No.

In the Supreme Court of the United States

MICHAEL WATSON, MISSISSIPPI SECRETARY OF STATE,
Petitioner,

v.

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal election-day statutes—2 U.S.C. § 7, 2 U.S.C. § 1, and 3 U.S.C. § 1—set the Tuesday after the first Monday in November in certain years as the "election" day for federal offices. Like all other States, Mississippi requires that ballots for federal offices be cast—marked and submitted to election officials—by that day. And like most other States, Mississippi allows some of those timely cast ballots (mail-in absentee ballots, in Mississippi's case) to be counted if they are received by election officials a short time after election day (in Mississippi, within 5 business days after election day). Miss. Code Ann. § 23-15-637(1)(a). In the decision below, the Fifth Circuit held that the federal election-day statutes require that ballots be both cast by voters and received by election officials by election day and thus preempt Mississippi's law.

The question presented is whether the federal election-day statutes preempt a state law that allows ballots that are cast by federal election day to be received by election officials after that day.

PARTIES TO THE PROCEEDING

Petitioner is Michael Watson, in his official capacity as the Mississippi Secretary of State. He was a defendant-appellee in the court of appeals.

Respondents are the Republican National Committee, the Mississippi Republican Party, James Perry, Matthew Lamb, and the Libertarian Party of Mississippi. They were plaintiffs-appellants in the court of appeals.

Vet Voice Foundation and Mississippi Alliance for Retired Americans were intervenor defendants-appellees in the court of appeals.

The other defendants-appellees in the court of appeals were: Justin Wetzel, in his official capacity as the clerk and registrar of the Circuit Court of Harrison County; and Toni Jo Diaz, Becky Payne, Barbara Kimball, Christene Brice, and Carolyn Handler, in their official capacities as members of the Harrison County Election Commission.

RELATED PROCEEDINGS

United States District Court (S.D. Miss.):

Republican National Committee, et al. v. Wetzel, et al., No. 24-cv-25 (July 29, 2024)

Libertarian Party of Mississippi v. Wetzel, et al., No. 24-cv-37 (July 29, 2024)

United States Court of Appeals (5th Cir.):

Republican National Committee, et al. v. Wetzel, et al., No. 24-60395 (Oct. 25, 2024)

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INTRODUCTION

The Fifth Circuit in this case held that the federal laws setting the federal "election" day preempt a Mississippi law allowing absentee ballots cast by election day to be received shortly after that day. That ruling defies statutory text, conflicts with this Court's precedent, and—if left to stand—will have destabilizing nationwide ramifications. As five judges explained in dissenting from the denial of rehearing en banc, the decision is thus deeply wrong and raises an issue of exceptional importance. This Court should review that decision now and reject it.

Federal law sets the Tuesday after the first Monday in November in certain years as the "election" day for federal offices. 2 U.S.C. § 7; 2 U.S.C. § 1; 3 U.S.C. § 1. Like all other States, Mississippi requires that ballots for federal offices be cast—marked and submitted to election officials—by that day. And like most other States, Mississippi allows some of those timely cast ballots (mail-in absentee ballots, in Mississippi) to be counted if they are received by election officials soon after election day (in Mississippi, within 5 business days after election day). Miss. Code Ann. § 23-15-637(1)(a). The Fifth Circuit held here that federal law requires that ballots be received by election day and so preempts Mississippi's law.

The Fifth Circuit's decision is wrong. As a matter of plain meaning, an "election" is the *conclusive choice* of an officer. Voters make that choice by casting—marking and submitting—their ballots by election day. The election has then occurred, even if election officials do not receive all ballots by that day. Under

Mississippi law, voters cast their ballots by election day. So federal law does not preempt Mississippi law.

That plain-text view has the support of this Court's cases defining "election" from ratification to the modern day, dictionary definitions across the centuries, and this Court's holdings. Those authorities emphasize *the voters' choice* of an officer—which is made when ballots are *cast*. *E.g.*, *Foster v. Love*, 522 U.S. 67, 71 (1997) (an *election* is "'[t]he act of choosing a person to fill an office'") (quoting Noah Webster, An American Dictionary of the English Language 433 (1869)); *Newberry v. United States*, 256 U.S. 232, 250 (1921) (since ratification, *election* has meant "final choice of an officer by the duly qualified electors"). And this Court has held that election day is the day to "conclude[ ]" the election—through a "final selection" of officers. *Foster*, 522 U.S. at 71, 72. That occurs when voters have marked and submitted their ballots: ballots are then cast and the *final selection* is *concluded*—even if that selection cannot be effectuated until ballots are received. None of these authorities even mentions ballot receipt in defining an "election." That is because ballot "cast[ing]" is "fundamental[ ]" to an election, but ballot "recei[pt]" is not. *Republican National Committee v. Democratic National Committee*, 589 U.S. 423, 424, 426 (2020) (per curiam).

Ballot receipt is, of course, critical to *effectuating* the voters' choice. But that is also true of counting votes. Yet—as the Fifth Circuit and respondents agree—counting votes is not part of the election. That is why counting votes lawfully can and does occur after election day. So too with ballot receipt: it is vital—but it is not part of the election itself. States may thus do what Mississippi has done: make a

"policy choice" to "require only that absentee ballots be *mailed* by election day." *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

The Fifth Circuit's decision warrants this Court's review. The court struck down a state law regulating elections—a matter the Constitution allows States to address—based on stark errors of law. That decision will have sweeping ramifications. The rule the Fifth Circuit adopted would require scrapping election laws in most States. About 30 States and the District of Columbia accept some ballots that are mailed by election day but received after that day. The decision below thus invites nationwide litigation against laws in most States—risking chaos in the next federal elections, particularly given the tendency of election-law claims to spur last-minute lawsuits. Less than 18 months remain before the next federal election—and state electoral processes start much sooner. States need to know whether federal law permits post-election-day ballot-receipt laws—and thus whether they must change their laws to comply with federal law or whether they may change their laws on policy grounds. The stakes are high: ballots cast by—but received after—election day can swing close races and change the course of the country. And this case is an excellent vehicle. The decision below is countered by a comprehensive dissent from the denial of rehearing en banc, so this Court has the benefit of thorough lower-court treatment of the purely legal question presented. Waiting to resolve that question will invite chaos, confusion, and unfairness. This Court should grant review now and reverse.

OPINIONS BELOW

The court of appeals' opinion (App.1a-26a) is reported at 120 F.4th 200. The court of appeals' order denying rehearing en banc and the opinions accompanying that denial (App.27a-58a) are reported at 132 F.4th 775. The district court's opinion (App.59a-85a) is reported at 742 F. Supp. 3d 587.

JURISDICTION

The court of appeals' judgment was entered on October 25, 2024. The court of appeals denied rehearing en banc on March 14, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the appendix to this petition. App.86a-91a.

STATEMENT

1. a. As a "default" rule, the Constitution "invests the States" with "responsibility" over most of "the mechanics" of elections to federal offices. *Foster v. Love*, 522 U.S. 67, 69 (1997). States thus enjoy "a wide discretion" in establishing a "system" for federal elections. *United States v. Classic*, 313 U.S. 299, 311 (1941). At the same time, the Constitution "grants" to Congress authority over some aspects of federal elections and "the power to override" certain state election regulations. *Foster*, 522 U.S. at 69.

This framework is set out chiefly in Articles I and II. Article I addresses congressional elections. The Elections Clause provides: "The Times, Places and

Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Article II addresses presidential elections. The Electors Clause provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" to vote for President and Vice President. *Id.* art. II, § 1, cl. 2; *see id.* art. II, § 1, cl. 1; *id.* amend. XII. But "[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." *Id.* art. II, § 1, cl. 4.

For decades after the Founding, "Congress left the actual conduct of federal elections to the diversity of state arrangements." *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1171 (9th Cir. 2001). But Congress eventually set some "uniform" national "rules" for federal elections. *Foster*, 522 U.S. at 69.

This case involves one of those rules: the rule setting the election day for federal offices. In three federal statutes, Congress has established federal election day as the Tuesday after the first Monday in November in certain years. The statute on Representatives, adopted in its original form in 1872, says: "The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter." 2 U.S.C. § 7; *see* Act of Feb. 2, 1872, ch. 11, § 3, 17 Stat. 28. The statute on Senators, first

enacted in 1914 (after the Seventeenth Amendment called for the popular election of Senators), adopts the same rule. Act of June 4, 1914, ch. 103, § 1, 38 Stat. 384. It now says: "At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter." 2 U.S.C. § 1. And the same rule applies for appointing electors for President and Vice President. The governing statute, adopted in its original form in 1845, now says: "The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day." 3 U.S.C. § 1; *see id.* § 21(1) ("election day" in 3 U.S.C. § 1 "means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State," except with certain "force majeure events"); Act of Jan. 23, 1845, ch. 1, 5 Stat. 721.

b. Mississippi law allows qualified residents to vote in federal elections in person on election day or (in limited circumstances) absentee. Miss. Code Ann. §§ 23-15-541 *et seq.*, 23-15-621 *et seq.* Mississippians wishing to vote absentee may do so "either by mail or in person with a regular paper ballot." *Id.* § 23-15-637(3). For in-person absentee ballots to be counted, they must be "cast ... and deposited into a sealed ballot box by the voter, not later than 12:00 noon on the Saturday immediately preceding elections held on Tuesday." *Id.* § 23-15-637(1)(b). For mail-in absentee ballots (including ballots sent by "common carrier") to

be counted, they "must be postmarked on or before the date of the election and received by the registrar no more than five (5) business days after the election." *Id.* § 23-15-637(1)(a). "[A]ny" ballots "received after such time ... shall not be counted." *Ibid.* A mail-in absentee ballot is thus "cast" when it is mailed, "timely cast" when it is postmarked on or before election day, and "timely ... received" when received within 5 business days after election day. *Id.* § 23-15-637(1)(a), (2). Absentee ballots are counted only after "the polls close" on election day. *Id.* § 23-15-639(1)(c); *see id.* § 23-15-581.

2. In 2024 the Republican National Committee, the Mississippi Republican Party, James Perry (a Mississippi voter affiliated with Republican committees), and Matthew Lamb (a Mississippi voter and county election commissioner) filed suit under 28 U.S.C. § 1331 against the Mississippi Secretary of State (petitioner here) and several county officials charged with election administration. ROA.23-36 (complaint). The Libertarian Party of Mississippi filed a separate suit against the same defendants. App.5a. Plaintiffs are respondents here.

Respondents contend that the federal election-day statutes (2 U.S.C. § 7, 2 U.S.C. § 1, and 3 U.S.C. § 1) require ballots to be received by election officials—not just cast—by election day. They claim that Mississippi's law allowing mail-in absentee ballots cast by election day to be received within 5 business days after that day (Miss. Code Ann. § 23-15-637(1)(a)) is therefore preempted by the federal election-day statutes, violates the right to stand for office protected by the First and Fourteenth Amendments, and violates the right to vote protected by the Fourteenth Amendment. App.5a.

The district court consolidated the cases, allowed Vet Voice Foundation and Mississippi Alliance for Retired Americans to intervene as defendants, and agreed to resolve the cases on cross-motions for summary judgment. App.5a-6a & n.2.

The district court granted summary judgment to the defendants. App.59a-85a. It ruled that respondents have Article III standing (App.62-72a) but that their claims fail on the merits (App.72a-83a).

On the merits, the court first rejected respondents' preemption claim, holding that Mississippi's law "does not conflict with" the federal election-day statutes. App.84a; *see* App.72a-82a. The court focused on "the meaning of the word 'election'" in those statutes. App.77a; *see* App.77a-79a. When Congress enacted those statutes, the court explained, the "ordinary meaning" of *election* was "'*final* choice of an officer by the duly qualified electors'" or "'the combined actions of voters and officials meant to make *a final selection* of an officeholder.'" App.77a, 78a (quoting *Newberry v. United States*, 256 U.S. 232, 250 (1921), then *Foster*, 522 U.S. at 71; district court's emphases). Mississippi's law, the court held, accords with that meaning by requiring that the "election" be held on federal election day. "[U]nder Mississippi's law," the court explained, "no 'final selection' is made *after* the federal election day." App.79a. "All that occurs after election day is the delivery and counting of ballots cast on or before election day." *Ibid.* The court added that its conclusion respects the federal election-day statutes' aims, because requiring ballot casting by election day (but ballot receipt after that) does not "burden[ ] citizens with multiple election days" or "risk[ ] undue influence upon voters in one state from the announced tallies in states voting

earlier." App.82a; *see Foster*, 522 U.S. at 73-74 (discussing Congress's aims).

The court also rejected respondents' right-to-vote and right-to-stand-for-office claims. App.83a. The court said that those claims "stand or fall on whether the Mississippi absentee-ballots statute conflicts with federal law, in which case [respondents] say their rights would be violated." *Ibid.* Because there is "no such conflict," there are "no such violations." *Ibid.*

3. The court of appeals reversed in part, vacated in part, and remanded. App.1a-26a.

On standing, the court held that respondents possess Article III standing and that "this case fits comfortably within" precedent. App.6a n.3.

