordinary public meaning of "casting" a ballot, *see Maddox*, 149 P.2d at 115. Black's Law Dictionary at the time even incorporated the court's understanding in its definition of "cast." *See Cast*, Black's Law Dictionary (4th rev. ed. 1968) (citing *Maddox*, 149 P.2d at 115). And the Montana Supreme Court held that Montana's "unusual provisions" permitting a "seven weeks delay after the statutory election day for the depositing of military ballots with election officials" was "in conflict with the constitutional congressional Act which requires the electing to be done on election day." *Maddox*, 149 P.2d at 114-15. If the case was purely a matter of state law, as Intervenors suggest, *see* Interv. Br. 19, the court would not have declared its own state law "unconstitutional" and preempted by the election-day statutes, *Maddox*, 149 P.2d at 115.

Fourth, the Defendants' custody theory rests on a false premise. The Intervenors argue that depositing the ballot in the mail is the critical moment because "the voter has no opportunity to change their vote between the time the ballot is deposited in the mail and the time it is received, processed, and canvassed by election officials." Interv. Br. 19; *cf.* Sec'y Br. 23 ("Mississippi voters cannot change their votes" after election day.). That distinction is not just arbitrary—it's inaccurate. The U.S. Postal Service allows voters to recall various types of mail. *See* U.S. Postal Serv., *Mailing Standards of the United States Postal Service Domestic Mail Manual* §507.5 (July 14, 2024), perma.cc/43FK-H25K. Overseas ballots are exempt from the recall process, but election mail in general is not. *See* U.S. Postal Serv., Postal Bulletin 22642: Election Mail (Jan. 25, 2024), perma.cc/YU67-FG3Z. In other States, the DNC—an amicus and attempted intervenor in this case—has even argued that voters should be allowed to spoil their valid ballots after they are in the custody of state election officials. *See State ex rel. Kormanik v. Brash*, 980 N.W.2d 948, 949-50 (Wis. 2022).

In sum, the Defendants misconstrue the ordinary meaning of "election." Their arbitrary focus on the voter's actions leads them to conclude that the "election" is only about marking and getting rid of the ballot. But as used in the election-day statutes, the word "election" more sensibly refers to the State's process of facilitating voting. Dictionary definitions help frame that use of the word, but historical practice gives the substantive content to the "election" process.

B. When Congress established the national election day, States uniformly required ballots to be received by election officials on that day.

The Defendants downplay the importance of history because they misunderstand its role in statutory interpretation. The Secretary argues that a history of election-day receipt "would not foreclose States" from adopting other rules. Sec'y Br. 41-42. And the Intervenors argue that the election-day statutes did not "freeze state election practices in time." Interv. Br. 32. But those arguments miss that the historical practice informs the meaning of "the day for the election." Applying the original public meaning of those words, as this Court must, requires examining "a variety of legal and other sources to determine *the public understanding* of [the] legal text in the period after its enactment or ratification." *Dist. of Columbia v. Heller*, 554 U.S. 570, 605 (2008). Those tools are "critical" to constitutional and statutory interpretation. *Id.* The Intervenors would prefer evidence that the "drafters of the Election Day Statutes intended to prohibit" post-election receipt of ballots, or that "legislators … understood the Election Day Statutes that way." Interv. Br. 32. And while that evidence "is considered persuasive by some," *Heller*, 554 U.S. at 605, it is not evidence of "the ordinary *public* meaning of [the statute's] terms at the time of its enactment," *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020) (emphasis added).

When the paper ballot was introduced, ballot delivery occurred simultaneously with ballot receipt on election day. Absentee voting—first during the Civil War—separated those two acts. That period is informative because it occurs near the passage of the election-day statutes, and it presented the first opportunity for States to deviate from that practice. Instead, they uniformly followed it.

The Intervenors grapple with the Civil War history, but their arguments reveal that ballot receipt by election officials was the universal norm. The Intervenors acknowledge that soldiers would "cast their ballots in the field on election day." Interv. Br. 33. They point out "their votes were not added to the full count until conveyed back to their home states for a canvass." *Id.* That's true, but irrelevant. The Plaintiffs are not challenging when ballots can be "canvassed," "counted" or "added to the official tally." *Id.* at 34. They're challenging when ballots must be received by election officials.