On the merits, the court held that "Mississippi's law is preempted." App.6a; *see* App.2a-3a, 6a-24a. The court ruled that, under the federal election-day statutes, federal "election" day "is the day by which ballots must be both *cast* by voters and *received* by state officials" and that Mississippi law conflicts with those statutes because it allows ballots to be received after election day. App.3a. That holding, the court said, flows from "[t]ext, precedent, and historical practice." App.2a-3a.

On text: The court said that preemption here "turns on the meaning of *election*" in the federal election-day statutes. App.8a (emphasis added). The court acknowledged that "dictionary definitions often help" in "understanding ... statutory text," but declared that those definitions "do not shed light on Congress's use of the word 'election' in the nineteenth century." App.8a n.5. The court said that one dictionary "largely restates the federal election

statutes" and "most other contemporary sources make no mention of deadlines or ballot receipt." *Ibid.*

On precedent: The court focused (App.8a-13a) on this Court's decision in *Foster v. Love*, which held that 2 U.S.C. §§ 1 and 7 preempted a Louisiana law allowing Senators and Representatives to be elected in October, "without any action to be taken on federal election day" in November. 522 U.S. at 68-69, 74. *Foster* ruled that "[w]hen the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder." *Id.* at 71. Because the election must occur on federal election day, this Court held, a congressional election "may not be consummated prior to federal election day." *Id.* at 72 n.4.

From *Foster* the court drew three "elements" to an "election" that the federal election-day statutes require by election day: "official action"; "finality"; and "consummation." App.9a. The court faulted Mississippi's law on each element. App.9a-13a.

First, the court ruled that, by requiring ballot casting but not ballot receipt by election officials by election day, Mississippi law lacks the "official action" that must occur on election day. App.9a-10a. Citing "hypotheticals" that it called "obviously absurd"—what if a State allowed voters to mark their ballots and then "place them in a drawer" or "post a picture on social media"?—the court declared it "equally obvious" that "a ballot is 'cast' when the State takes custody of it." App.10a.

Second, the court ruled that Mississippi law does not provide the "finality" that must occur on election day. App.10a-12a. The court declared that an election

involves "the polity's final choice of an officeholder"—not just individual voters' "selection[s]"—and the polity has not "made an election and finally chosen the winner before all voters' selections are received." App.10a (emphases omitted). The court contrasted ballot receipt with ballot counting—which it agreed need not occur on election day. *Ibid.* Even if ballots have not been counted on election day, the court said, "the result is fixed when all of the ballots are received and the proverbial ballot box is closed": "[t]he selections are done and final." *Ibid.* But "while election officials are still receiving ballots, the election is ongoing": "[t]he result is not yet fixed, because live ballots are still being received." *Ibid.* The court also cited state agency regulations saying that mail-in absentee ballots are "final" when "accepted," processed, and deposited in a ballot box. 1 Miss. Admin. Code pt. 17, R. 2.1, 2.3(a). The court took those regulations to mean that absentee ballots are not final when mailed. App.11a. The court closed by declaring that "mail-in ballots are less final than Mississippi claims" because "[t]he postal service permits senders to recall mail." App.12a.

Third, the court ruled that under Mississippi law an election is not "consummated" on election day. App.12a-13a. "[T]he election is consummated," the court said, only "when the last ballot is received and the ballot box is closed." App.13a. "[S]o long as the State continue[s] to receive ballots, the election [is] ongoing and ha[s] not been consummated." App.12a-13a. By contrast, when officials only count ballots after election day, the election is "consummated" because "officials know there are X ballots to count" since "the proverbial ballot box is closed." App.13a.

The court saw no conflict (App.23a-24a) between its holding and *Republican National Committee v. Democratic National Committee*, 589 U.S. 423 (2020) (per curiam), which stayed an injunction that allowed ballots in Wisconsin to be mailed after primary election day because "allow[ing] voters to mail their ballots after election day ... would fundamentally alter the nature of the election by allowing voting ... after the election." *Id.* at 426. That conclusion, the court said, "is equally consistent with the ballot-receipt requirement" as it is with the view that an election requires only ballot casting: "If voters can mail their ballots after Election Day, those ballots are necessarily received after Election Day, too." App.24a. The court added that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Ibid.*

On history: The court believed that "[h]istory confirms that 'election' includes both ballot casting and ballot receipt." App.14a; *see* App.14a-18a. "For over a century after Congress established a uniform federal Election Day," the court said, "States understood those statutes to mean ... that ballots must be received no later than the first Tuesday after the first Monday in November." App.14a. According to the court, early American voting occurred ("[b]y necessity") "contemporaneously with receipt of votes," App.14a, absentee voting (from soldier absentee voting in the Civil War to broader civilian absentee voting deep into the 20th century) long largely required ballot receipt by election day, App.15a-17a, and "[e]ven today" most States "prohibit officials from counting ballots received after" election day, App.17a.

The court said that other federal laws are either "silent on the deadline for ballot receipt" (and so do

"nothing at all" that would allow post-election-day ballot receipt) or "show that Congress knew how to authorize post-Election Day voting when it wanted to do so." App.19a, 20a (emphasis omitted); *see* App.19a-23a. On the latter point, the court first cited the Help America Vote Act of 2002 (HAVA), 52 U.S.C. § 20901 *et seq.*, which sets a voting procedure for when a voter's eligibility is in question: such a voter submits a provisional ballot that is counted if the voter is later determined eligible. *Id.* § 21082(a). The court said: "All jurisdictions that issue such ballots accept them after Election Day." App.21a (citing U.S. Amicus Br. 16 (CA5 Dkt. 148)). The court then cited the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. § 20301 *et seq.*, which regulates military and overseas voting. The court said that UOCAVA "permits post-Election Day balloting, but it does so through its statutory text," which "authorize[s] the Attorney General to bring civil actions in federal court for declaratory or injunctive relief needed to enforce the Act." App.22a (citing 52 U.S.C. § 20307(a)). In "many" cases, the court said, federal courts have issued injunctions "extending ballot-receipt deadlines." *Ibid.* The court last cited 2 U.S.C. § 8(a) (which lets States hold congressional elections on days other than federal election day for vacancies and runoffs) and 3 U.S.C. § 21(1) (which lets States "modif[y]" the "period of voting" in presidential elections for certain "force majeure events"). App.22a-23a. These statutes, the court said, again show that, "[w]here Congress wants to make exceptions to the federal Election Day statutes, it has done so." App.23a.

Based on its view of the federal election-day statutes, the court of appeals reversed the district

court's judgment on respondents' preemption claims and remanded "for further proceedings to fashion appropriate relief" on those claims. App.24a, 26a. The court vacated the district court's judgment on respondents' other claims (since that judgment rested on the district court's preemption ruling) and "remand[ed] for reconsideration" of those claims. App.25a. The court called its decision "limited" in "nature." App.18a.

4. The court of appeals denied rehearing en banc by a 10-5 vote. App.29a. Four opinions accompanied that denial. App.30a-58a.

Judge Graves dissented in an opinion joined by four other judges. App.35a-56a. He maintained that "federal law does not mandate that ballots be received by state officials" by election day and that this case "presents a question of exceptional importance." App.35a. The panel decision, Judge Graves said, "runs counter to all the traditional tools of statutory interpretation": "plain meaning, dictionary definitions, common parlance, historical practice, congressional intent, and congressional history." App.56a. He maintained: that dictionary definitions show that an "election" requires that voters "ma[ke] choices for public officers—nothing more," App.38a; *see* App.38a-39a; that "common parlance" confirms that an election requires only ballot casting, not ballot receipt, App.41a-42a; that "[h]istorical practice" supports that view, because in the Civil War (which occurred around when the main election-day statutes were enacted) "many states accommodated wartime voting by counting timely-cast ballots that were received after Election Day," App.47a; *see* App.47a-51a; that other federal statutes confirm that the federal election-day statutes do not set a ballot-

receipt deadline, App.52a-54a; that the panel's analysis under *Foster* is flawed, App.39a-47a; and that "statutory and practical" "[l]imiting principles" "prevent" absurd outcomes (such as a ballot-receipt deadline 100 days after election day), App.54a. He observed that the panel's holding deems preempted "ballot receipt laws in at least twenty-eight states and the District of Columbia." App.56a.

In a concurrence joined by all members of the three-judge panel (plus Judge Smith), Judge Oldham said that the panel "did not hold that the States' common practice of counting timely-cast ballots received after Election Day was preempted," because the panel "recognized" that States "obviously can accept ballots after Election Day under circumstances authorized by federal law" (as in HAVA and UOCAVA). App.33a (cleaned up). And without "time limits" on "ballot acceptance," he added, States could extend congressional ballot-receipt deadlines "2 months, or even 2 years, after Election Day" and could "engage in gamesmanship, experiment with deadlines, and renew the very ills Congress sought to eliminate: fraud, uncertainty, and delay." App.34a.

Judge Higginson wrote a dissent commending two non-party attorneys' written "critique[s]" of the panel decision. App.57a-58a. Judge Ho responded with a concurrence suggesting that such critiques "may just reflect the institutional bias at many of the nation's largest law firms." App.30a; *see* App.31a-33a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari and hold that the federal election-day statutes do not preempt state laws, like Mississippi's, that allow ballots that are cast by federal election day to be received a short time

after that day. The court of appeals' contrary holding defies the federal election-day statutes' plain text and this Court's precedent. Unless this Court intervenes, that holding will have profound and destabilizing nationwide ramifications. That holding would scrap election laws in most States and will invite breakneck litigation and threaten electoral chaos. This Court can avoid all that by granting review now and reversing.

I. The Decision Below Is Wrong.

Under federal law, election day is the day for voters to *conclusively choose* federal officers. Voters make that conclusive choice by *casting*—marking and submitting—their ballots by election day. Under Mississippi law, mail-in absentee voters cast their ballots by election day. So federal law does not preempt Mississippi law. The court of appeals erred in ruling otherwise.

A. 1. The federal election-day statutes establish a uniform federal "election" day. 2 U.S.C. § 7; 2 U.S.C. § 1; 3 U.S.C. § 1. The core term uniting those statutes is "election." That word's meaning thus dictates what those statutes require of federal election day.

Start with plain meaning. An *election* is the *conclusive choice* of an officer. When the Constitution was ratified, *election* meant "*final choice* of an officer by the duly qualified electors." *Newberry v. United States*, 256 U.S. 232, 250 (1921) (emphasis added). *Election* had that same meaning in 1845, when the statute setting the time for presidential elections was first enacted. *See ibid.*; Noah Webster, An American Dictionary of the English Language 288 (1841). In 1872, when Congress first set a uniform time for electing Representatives, *election* had the same meaning: "'[t]he act of *choosing* a person to fill an

office.'" *Foster v. Love*, 522 U.S. 67, 71 (1997) (quoting Noah Webster, An American Dictionary of the English Language 433 (1869); emphasis added); *see* Joseph E. Worcester, Dictionary of the English Language 469 (1860) ("The act or the public ceremony of choosing officers of government."). When, in 1914, Congress passed the statute setting the time for electing Senators, *election* had the same meaning: "The *selecting* of a person or persons for office, as by ballot." Funk and Wagnalls, Desk Standard Dictionary 266 (1919) (emphasis added); *see Newberry*, 256 U.S. at 250. *Election* retains that meaning to this day. As this Court put it in 1941, an election is "*the expression* by qualified electors of their *choice* of candidates." *United States v. Classic*, 313 U.S. 299, 318 (1941) (emphases added). And as this Court said more recently, when 2 U.S.C. §§ 1 and 7 refer to "the election" of a Senator or Representative, "they plainly refer to the combined actions of voters and officials meant to make *a final selection* of an officeholder." *Foster*, 522 U.S. at 71 (emphasis added).

An *election* thus occurs when voters make their *choice* of officers and that choice is *conclusive—final*. Under the federal election-day statutes, then, election day is the day by which voters must *conclusively choose* federal officers. Although parts of the electoral process can occur before and after that day, voters cannot make their choice after that day, and the choice cannot be conclusive before that day.

An election thus does not depend on when ballots are *received*. The definitions set out above impose no requirement of ballot receipt as part of the election itself. Those definitions instead recognize that an election occurs once *voters* make their *conclusive choice*—which they do by marking and submitting

ballots by election day. Voters have then chosen and their choice is conclusive: the election is over. Ballot *casting* is thus materially different from ballot *receipt*. Ballot receipt is, of course, critical to effectuating the voters' choice. But that is also true of counting votes. Yet—as the court of appeals and respondents agree—counting is not part of the election itself. App.10a, 13a. That is why counting votes lawfully can and does occur after election day. *See ibid.* The same is true of ballot receipt: it is critical, but it is not part of the election itself.

This Court's holdings confirm that plain-text understanding. In *Foster*, this Court held that 2 U.S.C. §§ 1 and 7 preempted Louisiana's "open primary" law allowing Senators and Representatives to be elected in October, "without any action to be taken on federal election day." 522 U.S. at 68-69, 74. This Court ruled that, "[w]hen the federal [election-day] statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a *final selection* of an officeholder." *Id.* at 71 (emphasis added). So "a contested selection of candidates for a congressional office that is *concluded* as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violates" federal law. *Id.* at 72 (emphasis added). An election thus "may not be *consummated* prior to federal election day." *Id.* at 72 n.4 (emphasis added). Under *Foster*, then, election day is the day to "conclude[ ]" and "consummate[ ]" the election—through a "final selection." *Id.* at 71, 72 & n.4. That occurs when voters have marked and submitted their ballots as state law requires: ballots are then cast and the *final selection* is *concluded* and *consummated*—

even if the final selection cannot be effectuated until ballots are received and counted.