Next, the Intervenors dismiss as a "distinction without a difference" that the soldiers accepting ballots in the field were state election officials. *Id.* But that's the rub: if those soldiers hadn't been sworn in as election officials, then they couldn't receive valid ballots on election day. *See* RNC Br. 5. That States uniformly required receipt by election officials on election day is strong evidence that the original public meaning of "the day for the election" meant the final day ballots are received by election officials. If the public didn't understand the "day for the election" to mean receipt by election officials, there would have been no need to deputize soldiers as state officials—they could have just set a post-election receipt deadline, as Mississippi does today.

Defendants offer no other contemporaneous historical evidence that the original understanding of the "day for the election" was anything other than ballot-receipt day. The earliest post-election receipt deadline that the Intervenors identify is Kansas's 1923 law permitting military ballots to be received ten days after the election. *See* Interv. Br. 35. But this deviation from the universal practice is still 75 years removed from Congress establishing the uniform election day. *See* Act of Jan. 23, 1845, ch. 1, 5 Stat. 721. When "earlier generations addressed the societal problem, but did so through

materially different means," it is "evidence that a modern regulation" likely doesn't comport with the original meaning of the text. *N.Y. State Rifle & Pistol Ass'n, v. Bruen*, 597 U.S. 1, 26-27 (2022). Later state laws—California, New York, and Minnesota, *see* Interv. Br. 35-36—were sparse and short-lived. *See* RNC Br. 22-23; LP Br. 40 & n.36. At most, these "few late-19th-century outlier jurisdictions," *Bruen*, 597 U.S. at 70, have little bearing on the original meaning of the "day for the election."

More recent state laws are even less relevant. That "five states," such as Washington, "permitted an absent voter to cast a ballot elsewhere within the state on election day" is not at issue in this case. Interv. Br. 34-35. Those States still required receipt by election officials by election day. RNC Br. 22-23. And by 1942—nearly a century after Congress established the national election day—only "seven states … had post-election ballot receipt deadlines, either for civilians, servicemembers, or both." Interv. Br. 37 (emphasis omitted).

Even under the most generous reading of the history in Defendants' favor, post-election receipt of ballots doesn't come close to the "longstanding practice" necessary to pass muster under the election-day statutes. *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000). Even today post-election receipt of ballots is far from "universal." *Id.* Every court to address the post-election receipt of mail-in ballots has overlooked this history. But the history confirms that the original meaning of the "day for the election" was the final day for ballots to be received by election officials—not the final day for ballots to part from a voter's hands. Absent intervening law, courts must apply that original understanding. And as the next sections explain, subsequent laws, congressional inaction, and court cases don't upset that original meaning.

C. Later federal laws have not changed the original meaning of the election-day statutes.

The Defendants point to various other federal laws that they argue implicitly vindicate their post-election receipt theory. But none of those laws set post-election receipt deadlines, either implicitly or explicitly. Even if they did, Congress has power to carve out those exceptions to the general election-day rule.

Start with the Voting Right Act. *See* Sec'y Br. 32-33. Among other things, the 1970 amendments to that act require States to accept absentee ballots for presidential elections that are returned "to the appropriate election official … not later than the time of closing of the polls … on the day of such election." 52 U.S.C. §10502(d). The act also provides for registration "not later than thirty days immediately prior to any presidential election," thirty-day maximum durations on residency requirements, and various other voting rules. *Id.* §10502(c), (d), (e). The act then ends with a rule of construction: "Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein." *Id.* §10502(g). Defendants read that rule to say "nothing in the entire U.S. Code" prevents States from adopting less restrictive voting practices. But the rule of construction applies only to "this section" of the Voting Rights Act. *Id.* §10502(g). And the Plaintiffs aren't enforcing any part of that act. They're enforcing a different, much older law. The VRA's rule of construction—adopted by a different Congress in a different statute over a century after the election-day statutes—sheds no light on the original meaning of the "day for the election."