That view is reinforced by *Republican National Committee v. Democratic National Committee*, 589 U.S. 423 (2020) (per curiam), which stayed an injunction that allowed ballots to be mailed after primary election day in Wisconsin. In granting that relief, this Court distinguished "the date by which ballots may be *cast* by voters" from "the date by which ballots may be ... *received* by the municipal clerks," and ruled that extending the former date "fundamentally alters the nature of the election." *Id.* at 424 (emphases added). "[A]llow[ing] voters to mail their ballots *after* election day," *RNC* declared, "would fundamentally alter the nature of the election by allowing *voting* ... after the election." *Id.* at 426 (emphases added). This Court accordingly recognized that ballot "cast[ing]" is "fundamental[ ]" to voting and thus to the election itself, but ballot "recei[pt]" is not. *Id.* at 424, 426. So when a State adopts a post-election-day ballot-receipt deadline, it is making a permissible "policy choice." *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay); *see id.* at 32 ("variation" in state "election-deadline rules" "reflects our constitutional system of federalism").

2. Mississippi law comports with the federal election-day statutes.

Under Mississippi law, mail-in absentee voters—like all other voters—make their conclusive choice of federal officers by federal election day. Mississippi law directs that, to be counted, mail-in absentee ballots "must be postmarked on or before the date of

the election" and "received by the registrar no more than five (5) business days after the election." Miss. Code Ann. § 23-15-637(1)(a). Under that law, a mail-in absentee ballot is thus "cast" when it is mailed and "timely cast" when it is postmarked on or before election day. *Id.* § 23-15-637(1)(a), (2). The law thus aligns with the ordinary understanding of casting a ballot by mail. *See RNC*, 589 U.S. at 424 (equating "cast[ing]" absentee ballots with "mail[ing] and postmark[ing]" them). So Mississippi requires that mail-in absentee ballots be cast by election day.

That framework harmonizes with federal law. Because Mississippi law requires that mail-in absentee ballots be cast by election day ("on or before the date of the election"), Mississippi voters make their *choice* by election day. Miss. Code Ann. § 23-15-637(1)(a). And Mississippi voters cannot change their votes after that date or submit votes after that date. *See id.* §§ 23-15-581, 23-15-637(1)(a). So their choice, made by election day, is *conclusive*: the "final selection of an officeholder" occurs on federal election day because ballots must be cast—marked and submitted by mail—by that day. *Foster*, 522 U.S. at 71.

It does not matter that some ballots in Mississippi may be received after election day. As explained, only ballot casting is essential to the *election*. Mississippi does not "allow voters to mail their ballots *after* election day," so it does not "allow[ ] *voting* ... after the election." *RNC*, 589 U.S. at 426 (emphases added). Under Mississippi law, "no 'final selection' is made *after* the federal election day." App.79a. "All that occurs after election day is the delivery and counting of ballots cast on or before election day." *Ibid.* Under Mississippi law the election is "concluded" and "consummated" on federal election day because by

that day Mississippi voters make a "final selection" of officers. *Foster*, 522 U.S. at 71, 72 & n.4. Reasonable people can disagree with Mississippi's "policy choice" to "require only that absentee ballots be *mailed* by election day." *Wisconsin State Legislature*, 141 S. Ct. at 34 (Kavanaugh, J., concurring). But it is a choice that the Constitution "authori[zes]" Mississippi to make. *Id.* at 32 (noting that Mississippi is among the States that "no longer require that absentee ballots be received before election day").

B. The court of appeals held that, under the federal election-day statutes, "ballots must be both *cast* by voters and *received* by state officials" by election day. App.3a; *see* App.6a-24a. The court erred.

1. On text, although the court agreed that preemption here turns on the "meaning" of *election* in the federal election-day statutes, App.8a, the court cast aside a premier aid to assessing plain meaning: dictionaries. *See*, *e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 581, 582, 584, 586, 587-88, 597 (2008) (relying on dictionary definitions to construe Second Amendment); *Foster*, 522 U.S. at 71 (relying on dictionary definition of *election* to interpret statutes at issue here). The court declared that dictionary definitions "do not shed light on" Congress's use of the word "election" in the federal election-day statutes because those definitions "make no mention of deadlines or ballot receipt." App.8a n.5. That was error. App.38a-39a (Graves, J., dissenting). The failure of *any* dictionary definition of "election" to even *mention* ballot receipt is a strong signal that ballot receipt is *not* part of an election. *See Heller*, 554 U.S. at 586 (faulting proposed definition because "[n]o dictionary has ever adopted that definition"). When evidence cuts against a conclusion, that does not

mean that the evidence is unhelpful. It means that the conclusion is likely wrong. So it is here. The dictionary definitions cited in this case all support the view that *ballot casting* defines an election. *E.g.*, App.8a n.5; *supra* pp. 16-17. None supports the view that ballot receipt defines an election.

2. On precedent, the court drew from *Foster* three "elements" that must occur by election day—"official action," "finality," "consummation"—and faulted Mississippi law on each. App.9a; *see* App.8a-13a. The court erred. *See* App.39a-47a (Graves, J., dissenting).

First, the court ruled that the requirement for "official action" means that a ballot can be cast only when it is "received" by election officials. App.9a-10a. The court cited no authority saying that: it just deemed the matter "obvious." App.10a. But the authorities set out above say otherwise: all show that an "election" focuses on the voters' choice and imposes no ballot-receipt requirement. *Supra* pp. 16-19. So an election official's only necessary involvement in the election is giving a voter the means to make a final selection—such as by offering a ballot and a method to cast it. That occurs in Mississippi.

The court suggested that if a ballot could be "cast" before it is received then a State could allow voters to mark their ballots and then "place them in a drawer" or "post a picture on social media." App.10a. But the panel cited nothing to show that its hypotheticals satisfy any plausible understanding of *ballot casting*. And there is no dispute that an election requires at least ballot casting—marking and submitting a ballot to election officials. Mississippi's law requires ballot casting. Indeed, that law requires that a mail-in absentee ballot be "postmarked on or before" election

day and thus bear an objective indicator that it is cast—and cast timely. Miss. Code Ann. § 23-15-637(1)(a). That law has no resemblance to the panel's hypotheticals.

Second, the court ruled that an election requires "the polity's" final choice of officers—rather than just individual voters' selections—and that the polity's "final[ ]" choice is not made until "all voters' selections are received." App.10a. The court again cited nothing to support this view. And under Mississippi law, the polity *does* make its choice by election day: every vote must be cast by that day, so the polity's final choice is made by that day. Even though "officials are still receiving ballots," "the result is fixed" on election day and the election is not "ongoing": voting is closed on election day. *Contra ibid.* And if (as the court thought) the election were "ongoing" when the State is receiving ballots, it is also ongoing when the State is counting ballots: the "selections" are "done and final"—the result is "fixed"—at both stages. *Ibid.* That means that ballot casting—not ballot receipt—defines an "election."

The court thought that state agency regulations support its view. App.11a. But those regulations do not provide that ballots become "final" after election day. *Contra ibid.* They instead (a) prevent a voter from casting an absentee ballot and then casting a second ballot in person on election day, and (b) provide a backstop method of casting an affidavit ballot in person on election day that will be counted only if a mail-in ballot is untimely or flawed. Under those regulations, a mail-in absentee ballot is the voter's "final vote" (1 Miss. Admin. Code pt. 17, R. 2.1) and the voter cannot "cast a regular ballot" "at the polling place on election day" (*id.*, R. 2.3(a)). A voter

who arrives at the polling place on election day can cast "an affidavit ballot"—but that affidavit ballot will be accepted and counted only if the voter's "absentee ballot has not been received within five (5) business days after the election" or is "rejected" because of a flaw. *Id.*, R. 2.3. So a mail-in absentee ballot *is* final when mailed—which must occur by election day. And affidavit ballots are all *cast and received* on election day—and thus also satisfy any election-day deadline.

The court said that the postal service "permits senders to recall mail," so mail-in ballots "are less final than Mississippi claims." App.12a. The court erred. Respondents never presented evidence that a mail-in ballot *has ever been*—or as a practical matter *could ever be*—recalled after mailing. *Cf.* App.45a-46a & n.4 (Graves, J., dissenting). Respondents never suggested such a possibility *until their appellate reply briefs*. And they were unable to defend that claim at oral argument. The court should not have relied on that forfeited claim to condemn Mississippi's law.

Third, the court ruled that an election is "consummated" only when the last ballot is received because officials then "know there are X ballots to count." App.13a; *see* App.12a-13a. But the election is just as consummated when no more ballots can be cast: the election is then finished and decided. Under Mississippi law, that occurs on federal election day.

The court brushed aside *Republican National Committee v. Democratic National Committee*, which stayed an injunction allowing ballots to be mailed after primary election day in Wisconsin. The court claimed that *RNC* "is equally consistent with the ballot-receipt requirement" as it is with the view that an election requires only ballot casting. App.24a.

Nonsense. *RNC* distinguished ballot "cast[ing]" from ballot "recei[pt]"; it emphasized that "[e]xtending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election"; and it reemphasized that "allow[ing] voters to mail their ballots after election day" is what "would fundamentally alter the nature of the election by allowing voting for six additional days after the election." 589 U.S. at 424, 426. The court below declared that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." App.24a. Granted. But this not about mere "language" in an opinion: it is about an on-point *holding* of *this Court*. The court of appeals did not follow that holding.

3. On history, the court said that until recently States generally required ballot receipt by election day. App.14a-18a. Even if that were true, *but see*, *e.g.*, App.47a-51a (Graves, J., dissenting); U.S. Amicus Br. 19-22, the federal election-day statutes would not block States from adopting a different practice. The court cited nothing—no judicial decision, no legislative finding, no legislator's statement, no treatise, *nothing*—to show that any State imposed an election-day ballot-receipt deadline because it thought the federal election-day statutes require it. *Contra* App.14a ("For over a century after Congress established a uniform federal Election Day, States *understood those statutes to mean*" that ballots must be received by that day.) (emphasis added). At most this history shows that many States have viewed election-day ballot receipt as good policy. But federal law does not mandate that "policy choice." *Democratic*

National Committee v. Wisconsin State Legislature, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring).

Indeed, there is a more logical inference from these election-day ballot-receipt practices than the one the court of appeals drew: for much of our history there was little or no reason for another practice. For 120 years after the Founding—and for decades after the main federal election-day statutes were enacted—States largely required voting to occur in person. *See*, *e.g.*, Paul G. Steinbicker, Absentee Voting in the United States, 32 Am. Pol. Sci. Rev. 898, 898 (1938) (before 1913, only two States had general civilian absentee-voting laws). When people vote in person on election day, it makes little sense for them to do anything but immediately cast a ballot that is also immediately received. *Cf.* App.14a ("By necessity, early American voting occurred contemporaneously with receipt of votes."). That does not mean that the federal election-day statutes require that practice. As the world changed and more States adopted "absent voting," States had reason to change ballot-receipt practices. Charles Kettleborough, Absent Voting, 11 Am. Pol. Sci. Rev. 320, 320 (1917) (connecting expansion of absent voting in 1913-1917 to the rise of work requiring "absence from home" on election day—as with railroad employees and traveling salesmen). Some did change practices; some did not. *See* Steinbicker 905-06 ("usual" ballot-receipt deadline in early-20th-century absentee-voting laws was on or before election day, but deadlines "range[d] from six days before to six days after" election day). The federal election-day statutes allow both policy choices.

4. The court claimed that other federal statutes are "silent on the deadline for ballot receipt" or "show that Congress knew how to authorize post-Election

Day voting when it wanted to do so," App.19a, 20a (emphasis omitted); *see* App.19a-23a. But no statute the court invoked shows that the federal election-day statutes require ballot receipt by election day.

The court cited the Help America Vote Act, which sets a voting procedure, using provisional ballots, when a voter's eligibility is in question. App.20a-21a. The court said: "All jurisdictions that issue such ballots accept them after Election Day." App.21a. All the court cited on that point is the United States' brief noting that this is the universal practice. U.S. Amicus Br. 16. But HAVA's *text* is silent on provisional-ballot-receipt deadlines. *See* 52 U.S.C. § 21082(a). Because (according to the court below) "congressional silence" means "nothing at all," App.20a, on the court's own reasoning HAVA *does not* authorize post-election-day ballot receipt—let alone confirm that the federal election-day statutes require ballot receipt by election day, *see ibid.* Worse yet: On the court of appeals' reasoning, the laws of 48 States allowing post-election-day receipt of provisional HAVA ballots (U.S. Amicus Br. 16) are subject to the federal election-day statutes and are all preempted.

The court claimed that UOCAVA "permits post-Election Day balloting, but it does so through its statutory text." App.22a. This is wrong too. UOCAVA says: "The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this chapter." 52 U.S.C. § 20307(a). That text is silent on ballot-receipt deadlines. Indeed, just pages before saying that UOCAVA's "text" permits "post-Election Day balloting," App.22a, the court declared that "[n]othing in" UOCAVA "says that States are allowed to accept and count ballots received after Election

Day," App.19a; *see ibid.* (UOCAVA "say[s] nothing about the date or timing of ballot receipt"). Worse: On the court's own view of congressional silence, the federal election-day statutes clearly bar post-election-day receipt of UOCAVA ballots—and so render unlawful the injunctions "extending ballot-receipt deadlines" the United States has obtained in "many" UOCAVA cases. App.22a; *see United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 496 (2001) (equity courts cannot issue injunctions that override a "clear and valid legislative command").

Last, the court cited 2 U.S.C. § 8(a) and 3 U.S.C. § 21(1). App.22a-23a. The former allows congressional elections on days other than federal election day for special elections to fill vacancies and for runoff elections. The latter defines "election day" in 3 U.S.C. § 1 to be "the Tuesday next after the first Monday in November" in every fourth year, but has an exception: if a State that "appoints electors by popular vote" timely "modifies the period of voting" in response to certain "force majeure events," "election day" will "include the modified period of voting." The court viewed these statutes as exceptions to the rule that elections be held on federal election day and believed that they show that, "[w]here Congress wants to make exceptions to" the federal election-day statutes, "it has done so." App.23a. Even if that were right, it would not show that the federal election-day statutes require ballot receipt—rather than ballot casting—by election day. And because the "election" requires only ballot casting, a State that requires only ballot casting by election day is not seeking an exception to those statutes—it is following them.

5. In a concurrence in the denial of rehearing en banc, the panel members claimed that rejecting preemption here would mean that "federal law imposes no time limits at all on ballot acceptance"—so States could allow ballot receipt "2 months, or even 2 years, after Election Day." App.34a. This claim has many flaws. One: The Constitution supplies deadlines that force action. The Twentieth Amendment provides that "the terms" of "the President and Vice President" "shall ... begin" "at noon on the 20th day of January" and that "the terms" of "Senators and Representatives" "shall ... begin" "at noon on the 3d day of January." U.S. Const. amend. XX, § 1. Two: If Congress is dissatisfied with state ballot-receipt deadlines, it can act. *Id.* art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 4. Three: Congress *has* imposed deadlines. *E.g.*, 2 U.S.C. §§ 1, 7 (recognizing January 3 as the start of congressional terms); 3 U.S.C. §§ 5(a)(1) (timing of certification of electors), 7 (each State's electors "shall meet and give their votes on the first Tuesday after the second Wednesday in December"); *see* App.54a (Graves, J., dissenting).

The concurrence also claimed that, without an election-day ballot-receipt deadline, States could "engage in gamesmanship, experiment with deadlines, and renew the very ills Congress sought to eliminate: fraud, uncertainty, and delay." App.34a. The concurrence offered no support for that claim. And Mississippi law produces none of the ills that the federal election-day statutes address. Mississippi law respects the "uniform[ity]" that Congress sought to achieve when it "mandate[d] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster v. Love*, 522 U.S. 67, 69, 70 (1997). Mississippi voters make a conclusive

choice of federal officers by federal election day. And Mississippi law does not "distort[ ]" "the voting process" by allowing "the results of an early federal election in one State" to "influence later voting in other States." *Id.* at 73. Mississippi's absentee ballots are not counted until the polls close on election day. *See* Miss. Code Ann. § 23-15-639(1)(c). And Mississippi does not "burden" citizens by "forc[ing]" them "to turn out on two different election days to make final selections of federal officers in Presidential election years." 522 U.S. at 73. In Mississippi, all federal elections occur the same day. Miss. Code Ann. §§ 23-15-781, 23-15-1033, 23-15-1041.

From top to bottom, the court of appeals erred. Federal law does not preempt Mississippi law.

II. The Decision Below Warrants Review.

The decision below raises issues of exceptional importance and warrants this Court's review.

The court of appeals deemed unconstitutional a state law that passed by wide margins. *See* Mississippi Legislature, 2024 Regular Session, House Bill 1406, https://bit.ly/43RAHr1. Whenever a federal court invalidates a state law, the matter is important. *See Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018). Here it is especially so. The decision below invalidates a state law regulating elections—a matter the Constitution authorizes States to address—and thus strips Mississippi of an important power. U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. And it does so based on serious errors of law. *Supra* Part I.

The decision has profound ramifications. The rule the court of appeals adopted would invalidate laws in most States. App.56a (Graves, J., dissenting). About

30 States and the District of Columbia accept some ballots that are mailed by election day but received after that day. *See*, *e.g.*, National Conference of State Legislatures, Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots (updated May 12, 2025), https://bit.ly/4mLlbV1. The decision below imperils laws in all those States—and may doom the laws of the 48 States that (according to the court below) allow post-election-day receipt of provisional HAVA ballots. *Supra* p. 27. The court suggested that its holding allows post-election-day receipt of HAVA and UOCAVA ballots. App.20a-22a; *see also* App.33a-34a (Oldham, J., concurring). That suggestion defies the court's own reasoning and so provides no assurance at all. *Supra* pp. 27-28. The court touted "the limited nature" of its decision. App.18a. The decision is not "limited." It adopts a rule that would "necessarily invalidate (or at least call into question)" laws in most States and thus has significant nationwide "implications." *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28, 35 (2020) (Kavanaugh, J., concurring).

This Court's review is warranted now. If left to stand, the decision below will spark litigation challenging many States' laws—risking chaos in the next federal elections, particularly given the tendency of election-law claims to spur last-minute lawsuits. In the meantime, the decision will cast a shadow over every state law allowing post-election-day ballot receipt in federal elections. Less than 18 months remain before the next federal election—and electoral processes start much sooner. State legislatures need to know what rule governs post-election-day ballot receipt. If it is the Fifth Circuit's rule, legislatures need to know that so that they can change their laws

to comport with that rule. If it is not the Fifth Circuit's rule, legislatures need to know that so that they can appreciate their policy options. And States need to know all this before lawsuits are upon them. This case provides an opportunity to answer the question presented "in the ordinary course of litigation rather than in emergency proceedings on the eve of an election." Pet. for Cert. 27, *Bost v. Illinois Board of Elections*, No. 24-568, *cert. granted*, — S. Ct. —, 2025 WL 1549779 (June 2, 2025) (granting review on issue of candidate standing in a case "involv[ing] nearly identical claims" to those here, *Bost* Pet. 30 n.12).

When a lower court's invalidation of a state law raises issues of exceptional importance, this Court has granted certiorari even without a circuit conflict. The most on-point example is *Foster*. *See Foster* Pet. for Cert. 7-15, No. 96-670. If review was warranted in *Foster*, it is warranted here: the open-primary law at issue in *Foster* was apparently unique; post-election-day ballot-receipt laws are widespread; so this case's national impact vastly exceeds *Foster*'s. This Court has all it needs to resolve the question presented: The panel decision is countered by a thorough dissent from the denial of rehearing en banc and is complemented by a responsive concurrence joined by all panel members. Together those opinions air the key arguments in a case that boils down to construing straightforward statutes.

This case is an excellent vehicle. The case was decided on summary judgment and presents a purely legal question. The court of appeals squarely decided that question. That issue is outcome determinative. There is a clean Article III case. App.6a n.3. Although the court of appeals remanded the preemption claim for "further proceedings" on relief, App.24a, the case

is not interlocutory in any way that matters. The court of appeals' decision amounts to a direction to enter at least a declaratory judgment against Mississippi's law. The core result on remand—the voiding of Mississippi's law—is foreordained. There is no point to awaiting further lower-court proceedings.

Beyond all this, ballots cast by—but received after—election day can swing close races and thus the course of the country. Every practical consideration favors review now, in this case. Waiting will invite chaos, confusion, and unfairness. This Court can avert all that by granting review now and reversing.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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June 2025

APPENDIX

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United States Court of Appeals for the Fifth Circuit

[Filed October 25, 2024]

No. 24-60395

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

Plaintiffs–Appellants,

versus

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,

versus

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,

VET VOICE FOUNDATION; MISSISSIPPI ALLIANCE FOR RETIRED AMERICANS,

Intervenor Defendants–Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC Nos. 1:24-CV-25, 1:24-CV-37

Before HO, DUNCAN, and OLDHAM, *Circuit Judges*.

ANDREW S. OLDHAM, *Circuit Judge*:

Congress statutorily designated a singular "day for the election" of members of Congress and the appointment of presidential electors. Text, precedent,

and historical practice confirm this "day for the election" is the day by which ballots must be both *cast* by voters and *received* by state officials. Because Mississippi's statute allows ballot receipt up to five days after the federal election day, it is preempted by federal law. We reverse the district court's contrary judgment and remand for further proceedings.

I

A

Two constitutional provisions are relevant to this case. First, the Electors Clause provides: "The Congress may determine the Time of chusing the Electors" for President. U.S. CONST. art. II, § 1, cl. 4. Pursuant to the Electors Clause, the Second Congress mandated that States appoint presidential electors within a 34-day period "preceding the first Wednesday in December in every fourth year." Act of Mar. 1, 1792, ch. 8, § 1, 1 Stat. 239. Some States responded by adopting multi-day voting periods—but this caused election fraud, delay, and other problems. *See, e.g.*, Cong. Globe, 28th Cong. 2d Sess. 14–15, 29 (1844). So Congress intervened in 1845, fixing a "uniform time" for appointing presidential electors on the Tuesday after the first Monday in November. Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (to be codified at 3 U.S.C. § 1).

The second relevant constitutional provision is the Elections Clause. It provides: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. CONST. art. I, § 4, cl. 1. The Elections Clause imposes a "duty" upon States to hold elections for federal

officers. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). It also vests "power" in Congress to "alter those [state] regulations or supplant them altogether." *Ibid.* In the early Republic, congressional elections occurred at varying times, providing some States with an "undue advantage" of "indicating to the country the first sentiment on great political questions." Cong. Globe, 42d Cong., 2d. Sess., 141, 116 (1871). And the establishment of a uniform day for presidential elections resulted in many States having two separate days for federal elections. *Id.* at 141. As a result, Congress scheduled all House elections to occur on the presidential election day. Act of Feb. 2, 1872, ch. 11, § 3, 17 Stat. 28 (to be codified at 2 U.S.C. § 7).[1]

The upshot: These statutes "mandate[] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster v. Love*, 522 U.S. 67, 70 (1997). As to the President, "The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day." 3 U.S.C. § 1. And as to the House of Representatives, "The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election." 2 U.S.C. § 7. Throughout this opinion, we use the term "Election Day" to refer to this singular day established by federal law as the time for choosing members of Congress and presidential electors.

[1] After the passage of the Seventeenth Amendment, Congress immediately scheduled Senate elections to occur on the same day. Act of June 4, 1914, ch. 103, § 1, 38 Stat. 384.

B

During the COVID-19 pandemic, Mississippi amended its election laws to accept absentee ballots "postmarked on or before the date of the election and received by the registrar no more than five (5) business days after the election." Act of July 8, 2020, ch. 472 § 1, 2020 Miss. Laws 1411; MISS. CODE § 23-15-637(1)(a). Now, after the pandemic, Mississippi has preserved that deadline and amended the statute to cover absentee ballots transmitted by common carriers in addition to the United States Postal Service. 2024 Miss. Laws H.B. 1406; MISS. CODE § 23-15-637(1)(a).

On January 26, 2024, plaintiffs Republican National Committee, Mississippi Republican Party, James Perry, and Matthew Lamb sued various state officials in the Southern District of Mississippi to enjoin them from enforcing the State's post-election ballot deadline. On February 5, 2024, plaintiff Libertarian Party of Mississippi brought a functionally identical lawsuit. Both complaints alleged the federal Election Day statutes preempt Mississippi's law by establishing a uniform day for choosing members of Congress and appointing presidential electors. 3 U.S.C. § 1; 2 U.S.C. §§ 1, 7. They also brought claims under 42 U.S.C. § 1983 alleging violations of the right to stand for public office and the right to vote under the First and Fourteenth Amendments. The district court consolidated the cases.[2]

[2] The district court also granted a motion to intervene as defendants by Defendant-Appellees Vet Voice Foundation and Mississippi Alliance for Retired Americans.

Plaintiffs and defendants jointly moved to schedule briefing on cross-motions for summary judgment. The district court granted defendants' motion for summary judgment on July 28. Plaintiffs timely appealed. We granted Plaintiff-Appellants' motion to expedite the appeal on August 9. Jurisdiction is proper under 28 U.S.C. § 1291.[3]

II

Turning to the merits, we first (A) describe the preemption inquiry that applies in election law cases. We then (B) hold Mississippi's law is preempted by the uniform federal Election Day. Finally (C), we explain how historical practice confirms our holding.

We "review a district court's grant of summary judgment *de novo*." *Huskey v. Jones*, 45 F. 4th 827, 830 (5th Cir. 2022). On cross-motions for summary judgment, we review each motion independently, "with evidence and inferences taken in the light most favorable to the nonmoving party." *White Buffalo Ventures, LLC v. Univ. of Tex.*, 420 F.3d 366, 370 (5th Cir. 2005).