The Soldier Voting Act of 1942 is no different. That law required war ballots to be "received by the appropriate election officials" by "the hour of the closing of the

polls on the date of the holding of the election." Act of Sept. 16, 1942, ch. 561, §8, 56 Stat. 753. The Intervenors argue that the act shows that "when Congress wishes to set election day as a categorical deadline for receipt of ballots, it knows how to clearly do so." Interv. Br. 38. But that statute didn't establish "Election day as a categorical deadline." *Id.* Rather, it set a more specific deadline of "the hour of closing the polls on the date of the holding of the election." Act of Step. 16, 1942, ch. 561, §9. Moreover, the Soldier Voting Act, like the VRA amendments, is a century removed from the time of the election-day statutes and thus has little bearing on the original meaning of those statutes. The most that can be inferred from the Soldier Voting Act and VRA amendments is that Congress understands receipt by state election officials as the mark of a timely ballot.

UOCAVA also doesn't set a post-election receipt deadline. In fact, the Secretary admits that "UOCAVA does not specify a ballot-receipt deadline." Sec'y Br. 33. That concession is refreshing, but it comes after courts have repeatedly misread UOCAVA to "allow ballots received after Election Day to be counted … so long as they are cast by Election Day." *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720, 737 (N.D. Ill. 2023), *aff'd on alternative grounds*, No. 23-2644, 2024 WL 3882901 (7th Cir. Aug. 21, 2024); *see also Bognet v. Sec'y Commonwealth of Penn.*, 980 F.3d 336, 354 (3d Cir. 2020) ("[M]any States also accept absentee ballots mailed by overseas uniformed servicemembers that are received after Election Day, in accordance with [UOCAVA]…."), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021). The Secretary defends the district court's reliance on those cases, *see* Sec'y Br. 30, but he departs from their reasoning here. Without distorting UOCAVA as those courts did, the most the

Secretary can say about UOCAVA is that it "shows Congress's respect for state deadlines." Sec'y Br. 33. But even that inference is a reach.

UOCAVA doesn't set any deadlines for voters to mail their ballots. Neither does it "explicitly incorporate[]" state "deadlines by reference," as the Intervenors argue. Interv. Br. 41. Instead, it sets two rules: a deadline for federal election officials to return ballots, and a carve-out for voters who receive their state ballots late. First, it requires a federal official to collect overseas ballots and deliver them to state election officials "not later than the date by which an absentee ballot must be received in order to be counted in the election." 52 U.S.C. §20304(b)(1).[1] That says nothing about when the *voter* must deliver the ballot to the election official. Second, a voter who does not receive a state absentee ballot on time can use and return a "Federal write-in absentee ballot." *Id.* §20303(b). But States cannot count that federal write-in ballot if the voter's state absentee ballot is "received by the appropriate State election official not later than the deadline for receipt of the State absentee ballot under State law." *Id.* §20303(b)(3). This is essentially a rule on provisional ballots cast when there's a failure in the system. It says nothing about what makes a ballot timely under normal circumstances.

The Intervenors still argue that courts have remedied UOCAVA violations by extending the deadline for absentee ballots. Interv. Br. 42-43. They point out that courts can't order remedies that violate federal law. And because those remedies didn't violate federal law (they assume), it must be true that post-election receipt of ballots doesn't violate federal law. But the *legality* of those court orders is beside the point. Lawful or

[1] This provision is technically part of the MOVE Act, which amended portions of UOCAVA in 2009. *See* Pub. L. No. 111-84, §580(a), 123 Stat. 2190.

not, those recent judicial remedies have no bearing on the original meaning of the election-day statutes. Uniform court orders to that effect beginning in 1845 might be more relevant. But court orders beginning in 2000 under a new statute hardly show a "longstanding practice" that informs the original meaning of the election-day statutes.

Finally, the Defendants' arguments about each of these federal laws suffers from a more fundamental problem: Congress can create exceptions to its timing laws. Congress has power to "determine the Time of chusing the Electors" for the offices of President and Vice President. U.S. Const. art. II, §1. And Congress can "make" regulations or "alter" state laws affecting the timing of congressional elections. U.S. Const. art. I, §4. Congress can thus set different timing rules for different circumstances, including soldiers and overseas voters. For example, even if UOCAVA had explicitly permitted post-election receipt of ballots for overseas voters, it would at most be a carve-out from the default rule of election-day receipt. None of those federal laws abrogates the default rule, either explicitly or implicitly.

D. Congressional inaction has not changed the original meaning of the election-day statutes.

Defendants continue to rely on congressional acquiescence. In fact, many of their arguments, whether based on subsequent statutes or congressional inaction, boil down to an inference that "if Congress wanted to override state ballot-receipt deadlines under the federal election-day statutes, it would have said so." Sec'y Br. 34; *cf.* Interv. Br. 44. The Secretary even tries to invert the presumption against preemption because "this is not an area where Congress must be shy." Sec'y Br. 39. The "assumption that Congress is reluctant to pre-empt does not hold when Congress acts under" the

Elections Clause. *Inter Tribal Council*, 570 U.S. at 14. The Secretary inverts that principle by suggesting that when Congress doesn't step in to correct errant state election laws, the courts must assume that those state laws didn't actually violate federal law in the first place. *See* Sec'y Br. 39, 41. But that argument is just a backdoor for congressional acquiescence. Each time the Secretary cites the presumption against preemption in his favor, he's arguing that the Court must presume that Congress has acquiesced by not correcting States' post-election deadlines.[2]

No Defendant addresses the core problems with congressional acquiescence. The RNC details those problems in its opening brief: the rule applies when Congress acquiesces to agency or judicial interpretations of statutes, not to a *state law* that would otherwise contradict federal law. At best, congressional inaction expresses no opinion on the subject, not an endorsement of it. And the rule requires "abundant evidence that Congress both contemplated and authorized" the deviation. *CFTFC v. Schor*, 478 U.S. 833, 846-47 (1986). Defendants have no response to these shortcomings. *See* RNC Br. 35. And even if this Court were to draw inferences from Congress's inaction, the Defendants' own historical account shows that post-election-day receipt of ballots was neither a "universal" nor a "longstanding practice of which Congress was obviously well aware." *Bomer*, 199 F.3d at 776.

[2] The Secretary also defends the district court's presumption against preemption as really a presumption against implied repeal. *See* Sec'y Br. 39-40. But the conflict between federal laws is imagined. Viewing UOCAVA as conflicting with the election-day statutes just loads the dice in favor of the State's interpretation. Applying that presumption, the district court then piled on an inference "that the similar Mississippi statute on postelection receipt is likewise inoffensive." ROA.1179. These presumptions and inferences are just end runs around the Supreme Court's admonition that courts should not presume that Congress is reluctant to preempt state election laws.

E. Recent judicial decisions have not changed the original meaning of the election-day statutes.

Foster's reasoning controls future cases. That's the basic purpose of precedent. The Intervenors point out that the Court did not "par[e] the term 'election' in §7 down to the definitional bone." Interv. Br. 26-27 (quoting *Foster*, 522 U.S. at 72). But neither did the Court empty the word "election" of all meaning. That "case [did] not present the question whether a State must always employ the conventional mechanics of an election." *Foster*, 522 U.S. at 72 n.4. Neither does this case. The only issue is whether the original meaning of the election-day statutes required receipt by election officials on the "day for the election." Although *Foster* doesn't answer that question directly, it is still "instructive on the meaning of 'election.'" *Bomer*, 199 F.3d at 775. The Intervenors ignore that holding when they insist that the Court "declined to offer any opinion regarding the meaning of the term 'election.'" Interv. Br. 26.

The Intervenors next argue that post-election receipt of ballots fits within *Foster*'s reasoning because it still requires the "combined actions" of voters and election officials before election day. *Id.* at 28. In support, they point out that "election officials must disburse applications for absentee ballots, process the application, prepare and print the ballot, and mail the ballot to the elector." *Id.* But those are not the "combined actions of voters and officials *meant to make a final selection* of an officeholder," which is what the election-day statutes "plainly refer" to when they "speak of 'the election.'" *Foster*, 522 U.S. at 71 (emphasis added). Mailing applications and ballots is preparation for the election, but it is not itself the election. Likewise, "counting ballots, certification, and formal announcement of the results," Interv. Br. 29, are acts that occur—and have historically occurred—after election day. *Contra Millsaps v. Thompson*, 259 F.3d 535, 546

(6th Cir. 2001). The critical moment of the election is when the voter's choice is transmitted to those who effectuate the choice. That is the only moment that could be described as the "combined actions of voters and officials meant to make a final selection of an officeholder." *Id.*