A

The constitution struck a delicate balance between state and federal power to regulate elections. The Elections Clause creates a "default" presumption of state regulation, subject to Congress's powerful check. *Foster*, 522 U.S. at 69. States can regulate many

[3] Neither party disputes the plaintiffs' standing before this court. That is presumably because this case fits comfortably within our precedents. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017); *Vote.Org v. Callanen*, 89 F.4th 459, 471 (5th Cir. 2023).

elements of federal elections, "but only so far as Congress declines to preempt state legislative choices." *Ibid.* Congress retains the power under the Elections Clause to "override state regulations by establishing uniform rules for federal elections, binding on the States." *Ibid.* (quotation omitted). When Congress exercises that power, "any regulations it may make necessarily supersede inconsistent regulations of the State" given its "paramount" constitutional authority in this area. *Ex Parte Siebold*, 100 U.S. 371, 372 (1879). The question, then, is whether Mississippi's law is "inconsistent with" federal statutes establishing "the day for the election." *Inter Tribal*, 570 U.S. at 15.[4]

We generally apply a presumption against preemption when Congress "legislate[s] in areas traditionally regulated by the States." *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). That presumption does not apply under the Elections Clause, however. "Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Inter Tribal*, 570 U.S. at 14. *See also Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012), *aff'd sub nom. Inter Tribal*, 570 U.S. 1 (2013)

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[4] Fifth Circuit precedent states the preemption inquiry differently, asking whether a state statute "directly conflict[s] with federal election laws." *Voting Integrity Proj., Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000). Without expressly addressing the difference, a prior panel of this court has used both interchangeably. *Voting for America, Inc. v. Steen*, 732 F.3d 382, 399–400 (5th Cir. 2013) (using "conflict" and "inconsistent" interchangeably to analyze election-law preemption, citing both *Inter Tribal* and *Bomer*).

("In contrast to the Supremacy Clause . . . the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections."). Unlike other subjects of federal legislation, election law "*always* falls within an area of concurrent state and federal power." *Inter Tribal*, 570 U.S. at 14 n.6 (emphasis in original). We therefore need not employ any presumption against preemption.

B

Our preemption analysis begins with the statutory text, as interpreted by the Supreme Court. *See id.* at 9–10. Preemption thus turns on the meaning of election within "the day for the election." *See* 2 U.S.C. § 7; 3 U.S.C. §§ 1, 21. We must "interpret the words consistent with their ordinary meaning at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (quotation omitted).

The Supreme Court's decision in *Foster v. Love* guides our understanding of the statutory text.[5] That

[5] While dictionary definitions often help our understanding of statutory text, they do not shed light on Congress's use of the word "election" in the nineteenth century. Plaintiff-Appellants emphasize one that largely restates the federal election statutes: "[t]he day of a public choice of officers." *Election*, *in* NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1830); *see also* GOP Blue Br. at 19. But most other contemporary sources make no mention of deadlines or ballot receipt. *See, e.g.*, *Election*, *in* 3 THE CENTURY DICTIONARY AND CYCLOPEDIA 1866 (1901) ("The act or process of choosing a person or persons for office by vote . . . . [A]lso, the occasion or set time and provision for making such choice."); *Election*, *in* JAMES STORMONTH, ETYMOLOGICAL AND PRONOUNCING

case involved Louisiana's open primary system. 522 U.S. at 70. The State held congressional primary elections in which all candidates appeared on one ballot, and all voters could cast their votes. *Ibid.* If no candidate won a majority of votes, the general election proceeded as normal on the federal Election Day between the two candidates with the most votes. *Ibid.* If a candidate won a majority of votes, however, the election concluded then and there—*before* the federal Election Day. *Ibid.* The Court held this system preempted by 2 U.S.C. §§ 1 and 7. *Ibid.* Although the *Foster* Court declined to "par[e] the term 'election' in § 7 down to the definitional bone," three definitional elements bear emphasis: (1) official action, (2) finality, and (3) consummation. *Ibid.* (discussing 2 U.S.C. § 7). We discuss each in turn.

1

First, official action. *Foster* teaches that elections involve an element of government action. "When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder." *Id.* at 71. The State contends that "an election official's only necessary involvement is giving a voter the means to make a final selection—such as by offering a ballot and a method to cast it." MS Red Br. at 28.

DICTIONARY OF THE ENGLISH LANGUAGE (W. Blackwood ed., 1881) ("[T]he choice or selection of a person or persons to fill some office"); *Election*, BLACK'S LAW DICTIONARY (1st ed. 1891) ("The selection of one man from among several candidates to discharge certain duties in a state, corporation, or society.").

The State's problem is that it thinks a ballot can be "cast" before it is received. What if a State changes its law to allow voters to mark their ballots and place them in a drawer? Or what if a State allowed a voter to mark a ballot and then post a picture on social media? The hypotheticals are obviously absurd. But it should be equally obvious that a ballot is "cast" when the State takes custody of it.

2

Second, finality. The Supreme Court has said "the word [election] now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors." *Newberry v. United States*, 256 U.S. 232, 250 (1921). An election involves more than government action; it also involves the polity's *final* choice of an officeholder.

A voter's *selection* of a candidate differs from the public's *election* of the candidate. Officials tally each voter's *selection* and then declare a winner of the *election*. Those are the not the same thing. And while an individual voter might be able to make his or her selection in private, alone, it makes no sense to say the electorate as a whole has made an election and finally chosen the winner before all voters' selections are received.

That is not to say all the ballots must be counted on Election Day. Even if the ballots have not been counted, the result is fixed when all of the ballots are received and the proverbial ballot box is closed. The selections are done and final. By contrast, while election officials are still receiving ballots, the election is ongoing: The result is not yet fixed, because live ballots are still being received. Although a single

voter has made his final selection upon marking his ballot, the entire polity must do so for the overall election to conclude. So the election concludes when the final ballots are received and the *electorate*, not the individual *selector*, has chosen.

Mississippi's regulations further confirm this result. The absentee-ballot statute authorizes the Secretary of State to issue rules and regulations to effectuate the State's absentee voting scheme. MISS. CODE § 23-15-637(3). And those regulations state that "an absentee ballot is the final vote of a voter when, during absentee ballot processing by the Resolution Board, *the ballot is marked accepted*." 01-17 MISS. ADMIN. CODE R2.1 (emphasis added). For absentee ballots submitted by mail, the ballot "shall be final, if accepted by the Resolution Board" after receipt, processing, and deposit into a secure ballot box. *Id.* at R.2.3(a). Thus, Mississippi's own law belies its mailbox-rule theory of finality. *See* Red Br. at 2 ("Voters make a *conclusive choice*—a *final selection* that *concludes* and *consummates* the election—when they mark and submit their ballots as required by law. The final selection is then made." (emphasis in original)).

Mississippi's regulations also bring this case squarely within the holding of *Maddox v. Board of State Canvassers*, 149 P.2d 112 (Mont. 1944). In that case, the Montana Supreme Court found the Electors Clause preempted a state law that allowed receipt of ballots after Election Day. *Id.* at 116. Montana state law defined casting a ballot as "depositing [] the ballot in the custody of the election officials." *Id.* at 115. By the State's own terms, its statute thus permitted voters to cast ballots five days after Election Day. That conflicted with, and hence was preempted by,

federal law. So too with Mississippi's law because it, like Montana's, provides that a ballot is "final" when accepted by election officials—five days *after* Election Day.

Finally, mail-in ballots are less final than Mississippi claims. The postal service permits senders to recall mail, with the exception of overseas UOCAVA ballots. *See* Domestic Mail Manual, §§ 507.5, 703.8; 39 C.F.R. § 111.1 and 39 C.F.R. § 211.2 (incorporating the Domestic Mail Manual by reference into the Postal Service Regulations). This indicates that at least domestic ballots are not cast when mailed, and voters can change their votes after Election Day. That further undermines the State's claim that ballots are "final" when mailed.

3

Third, consummation. The *Foster* Court stated that "if an election does take place, it may not be *consummated* prior to federal election day." 522 U.S. at 72 n.4 (emphasis added). Louisiana's law ran afoul of the uniform federal Election Day because it permitted the State to conclude its election early with no further action on Election Day.

Similarly, we have blessed a Texas early-voting law that permitted "unrestricted" early voting up to 17 days before Election Day. *See Voting Integrity Proj., Inc. v. Bomer*, 199 F.3d 773, 774 (5th Cir. 2000). We held that scheme not preempted because election results would not be "decided or consummated before federal election day." *Id.* at 776 (quotation omitted). The *Bomer* panel emphasized that Texas's early voting scheme left polls open on federal election day and that most voters cast their ballots on that day. *Id.* at 775–76. In other words, so long as the State

continued to receive ballots, the election was ongoing and had not been consummated. Other circuits have agreed. *See Voting Integrity Proj., Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001) ("But we have a Supreme Court decision which we must follow . . . emphasizing that it found a violation of the statute only because there was no act of officials or voters left to be done on federal election day."); *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001) ("*Foster*'s narrow holding suggests that, so long as a State does not conclude an election prior to federal election day, the State's law will not 'actually conflict' with federal law."). Thus, the election is consummated when the last ballot is received and the ballot box is closed.

Of course, it can take additional time to tabulate the election results. *Cf. Bush v. Gore*, 531 U.S. 98, 116 (2000) (Rehnquist, C.J., concurring). It has become a "routine[]" practice for election officials to count (or recount) ballots after Election Day. *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1325 (N.D. Fla. 2000), *aff'd sub nom. Harris v. Fla. Elections Comm'n*, 235 F.3d 578 (11th Cir. 2000); *see also Millsaps*, 259 F.3d at 546 n.5 ("[O]fficial action to confirm or verify the results of the election extends well beyond federal election day . . ."). The election is nonetheless consummated because officials know there are X ballots to count, and they know there are X ballots to count because the proverbial ballot box is closed. In short, *counting* ballots is one of the various post-election "administrative actions" that can and do occur after Election Day. *Millsaps*, 259 F.3d at 546 n.5. *Receipt* of the last ballot, by contrast, constitutes consummation of the election, and it must occur on Election Day.

C

History confirms that "election" includes both ballot casting and ballot receipt. *Moore v. Harper* teaches that this "historical practice" is "particularly pertinent when it comes to the Elections and Electors Clauses." 143 S. Ct. 2065, 2086 (2023). For over a century after Congress established a uniform federal Election Day, States understood those statutes to mean what they say: that ballots must be *received* no later than the first Tuesday after the first Monday in November. *See Overseas Absentee Voting: Hearing on S. 703 Before the S. Comm on Rules and Admin*, 95th Cong. 33–34 (1977) (listing 48 States, Puerto Rico, the Virgin Islands, and the District of Columbia as requiring ballot receipt on or before Election Day).

By necessity, early American voting occurred contemporaneously with receipt of votes. Voting typically occurred *viva voce*, by showing hands, or by using handwritten ballots that voters physically brought to the polls for submission and counting. *Burson v. Freeman*, 504 U.S. 191, 200 (1992). Later, political parties started to print and disseminate ballots, which voters would take and submit. *Ibid.* Polling places became "akin to entering an open auction place," rife with "bribery and intimidation." *Id.* at 201–02. Adoption of the "Australian system" (including universal ballots and private polling booths) in the early 1890s addressed these issues. *Id.* at 202–05. The Australian system bifurcated the voting process so that a voter could express his preference non-contemporaneously with receipt and counting. But at the time Congress established a uniform election day in 1845 and 1872, voting and ballot receipt necessarily occurred at the same time.

Absentee voting began during the Civil War to secure the franchise of soldiers in the field. *See* JOSIAH HENRY BENTON, VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR 5, 9 (1915). Before the war, citizens could vote only in person at meetings in their election districts, and no jurisdiction permitted voting anywhere outside of the voter's district. *Id.* at 5. But when the war began, soldiers effectively lost their votes when they left their districts, which engendered a sense of injustice: "There seemed to be no reason why the man who was qualified to vote at home should be disqualified merely because he was out of the State fighting the battles of the Union or of the Confederacy." *Ibid.* As a result, States invented absentee voting procedures that severed the tie between physical presence and voting.

States authorized absentee voting for soldiers using two methods. First, voting in the field. Election officials brought ballot boxes to the battlefield, where soldiers cast their ballots. *Id.* at 15. In such cases, the voter's "connection with his vote ended when he put it in the box, precisely as it would have ended if he had put it into the box . . . at home." *Ibid.* Unlike Mississippi's mailbox-rule analogy, field voting involved soldiers directly placing their ballots into official custody with no carrier or intermediary. The act of voting simultaneously involved receipt by election officials. The second method, proxy voting, allowed soldiers to prepare ballots in the field and send them to a proxy for deposit in the ballot box of the soldier's home precinct. *Ibid.* When proxy voting occurred, "the voter's connection with his ballot did not end until it was cast into the box at the home precinct, and therefore [] the soldier really did vote, not in the field, but in his precinct at home." *Ibid.*

Here, again, the voter voted when the vote was received by election officials. Both methods underscore that official receipt marked the end of voting.