The Intervenors try to distinguish *Bomer*, but its reasoning shows why post-election receipt can't be squared with the election-day statutes. The Intervenors point out that "'some acts associated with the election may be conducted before the federal election day.'" Interv. Br. 23 n.9 (quoting *Bomer*, 199 F.3d at 776). Agreed. Voters can cast ballots and election officials can receive ballots before the final day "for the election." Those acts are supported by "[m]ore than a century" of state practice. *Bomer*, 199 F.3d at 776. Post-election receipt of ballots is not. The Intervenors assert that post-election receipt of ballots has "longstanding pedigree in American elections," Interv. Br. 23 n.9, but their own account of the history belies that claim, *see id.* at 36-37 ("seven states" had post-election receipt by the mid-1900s). In contrast, absentee and early voting began just after Congress enacted the election-day statutes, and "all states currently provide for it in some form." *Bomer*, 199 F.3d at 776. Post-election receipt doesn't come close to that historical record.

In short, for all the reasons Texas' early voting law passed the test in *Bomer*, Mississippi's post-election-receipt law flunks it. Post-election receipt is neither "universal" nor "longstanding;" Congress has not passed laws that "*required*" post-election receipt; and nothing about an election-day deadline "imped[es] citizens in exercising their right to vote." *Bomer*, 199 F.3d at 776.

* * *

At bottom, the Defendants don't rebut the original meaning of the "day for the election." At the time of enactment, those words referred to the day that ballots are received by election officials. Absent a change in the law, that original meaning controls. And the Defendants have identified no change to the election-day statutes—by Congress or courts—that would upset that original meaning. The Defendants' remaining arguments ask this Court to deviate from the original understanding because of some abstract inference about congressional inaction, legislative purposes, or other policy reasons. The Court should reject those atextual arguments.

II. This Court has enforced the election-day statutes through 42 U.S.C. §1983.

Defendants ignore *Foster*'s holding that Louisiana's law violated the rights of voters because it conflicted with the federal election-day statutes. 522 U.S. at 74. They don't dispute that *Foster* enforced the election-day statutes through §1983, and they don't argue that *Foster* was wrong to do so. They just ignore it. *See* Sec'y Br. 47-49; Interv. Br. 44-47. And they ignore that every case that has confronted whether state law violates the election-day statutes evaluated the claim as a violation of the right to vote, enforceable through §1983. *Voting Integrity Project, Inc. v. Bomer*, 61 F. Supp. 2d 600 (S.D. Tex. 1999), *aff'd*, 199 F.3d 773; *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1170 n.2 (9th Cir. 2001); *Millsaps*, 259 F.3d at 542. This Court should follow that precedent.

And the precedent is correct. The Secretary points out that the right of candidates to run for office is "implicated when a State restricts the ability of a candidate or political party to be placed on election ballots." Sec'y Br. 48. That's true. But it doesn't address Appellants' argument that States violate the rights of candidates when they count votes

that federal law says can't be counted. RNC Br. 37 (citing *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020)). Under the Secretary's view, a candidate's right to stand for office is not violated even if a State were to openly count the votes of noncitizens, toss out the ballots of only his supporters, or otherwise unlawfully change the final vote tally. *Cf. Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020) ("Electors here have standing independently as elector candidates…."). But if that right means anything, it must be implicated when States conduct elections in violation of Elections Clause legislation.

The right to vote is also implicated by elections that violate Elections Clause legislation. When Congress legislates under the Elections Clause, it protects "the fundamental right [to vote] involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). The Secretary ignores that principle, too. He points out that this is not an Equal Protection case like *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). *See* Sec'y Br. 49. But neither was *Foster*. Discriminatory treatment is not the only method of infringing the right to vote. "The right to an honest (count) is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States." *Anderson v. United States*, 417 U.S. 211, 226 (1974).

The Intervenors take things in a different direction. They argue that this Court must import the *Anderson-Burdick* test into the preemption analysis for Elections Clause legislation. *See* Interv. Br. 44-47. But this is a preemption case, not an *Anderson-Burdick* case. The *Anderson-Burdick* test applies only to claims that a law "unfairly or unnecessarily burdens" the right to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983).