Early postwar iterations of absentee voting universally required receipt by Election Day. After the Civil War ended, most States eliminated field voting. *See id.* at 314–15 (cataloging expiration of wartime voting measures). By the time of World War I, however, many States had adopted a variety of absentee voting laws. Some States limited absentee voting to soldiers and further limited it to only wartime elections. P. Orman Ray, *Military Absent-Voting Laws*, 12 AM. POL. SCI. REV. 461, 461–62 (1918). Nine States required voting on the day of the election, whether by proxy or by field voting. *Id.* at 464. New York's law allowed commanding officers to set a date and account for military emergencies, but "in no case shall it be later than the day of the general or special election." *Ibid.* Three States required ballots to be marked and submitted well before Election Day. *Ibid.* And West Virginia did not specify a date, so long as ballots were returned by mail "in time to be counted at home on election day." *Ibid.* Thus, *even* during the height of war-time exigency, a ballot could be counted only if *received* by Election Day.

Around this time, States that permitted civilian absentee voting imposed the same Election Day deadline for receiving ballots. Washington State permitted voters to return ballots to be counted in a voter's home county after Election Day, but those ballots were still collected by state officials by Election Day. P. Orman Ray, *Absent-Voting Laws, 1917*, 12 AM. POL. SCI. REV. 251, 253 (1918). Three

States required voters to swear that they would return ballots on or before Election Day. *Id.* at 255. Minnesota did not count ballots received in the voter's home district after Election Day. *Id.* at 256. Of the States permitting absentee ballots, only Illinois addressed what to do with ballots received too late: It provided for their destruction. *Id.* at 259. These early absentee voting laws universally foreclosed the possibility of accepting and counting ballots received *after* Election Day because they specified that ballots would be counted on Election Day.

Absentee and mail-in voting became more common over the course of the twentieth century. By 1938, 42 States permitted some form of absentee voting. Paul G. Steinbicker, *Absentee Voting in the United States*, 32 AM. POL. SCI. REV. 898, 898–99 (1938). But it was almost impossible to count a ballot received after Election Day. All but one of the 42 absentee voting States also had time limits for ballot receipt, with the "usual requirement" of Election Day. *Id.* at 905–06. By 1977, only two of the 48 States permitting absentee voting counted ballots received after Election Day. *Overseas Absentee Voting: Hearing on S. 703 Before the S. Comm on Rules and Admin*, 95th Cong. 33–34 (1977).

Even today, a substantial majority of States prohibit officials from counting ballots received after Election Day. In January 2020, before the COVID-19 pandemic, only 14 States and the District of Columbia accepted ballots postmarked by Election Day—with the other 36 requiring *receipt* on or before that date. Nat'l Conf. of State Legislatures, *Table 6: The Evolution of Absentee/Mail Voting Laws*, 2020–22 (Oct. 26, 2023), https://www.ncsl.org/elections-and-campaigns/the-evolution-of-absentee-mail-voting-

laws-2020-through-2022 [https://perma.cc/8ABZ-YFXC]. In advance of the 2020 general election, seven States extended their ballot-receipt deadlines, including Mississippi. *See ibid.* Of those seven, two already allowed post-election day receipt (California and North Carolina). *Ibid.* While Mississippi and Massachusetts retained their 2020 ballot-receipt dates, every other State that changed their receipt deadline subsequently reverted to earlier deadlines. *Ibid.* All told, as of November 2022, 18 States and the District of Columbia permit post-Election Day receipt. *See ibid.*

The considerable historical support for absentee voting says nothing about whether States can extend the election past the uniform, singular Election Day required by federal law. Instead, the practice of absentee voting that arose during the Civil War demonstrates that the election concludes when all ballots are received. A few "late-in-time outliers" say nothing about the original public meaning of the Election-Day statutes. *Cf. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 70 (2022); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 250–51 (2022).

III

Mississippi, Intervenors, and *amici* make several counterarguments. Each is unavailing. We (A) discuss other federal statutes' bearing on the preemption inquiry. We then (B) address Mississippi's analogy to the mailbox rule. We then (C) discuss relief and the limited nature of today's decision.

A

Mississippi offers several federal statutes purporting to show Congress "has reinforced that the federal election-day statutes do not require ballot receipt by election day." MS Red Br. at 2. But these statutes do no such thing. The cited statutes are *silent* on the deadline for ballot receipt—and congressional silence does not "reinforce[]" anything. *Ibid.*

First, the Uniform and Overseas Citizens Absentee Voting Act ("UOCAVA") provides procedures for voting by military members and civilians living abroad. *See* 52 U.S.C. § 20301 *et seq.* The Act requires federal officials to submit ballots 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." *Id.* § 20304(b)(1). It also creates a fail-safe federal absentee ballot for voters who do not receive their state ballots on time. *Id.* § 20303(a)(1). But those, too, must be submitted in the same manner and on the same timeline as absentee ballots in the voter's State. *Id.* § 20303(b).

Next, the 1970 Amendments to the Voting Rights Act. These amendments established a uniform absentee-ballot scheme for presidential elections. *See* 52 U.S.C. § 10502. And like UOCAVA, the 1970 Amendments say nothing about the date or timing of ballot receipt. Instead, voters must return ballots "to the appropriate election official of [their] State not later than the time of closing of the polls in such state on the day of such election." *Id.* § 10502(d).

Nothing in these statutes says that States are allowed to accept and count ballots received after Election Day. Other statutes invoked by both parties and *amici* suffer from the same deficiencies: All are

silent on ballot receipt and Election Day timing. At bottom, the very best Mississippi and its *amici* can muster is that some federal election statutes are silent about—and hence do not expressly prohibit—receiving and counting ballots after Election Day. And if all we had was congressional silence, it would be difficult or impossible for the plaintiffs to show preemption of state law.

But this is not a congressional-silence case. As demonstrated in Part II, *other* federal statutes—in their text, tradition, and interpretation by the Supreme Court—*do* require States to receive all ballots by Election Day. So the plaintiff political parties have federal statutes that conflict with Mississippi's state law, and the defendants, intervenors, and their *amici* have only congressional silence. Which is to say the latter have nothing at all. *See Sedima, SPRL v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985) ("[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute."); *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (plurality op.) (noting the Court's "oft-expressed skepticism toward reading the tea leaves of congressional inaction").

Congress's silence is particularly unhelpful to the State because other statutes show that Congress knew how to authorize post-Election Day voting when it wanted to do so. For example, the United States as *amicus* proffers the Help America Vote Act of 2002 ("HAVA"). *See* Brief for United States as *Amicus Curiae* 15–16; *see also* 52 U.S.C. § 20901 *et seq*. HAVA establishes a procedure for provisional voting when a voter's eligibility is in question. 52 U.S.C. § 21082. The voter casts a ballot and transmits it to appropriate election officials, who then determine his

eligibility to vote under state law. *Id.* § 21082(a)(1)–(3). Upon that verification, "the individual's provisional ballot shall be counted as a vote in that election in accordance with State law." *Id.* § 21082(a)(4). All jurisdictions that issue such ballots accept them after Election Day. *See* Brief for United States as *Amicus Curiae* 16.

But the fact that Congress authorized a narrow exception for potentially ineligible voters to cast provisional ballots after Election Day does not impliedly repeal all of the other federal laws that impose a singular, uniform Election Day for every other voter in America. As the Supreme Court has explained:

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both. A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. The intention must be clear and manifest. And in approaching a claimed conflict, we come armed with the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.

Epic Sys. Corp. v. Lewis, 584 U.S. 497, 510 (2018) (quotation and citations omitted). The United States as *amicus* cannot come close to showing that HAVA

displaces or impliedly repeals the longstanding general rule that the federal Election Day is the singular day on which the ballot box closes. Rather, the best way to harmonize HAVA with the other statutes governing the federal Election Day is that the former is a narrow exception that authorizes States to receive a certain small number of provisional ballots after Election Day from potentially unqualified voters. Not that it allows States to extend the federal Election Day by one day, five days, or 100 days for all voters.

UOCAVA also permits post-Election Day balloting, but it does so through its statutory text. UOCAVA's remedial provisions authorize the Attorney General to bring civil actions in federal court for declaratory or injunctive relief needed to enforce the Act. 52 U.S.C. § 20307(a). And the Attorney General has done so. *See Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act*, DEP'T OF JUST. (Mar. 24, 2022), perma.cc/J8AS-X3K6. In many of these cases, federal courts have awarded injunctive relief that includes extending ballot-receipt deadlines. *See ibid.* That *federal* officials, pursuant to *federal* law, may take enforcement actions in which *federal* courts grant ballot-receipt extensions says nothing about Mississippi's capacity to do so. And in any event, the fact that UOCAVA authorizes such actions in its text is very different from Mississippi's contention that congressional silence is enough to abrogate the uniform federal Election Day.

So too with the other Election Day exceptions. For instance, 2 U.S.C. § 8 permits States to hold congressional elections on days other than the federal Election Day in the event of a vacancy, including

those caused by "death," "resignation," "incapacity," or "failure to elect" a candidate on Election Day (i.e., permitting runoff elections). *Id.* at § 8(a). As such, it "creates an exception to section 7's absolute rule." *Busbee v. Smith*, 549 F. Supp. 494, 526 (D.D.C. 1982). Likewise, 3 U.S.C. § 21(1) permits States to "modif[y] the period of voting" in presidential elections for "force majeure events." Where Congress wants to make exceptions to the federal Election Day statutes, it has done so. All of this further proves Congress did not abrogate the uniform Election Day in other, non-excepted circumstances.

B

Mississippi next urges us to adopt a new mailbox rule: Once a voter casts her ballot, her "election" of a candidate is complete. *See* MS Red Br. at 18, 23. Such rules are embraced in other areas of the law. For example, a contract is formed when the offeree's acceptance is "put out of [his] possession, without regard to whether it ever reaches the offeror." Restatement (Second) of Contracts § 63(a) (Am. L. Inst. 1981). Federal tax law adopts such a mailbox rule. *See* 26 U.S.C. § 7502(a). But voting is not a contract or tax return. So the fact that mailbox rules are authorized in other areas of law is at best irrelevant. And at worst, it shows that Congress knows how to embrace a mailbox rule when it wants to do so.

Mississippi further points to a recent Supreme Court opinion discussing election deadlines as support for its proposed mailbox rule. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423 (2020) (per curiam). In response to COVID, a federal district court in Wisconsin issued a preliminary

injunction extending the State's primary election, such that ballots mailed and postmarked up to six days after the State's deadline would be counted. *Id.* at 423–24. The Court's opinion states the injunction at issue "would allow voters to *mail their ballots* after election day, which is extraordinary relief and would fundamentally alter the nature of the election by allowing *voting* for six additional days after the election." *Id.* at 426 (emphasis added). Mississippi claims that this statement proves the act of mailing ballots equates to voting, and it further reads the Supreme Court as embracing a mailbox rule for voting. MS Red Br. at 29.

But this is neither a logical nor necessary implication of the case. The Court's conclusion that mailing ballots after Election Day allows voting after the election is equally consistent with the ballot-receipt requirement. If voters can mail their ballots after Election Day, those ballots are necessarily received after Election Day, too. And in any event, the Supreme Court has repeatedly cautioned that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979); *see also Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 373 (2023).

C

Today's decision says nothing about remedies. We decline to grant plaintiffs' initial request for a permanent injunction, which they have not renewed before this court. *See* GOP Reply Br. at 2, MSLP Reply Br. at 22. Instead, we remand to the district court for further proceedings to fashion appropriate relief, giving due consideration to "the value of preserving

the status quo in a voting case on the eve of an election." *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 567 (5th Cir. 2020); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006).[6]

IV

In addition to their preemption claims, plaintiffs claimed violations of the right to vote and the right to stand for office under the First and Fourteenth Amendments and brought actions under 42 U.S.C. § 1983. The district court concluded that Plaintiff-Appellants' claims under § 1983 "stand or fall on whether the Mississippi absentee-ballots statute conflicts with federal law." *Republican Nat'l Comm. v. Wetzel*, No. 1:24-CV-00025-LG-RPM, 2024 WL 3559623, at *11 (S.D. Miss. July 28, 2024). Because the district court erroneously concluded that Mississippi's statute is not preempted by federal law, we vacate its grant of summary judgment on plaintiffs' § 1983 claims and remand for reconsideration.

* * *

[6] When reviewing the district court's grant of summary judgment, we consider only their entitlement to judgment as a matter of law. But "well-established principles of equity" require a plaintiff to demonstrate, before the court issues a permanent injunction, "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (citations omitted). These factors require due consideration on remand.

As Justice Kavanaugh recently emphasized: "To state the obvious, a State cannot conduct an election without deadlines . . . A deadline is not unconstitutional merely because of voters' own failures to take timely steps to ensure their franchise." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Mem.) (Kavanaugh, J., concurring in denial of application to vacate stay) (quotation omitted); *see also Burdick v. Takushi*, 504 U.S. 428, 438 (1992) ("Reasonable regulation of elections . . . *does* require [voters] to act in a timely fashion if they wish to express their views in the voting booth." (emphasis in original)). Federal law requires voters to take timely steps to vote by Election Day. And federal law does not permit the State of Mississippi to extend the period for voting by one day, five days, or 100 days. The State's contrary law is preempted.

The judgment of the district court is REVERSED in part and VACATED in part, and the case is REMANDED for further proceedings consistent with this opinion.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

[Filed March 14, 2025]

No. 24-60395

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

Plaintiffs–Appellants,

versus

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,

versus

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.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:24-CV-25
USDC No. 1:24-CV-37

ON PETITION FOR REHEARING EN BANC

Before HO, DUNCAN, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.35 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P.35 and 5TH CIR. R.35).

In the en banc poll, five judges voted in favor of rehearing (JUDGES STEWART, GRAVES, HIGGINSON, DOUGLAS, AND RAMIREZ), and ten judges voted against rehearing (CHIEF JUDGE ELROD, and JUDGES JONES, SMITH, RICHMAN, HAYNES, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM).

* Judges SOUTHWICK and WILSON did not participate in the consideration of rehearing en banc.

JAMES C. HO, *Circuit Judge*, concurring in the denial of rehearing en banc:

This is not the first time (and it surely won't be the last) that opposing political interests will cross swords over whether and how election deadlines should be enforced. In *Foster v. Love*, 522 U.S. 67 (1997), our court reached the same outcome that we do today—that is, we set aside a state law because it conflicts with deadlines set by Congress. The Supreme Court unanimously affirmed. So we applied the same principles to the state law challenged here.

My distinguished colleague nevertheless suggests that this case may be unusual (and thus remarkable) because "topflight lawyers . . . unaffiliated with the parties" have seen fit to offer their views on this case pro bono. *Post*, at _ (Higginson, J., dissenting from the denial of rehearing en banc). The implication is that the panel decision may be so off the mark that leading members of the profession have felt compelled to speak out.

But there's another explanation: The pro bono activity in this case may just reflect the institutional bias at many of the nation's largest law firms.

Legal scholars have documented how major law firms consistently favor one side in highly charged disputes like this one. *See*, *e.g.*, Derek T. Muller, *Ideological Leanings in Likely Pro Bono Biglaw Amicus Briefs in the United States Supreme Court*, HARV. J.L. & PUB. POL'Y PER CURIAM (2024); Eugene Scalia, *John Adams, Legal Representation, and the "Cancel Culture"*, 44 HARV. J.L. & PUB. POL'Y 333, 335–36 (2021).

This evidence has led to the belief that major firms are falling short of "the great traditions of the

profession." Scalia, 44 HARV. J.L. & PUB. POL'Y at 334. The concern is that they have abandoned neutral principles of representation, and instead engage in ideological or political discrimination in the cases that they're willing to take on. *See*, *e.g.*, *id.* at 338 ("representing a person with whom we may disagree is a hallowed, essential tradition of the profession"); *Lefebure v. D'Aquilla*, 15 F.4th 670, 675 n.1 (5th Cir. 2021) (same). Moreover, professional traditions may not be the only thing that firms are failing to uphold. Two years ago, the Justice Department advised our court that much of the institutional bias at major firms may also include workplace policies that discriminate on the basis of race or sex—yet remain fashionable in many legal circles. *See Hamilton v. Dallas County*, 79 F.4th 494, 509 (5th Cir. 2023) (Ho, J., concurring) (quoting Civil Rights Division asserting that it is unlawful for firms to "only . . . invite women" to certain career events, or to issue "work assignments . . . on the basis of race," and agreeing that "a lot of law firms" violate Title VII of the Civil Rights Act).

To be sure, evidence of political and other forms of bias doesn't by itself make a particular legal position right or wrong in any given case. But it does mean that we shouldn't be surprised when "topflight" firms consistently jump in on only one side of politically charged disputes, including this one—whether the law actually supports their position or not. Nor should the firms themselves be surprised when others take notice that they are no longer abiding by the principles of the profession, and react accordingly.

It should go without saying, of course, that licensed attorneys have the same right to opine as any other American citizen—whether their views are

principled or partisan. Indeed, motivated reasoning is precisely why clients retain counsel.

But then that's exactly how we should treat their work—as motivated lawyering designed to reach a predetermined result. And whatever firms may choose to do, our duty as judges remains the same—to apply the law in a consistent and principled manner, regardless of whose ox is gored. That includes resolving conflicts between state law and the Constitution, no matter what some lawyers might say about it.

ANDREW S. OLDHAM, *Circuit Judge*, joined by SMITH, HO and DUNCAN, *Circuit Judges*, concurring in the denial of rehearing en banc:

I do not recognize the panel decision described by my esteemed dissenting colleagues. With greatest respect, the panel decision did *not* hold that the States' "common practice" of "count[ing] timely-cast ballots received after Election Day [] was preempted by federal law." *Post*, at 9–10 (Graves, J., dissenting from denial of rehearing en banc). It is absolutely true that many States under different circumstances sometimes accept ballots received after Election Day. *See id.* at 9 (tallying 28 States). It is *also* true that federal statutes like the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") or the Help America Vote Act ("HAVA") authorize such receipt for narrow classes of voters described by federal law. The question presented to the panel was whether, in the *absence* of any federal statute authorizing any deviation from the uniform Election Day requirement, States nonetheless have freedom to accept ballots for as long as they would like. The panel held no. But it explicitly recognized that numerous States—including many if not all of the ones invoked as bugaboos by the dissenting opinion—obviously can accept ballots after Election Day under circumstances authorized by federal law. *See Republican Nat'l Comm. v. Wetzel*, 120 F.4th 200, 211–13 (5th Cir. 2024) (explaining that UOCAVA, HAVA, and other federal laws authorizing States to accept ballots received after Election Day show that Congress knows how to make such exceptions to the general federal deadline); *compare post*, at 9 (ignoring what the panel actually held and asserting the panel held "that ballot receipt laws in at least twenty-eight

states and the District of Columbia are preempted by federal law[]").

According to the dissenting opinion, States should be free to accept ballots for as long as they'd like after Election Day. That is, of course, a question for Congress. But even if it was a question for federal judges, do our dissenting colleagues really think that federal law imposes no time limits at all on ballot acceptance? True, statutory deadlines prescribe dates by which the certification of *presidential* electors must occur. *Post*, at 24 (Graves, J., dissenting from denial of rehearing en banc). At best, those provide a last-ditch backstop—several weeks after Election Day. At worst, they permit States to engage in gamesmanship, experiment with deadlines, and renew the very ills Congress sought to eliminate: fraud, uncertainty, and delay. *See Republican Nat'l Comm.*, 120 F.4th at 204 (citing CONG. GLOBE, 28th Cong. 2d Sess. 14–15, 29 (1844)). And nothing whatsoever prevents the States from innovating with ever-later ballot receipt deadlines 2 months, or even 2 years, after Election Day in *congressional* elections. The dissenting opinion's only response is to say States are unlikely to do that—but such pragmatic assurances only underscore that the dissenting opinion lacks any legal limit.

The opinion the dissenters wanted to rehear en banc and the opinion the panel wrote are very different animals. I concur in the court's decision not to pretend they're the same.

JAMES E. GRAVES, JR., *Circuit Judge*, joined by STEWART, HIGGINSON, DOUGLAS, and RAMIREZ, *Circuit Judges*, dissenting from the denial of rehearing en banc:

I would grant the petition for rehearing. At a minimum, this case presents a question of exceptional importance: whether federal law prohibits states from counting valid ballots that are timely cast and received by election officials within a time period designated by state law. The substantial, if not overwhelming, weight of authority—including dictionary definitions, federal and state caselaw, and legislative history—counsels against the preemptive interpretation that the panel adopted. Moreover, the opinion conflicts with the tradition that forms the bedrock for our nation's governance—federalism—which vests states with substantial discretion to regulate the intricacies of federal elections. Simply stated, federal law does not mandate that ballots be received by state officials before Election Day's conclusion, and the panel's contrary holding is erroneous.

I.

In 2020, during the COVID-19 pandemic, Mississippi lawmakers worked in bipartisan fashion to craft and pass House Bill 1521. The legislation amended the Mississippi Code to allow the counting of absentee ballots that were (1) mailed by Election Day, and (2) received by the applicable county registrar within five business days of Election Day. MISS. CODE. § 23-15-637(1)(a).

Upon H.B. 1521's enactment, Mississippi joined a significant number of states that permit the counting of timely-cast ballots received within a designated

period after Election Day. During the 2024 presidential election, eighteen states and the District of Columbia counted valid absentee ballots that were postmarked by Election Day and received by election officials within a pre-established, post-Election Day period. Deadlines for a ballot's postmark and timely receipt by election officials are determined on a state-by-state basis. Mississippi, as discussed above, requires an Election Day postmark and receipt within five business days of Election Day, while Texas instructs that absentee ballots be "placed for delivery by mail or common or contract carrier before election day" and arrive "not later than 5 p.m. on the day after election day." MISS. CODE. § 23-15-637(1)(a); TEX. ELEC. CODE § 86.007(a)(2). Ten additional states allow for post-Election Day receipt of ballots cast by overseas voters. In all, then, twenty-eight states and the District of Columbia allow the counting of at least some absentee ballots that were mailed by Election Day and received by election officials during a post-Election Day period. *See Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 22, 2025), https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots.

Despite more recent developments, absentee voting is not a pandemic-created phenomenon. The method has roots dating back to colonial America: in 1775, the town of Hollis, New Hampshire allowed soldiers who were away fighting in the Continental Army to vote "as if the men were present themselves." Hon. Samuel T. Worcester, *Town of Hollis, N.H., in the War of the Revolution*, *in* 30 NEW ENGLAND HISTORICAL & GENEALOGICAL REGISTER 288, 293

(1876). During the Civil War, states devised a variety of methods to collect and transport battlefield ballots back to home precincts in time for canvassing. *See generally* JOSIAH HENRY BENTON, VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR (1915). And throughout the twentieth century, numerous states extended the benefits of absentee voting to ordinary civilians; many, as noted above, allowed ballots to arrive after Election Day to broaden voting access and ease burdens on mail carriers and election officials.

In October 2024, a panel of this court concluded that this common practice—for states to count timely-cast ballots received after Election Day—was preempted by federal law. *Republican Nat'l Comm. v. Wetzel*, 120 F.4th 200 (5th Cir. 2024). The opinion contends that a federal statute establishing a uniform day for federal elections, when paired with the Constitution's Elections Clause, requires all ballots to be both "*cast* by voters and *received* by state officials" by the end of Election Day. *Id.* at 204 (emphases in original). For the reasons discussed below, I am wholly unconvinced that federal law supports the panel's conclusion.

II.

Federal law sets "the day for the election" as the first Tuesday that occurs after the first Monday in an even-numbered year. 2 U.S.C. § 7 (House of Representatives); 3 U.S.C. § 21 (presidential and vice-presidential electors); *see also* 2 U.S.C. § 1 (establishing the same date for the Senate). The preemption analysis thus turns on whether "the day for the election" also mandates that all ballots be in the custody of state officials at the conclusion of the

exact same day. Our judicial role is limited: we cannot "rewrite the statute that Congress has enacted," *Dodd v. United States*, 545 U.S. 353, 359 (2005), or impose our "individual policy preferences," *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 403 (2024). Instead, we must "interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (alteration in original) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

A.

Dictionaries are a useful starting point, as their "definitions inform the plain meaning of a statute." *United States v. Radley*, 632 F.3d 177, 182–83 (5th Cir. 2011) (citing *United States v. Ferguson*, 369 F.3d 847, 851 (5th Cir. 2004) (per curiam)). A review of dictionaries published around the time of the statute's enactment reveals that an "election" referred to the day that voters made choices for public officers—nothing more. *See, e.g.*, *Election*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) ("The day of a public choice of the officers."); *Election*, BLACK'S LAW DICTIONARY (1st ed. 1891) ("The selection of one man from among several candidates . . . .").

While the panel opinion acknowledges these definitions, it declares that they are not suitable because they "make no mention of deadlines or ballot receipt." 120 F.4th at 206 n.5. Respectfully, this sounds like an answer in search of a question. The date for holding an election is distinct from a deadline for receiving ballots cast in that election. *C.f. Bush v. Gore*, 531 U.S. 98, 116 (2000) (Rehnquist, C.J.,

concurring) ("*After* the election has taken place, the canvassing boards receive returns from precincts . . . ." (emphasis added)). "[T]here is no compelling reason not to read Elections Clause legislation simply to mean what it says." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 15 (2013). And if, at the time of the statute's enactment, the ordinary meaning of "election" carried no mandate as to when ballots were to be received, our inquiry should end.

Instead, the panel resorted to its own flawed reading of *Foster v. Love*, 522 U.S. 67 (1997). In *Foster*, the Supreme Court invalidated a Louisiana statute that allowed for its senatorial elections to be held, and potentially completed, a month before Election Day. *Id.* The panel culled a trio of factors from the decision that purportedly "guide" the contours of an election: "(1) official action, (2) finality, and (3) consummation." 120 F.4th at 207.