That is, voters have a unique cause of action to challenge otherwise valid state laws that "impermissibly burden the right to vote." *Burdick v. Takushi*, 504 U.S. 428, 430 (1992). Under those undue-burden claims, "a court 'must weigh the character and magnitude of the asserted injury' to voting rights 'against the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 143 (5th Cir. 2020) (citation omitted).

Plaintiffs' claim is not that the Mississippi law "burdens" their right to vote and stand for office, but that it *violates* those rights because it violates federal law. Louisiana undoubtedly had strong reasons for its open-primary law. But the Supreme Court didn't weigh those justifications against the burden on voters. It simply analyzed whether Louisiana's law conflicts with the election-day statutes. *Foster*, 522 U.S. at 74. The Intervenors cite no authority applying an undue-burden test to a basic preemption analysis. *Cf. Inter Tribal Council*, 570 U.S. at 7 (holding that Arizona's voter-registration rules conflicted with the National Voter Registration Act and violated the rights of "individual Arizona residents" and "nonprofit organizations").

On these points, the district court was correct. The court concluded that Plaintiffs' §1983 claims "stand or fall on whether the Mississippi absentee-ballots statute conflicts with federal law, in which case Plaintiffs say their rights would be violated." ROA.1182. The Defendants resist the district court's reasoning, but they don't outright argue that it was wrong. And the logic is consistent with every other preemption case applying the elections-clause statutes. The Defendants offer no persuasive reason why this Court should depart from that precedent.

In any event, no party disputes that the Court must reach the merits of the preemption claim even if it were to dismiss the §1983 claims in Counts II and III of the complaint. *See* Republican App. Br. 38. Count I of complaint requests declaratory and injunctive relief against state officials for violations of federal law. No party disputes that Plaintiffs have a claim under *Ex parte Young*, 209 U.S. 123 (1908), to seek that relief to the extent the state officials' actions conflict with the election-day statutes. The preemption claim is thus properly before the Court.

III. *Purcell* does not prohibit reversing the district court's dismissal of the case.

The State doesn't raise *Purcell*. For good reason: *Purcell* applies when federal courts consider the "issuance or nonissuance of an injunction" close to an election. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). It advises that "federal courts ordinarily should not enjoin a state's election laws in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurral). The Intervenors acknowledge as much when they argue that *Purcell* applies to "an injunction changing election procedures" close to the election. Interv. Br. 48. But no one requests that relief from this Court. Rather, a ruling in Appellants' favor would require reversing the district court's summary-judgment order in favor of Defendants, and remanding for further proceedings. The Plaintiffs would then move for entry of judgment, which would require briefing the remaining equitable factors for a permanent injunction. *See Stevens v. St. Tammany Parish Gov't*, 17 F.4th 563, 576 (5th Cir. 2021). Only then could the *Purcell* principle come into play—and only if the Plaintiffs demanded that the district court apply the injunction to the upcoming election.

For this reason, no one raised *Purcell* in the district court. The Court was never asked to enter an injunction—both sets of Plaintiffs moved for summary judgment "on the merits" of their claims. *Id.* And even if they had demanded an injunction, the Intervenors forfeited their *Purcell* argument by never raising it in the district court. For the first time, the Intervenors argue in their response that *Purcell* prohibits this Court from reversing the *dismissal* of Plaintiffs' case. No case supports their distortion of *Purcell*. This Court should reject the argument, which, in any event, the Plaintiffs didn't preserve.

CONCLUSION

This Court should reverse the District Court's judgment.

Respectfully submitted,

/s/ Thomas R. McCarthy

Thomas R. McCarthy
Gilbert C. Dickey
Conor D. Woodfin
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com
gilbert@consovoymccarthy.com
conor@consovoymccarthy.com

Spencer M. Ritchie
Forman Watkins & Krutz LLP
210 East Capitol Street, Ste. 2200
Jackson, MS 39201
(601) 960-3172
spencer.ritchie@formanwatkins.com

Dated: September 16, 2024

Counsel for Appellants Republican National Committee, Mississippi Republican Party, James Perry, and Matthew Lamb

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7) because it contains 6,489 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: September 16, 2024 */s/ Thomas R. McCarthy*

CERTIFICATE OF SERVICE

I filed this brief on the Court's electronic filing system, which will email everyone requiring notice.

Dated: September 16, 2024 */s/ Thomas R. McCarthy*