But the decision to employ *Foster* as a vehicle for analysis is questionable. The *Foster* court expressly renounced any intention of "paring the term 'election' in [2 U.S.C.] § 7 down to the definitional bone." 522 U.S. at 72. Yet the panel employs the opinion for that very purpose, declaring that three factors, selectively chosen from the opinion's text, encapsulate an election's defining features. What is more, *Foster* conceded that its holding did not "turn on any nicety in isolating precisely what acts must cause to be done on federal election day (and not before it) to satisfy the statute." *Id.* But again, the panel uses the decision to support that end—cutting it into various pieces to determine whether ballot receipt must occur by the conclusion of Election Day. In my view, it is ill-advised to employ a decision that characterizes its approach as "narrow" and simply "enough to resolve" the

dispute at hand, for the very purpose that the opinion disclaims. *Id.* at 71–72.

B.

Even assuming that the panel's trio of factors is proper, problems remain with its application to ballot receipt deadlines. The opinion defines the first prong, "official action," as "the combined actions of voters and officials meant to make a final selection of an officeholder." 120 F.4th at 207 (quoting *Foster*, 522 U.S. at 71). There are two logical ways to contextualize this factor within voting processes. The first is that the "combined action" consists of election officials providing the means of suffrage—*i.e.*, setting up in-person voting stations, offering a ballot drop box, or providing an absentee ballot—and eligible voters casting ballots. Under this reading, processing actions, including ballot receipt, voter validation, and tabulation, are administrative duties that occur after the election and finalize its result.[1] The second, alternative reading would circumscribe all of the above-mentioned activities within a single election. As the panel opinion acknowledges, this second reading is disfavored, as it would require election officials to complete counting and certify an election by the end of Election Day—a practically impossible

[1] The opinion rejects this reading by providing hypotheticals that it concedes are "obviously absurd": "[w]hat if a State changes its law to allow voters to mark their ballots and place them in a drawer? Or what if a State allowed a voter to mark a ballot and then post a picture on social media?" 120 F.4th at 207. To the extent that the hypotheticals can be construed as serious objections, both examples result in ballots that are cast (submitted in accordance with state law) but are neither received nor tabulated by an election official.

task. *Id.* at 208 ("Of course, it can take additional time to tabulate the election results.").

Curiously, the panel advances a third reading: that among all of the processing duties that election officials perform after voters have cast ballots, *only* ballot receipt must occur by the end of Election Day. It bases this splicing on the notion that a ballot cannot be cast unless and until it is received by election officials. *Id.* at 207. That is error. Consulting a dictionary confirms that a "cast" object is not necessarily received by its intended recipient. Broadly, the term means "to throw," and in the electoral context, it means "to deposit (a voting paper or ticket)." *Cast*, OXFORD ENGLISH DICTIONARY (online ed., 2025). Neither definition expressly conditions the act of casting on ultimate receipt of the item being cast.

The use of a term in common parlance can also aid statutory interpretation. Here, it confirms the dictionary definition: while casting an object connotes an expectation that the object is received by its intended recipient, receipt is neither necessitated nor guaranteed. Consider this example: if a law clerk tells me that he spent the weekend casting fishing lines, I would expect that the lines were "received"—that is, his hooks landed in the water. "But," the law clerk continues, "it was incredibly windy, and my lines were caught in a nearby tree." However poor my clerk's casting abilities are, his statements are correct from a vocabulary-based perspective.

A similar principle applies when analyzing the "cast" term in the context of an election. While the word "deposit" suggests that a ballot must be placed in the custody of someone else, that does not compel

the conclusion that the panel insists on: that a ballot must be "received by state officials" to be considered cast. 120 F.4th at 204 (emphasis omitted). Instead, lawmakers in each state exercise their legislative prerogative, and establish to whom a ballot must be deposited by the end of Election Day for it to be eligible for counting once timely received by election officials. In Mississippi, for example, voters may place ballots in the custody of the United States Postal Service or other "common carrier, such as United Parcel Service or FedEx Corporation." MISS. CODE § 23-15-637(1)(a). And while an absentee voter would likely expect that their cast ballot is timely received by the appropriate election official, that may not always be the result.

Indeed, the Supreme Court has recently recognized that the casting and receipt of a ballot are distinct actions. In staying a Wisconsin district court's ruling that required election officials to count ballots that were cast after a primary election day, the Court noted that "[e]xtending the date by which ballots may be *cast by voters—not just received by the municipal clerks but cast by voters*—for an additional six days after the scheduled election day fundamentally alters the nature of the election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam) (emphasis added). The Court's express differentiation between the casting and receipt of a ballot further highlights the panel's error in insisting that a ballot can only be cast if it is also received—and derivatively, that receipt is necessary for any "official action" requirement to be satisfied.

The panel's second factor, "finality," fares no better. The opinion relies heavily on two conclusions: (1) a voter's individual selections are different from

the polity's aggregate election of a candidate, and (2) an election cannot be considered "final" until all eligible ballots are in the custody of state officials. 120 F.4th at 207. The first conclusion is uncontroversial, particularly considering—as the opinion concedes—that "count[ing] (or recount[ing]) ballots after Election Day" is acceptable. *Id.* at 208. But the second conclusion—that an election cannot be "final" unless "the proverbial ballot box is closed," fails to withstand scrutiny. *Id.* at 207.

To start, the statement is not supported by any caselaw. The only federal case cited in this section merely addresses whether the Constitution authorizes the federal government to regulate political party primaries (the answer is no). *Newberry v. United States*, 256 U.S. 232 (1921). And even if *Newberry* was topical, the cited portion—that the "general significance" of an election is the "final choice of an officer by the duly qualified electors"—says nothing about when that "final choice" must occur, or whether the receipt of ballots has anything to do with that "final choice." *Id.* at 250.

Ironically, the other cited case, *Maddox v. Board of State Canvassers*, 149 P.2d 112 (Mont. 1944), supports a conclusion different from the panel's: that *state statutes* govern when each voter has made the "final choice" that *Newberry* identifies. The panel summarized the Montana Supreme Court's holding as follows: "the Electors Clause preempted a state law that allowed receipt of ballots after Election Day." 120 F.4th at 208. But that description omits a critical feature: at the time *Maddox* was decided, Montana's laws required that ballots be "*delivered* to the election officials *and deposited* in the ballot box *before* the closing of the polls on election day." 149 P.2d at 115

(emphases added) (citations omitted). The following paragraph confirms the significance of this important distinction: "federal and state laws must be read together, *and since the state law provides for ballots deposited with the election officials*, that act must be completed on the day designated by *state and federal laws*." *Id.* (emphases added).

Mississippi's current laws are materially different: to be counted, an absentee ballot must be deposited, with a confirming postmark, to a mail carrier "on or before the date of the election"; and be received by election officials "no more than five (5) business days after the election." MISS. CODE. § 23-15-637(1)(a). And while the panel opinion identifies a pair of Mississippi election regulations that, within the tabulation process, classify a ballot as "final" only after election officials validate and count that ballot, 120 F.4th at 207–08 (citing 1 MISS. CODE R. 17-2.1, 17-2.3(a)), that regulatory label does not in practice[2]—and cannot, as a matter of principle—invalidate the statute's directive allowing for post-Election Day ballot receipt. After all, a Mississippi agency "may not make rules and regulations which conflict with, or are contrary to, the provisions of a statute, particularly the statute it is administering or which created it." *Miss. Pub. Serv. Comm'n v. Miss. Power & Light Co.*, 593 So. 2d 997, 1000 (Miss. 1991) (citation omitted).

[2] The panel's reliance on the two Mississippi regulations conflates the selections made by a voter (while casting an individual ballot) with the processing and tabulation actions that election officials undertake to finalize an election. And, as the opinion concedes, ballot processing and counting can occur after Election Day. 120 F.4th at 208.

The panel further justifies its line-drawing of finality by claiming that "the result is fixed when all of the ballots are received and the proverbial ballot box is closed." 120 F.4th at 207. But this notion of a "fixed" result is belied by the panel's artificial separation of the receipt of a ballot from other administrative functions. As the opinion acknowledges, Mississippi election officials are required to perform a multi-faceted verification process to ensure ballot integrity. That process undoubtedly strikes some number of received ballots from being counted, and thus undermines the panel's conclusion that receipt ensures a fixed result.[3]

Lastly, in insisting that federal law requires that ballots be in the custody of an elections official, and not a designated intermediary, by Election Day's conclusion, the panel claims that a sender's purported ability "to recall mail" means that "voters can change their votes after Election Day." *Id.* at 208. Even without considering the practical issues[4] with this

[3] At a minimum, then, the panel's conception of a "fixed" result is no better than an alternative reading: that in jurisdictions with post-Election Day receipt deadlines, the results are "fixed" by Election Day because that deadline establishes a definitive range, with a one-way ratchet, of eligible ballots.

[4] While recalling a mailed ballot is theoretically possible, practical considerations render the occurrence incredibly unlikely. For one, mail recall is not automatically available for every ballot mailed through the postal service. A voter must instead have the foresight and means to have a parcel tracking number attached to their ballot envelope (akin to a shipper adding a tracking service onto a package), and the means to pay an additional fee if their package is successfully recalled. Domestic Mail Manual, § 507.5.1.3 ("Package Intercept is not

reasoning, the logic is fatally flawed. Any piece of mail that is successfully recalled will receive a new postmark when mailed again, and if that new postmark bears a post-Election Day date, Mississippi election officials must reject it. MISS. CODE § 23-15-647 ("All such absentee ballots returned to the registrar after the cutoff time shall be safely kept unopened" and are ultimately "destroyed."). And if a voter fails to resubmit a recalled ballot, the result remains the same: the election official has neither received nor tabulated any ballot from that voter. In no scenario is a voter abusing delivery services to meaningfully "change their vote after Election Day." 120 F.4th at 208.

The final prong of the panel's triad, "consummation," purportedly evaluates the theoretical point at which an election is complete. The opinion cites to two cases, *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773 (5th Cir. 2000) and *Foster*, 522 U.S. 67, for the proposition that "so long as the State continued to receive ballots, the election was ongoing and had not been consummated." 120 F.4th at 208.

But that framing confuses a derivative act for the predicate requirement. Both *Bomer* and *Foster* emphasize that the consummation of an election

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available for . . . [m]ailpieces that do not contain a tracking barcode."); § 507.5.2 ("Customers must pay a nonrefundable per-price fee once the USPS successfully intercepts the package."). And for two, it is nearly impossible to meaningfully alter a vote once it has been marked. What is a voter supposed to do with their prior selections—apply whiteout? Cross out their prior marks? Make superseding marks with a different pen, or perhaps permanent marker? The possibilities may be endless, but all would likely be futile. !

cannot occur prior to Election Day because doing so would infringe upon the electorate's ability to vote on the day that Congress designated for voting. *Bomer*, 199 F.3d at 775–76 (affirming the constitutionality of a Texas early voting law because polls remained "open on federal election day and most voters cast their ballots that day"); *Foster*, 522 U.S. at 74 (noting the Louisiana Attorney General's concession that the state's voting "system certainly allows for the election of a candidate in October, as opposed to actually electing on Federal Election Day"). If the panel was correct that consummation was strictly linked to ballot receipt, a state could comply with federal election laws by only receiving absentee ballots on Election Day, while also barring in-person voting itself. That notion, of course, is soundly rejected by *Foster* and *Bomer*.

III.

Though not dispositive, "[h]istorical practice [is] particularly pertinent when it comes to [interpreting] the Elections and Electors Clauses." *Moore v. Harper*, 600 U.S. 1, 32 (2023). Given that 2 U.S.C. § 7 was enacted in the 1870s, absentee ballot practices employed during the Civil War are particularly illuminative of Congress's understanding. And the historical record demonstrates that many states accommodated wartime voting by counting timely-cast ballots that were received after Election Day.

The panel opinion casts Civil War absentee voting methods as a binary: either local "election officials brought ballot boxes to the battle-field, where soldiers cast their ballots," or soldiers prepared ballots in the field and gave "them to a proxy for deposit in the ballot box of the soldier's home precinct." 120 F.4th at

209–10. Both methods, according to the panel, underscore that a soldier only "voted when the vote was received by election officials"—either by placing the ballot in a box brought to the battlefield by election officials, or when a proxy-transported vote was deposited at a soldier's county of residence. *Id.* at 210.

But this summation oversimplifies the historical record in two material respects. For one, at least three states allowed Civil War soldiers to vote on Election Day, with administrative oversight performed not by local election officials, but by military personnel.[5] After voting concluded, ballots were transported back to home precincts for counting, and necessarily arrived after Election Day, given inferior transportation methods that existed in the 1860s. These three states counted these ballots upon receipt, even though they were neither deposited in a box "brought . . . to the battle-field" by election officials, nor "deposit[ed] in the ballot box of the soldier's home precinct" before Election Day. *Id.* at 209–10.

For example, until at least 1862, Pennsylvania's General Election Law allowed soldiers to "exercise the right of suffrage at such place as may be appointed by the commanding officer of the troop or company." BENTON, *supra*, at 189. Each soldier's selections were treated "as fully as if [the soldiers] were present at the

[5] While some may suggest that these military officers acted as *ex officio* election officials, military designees were readily distinguishable from civilian election officials. As the merits-stage amicus brief submitted by the United States explains, most states required civilian election officers "to swear oaths to fairly conduct the election or uphold state oaths." In-field military officers lacked such deputization; they were simply designated as chaperones through their military rank.

usual place of election," and "their votes were counted," even though those ballots necessarily arrived after Election Day. *Id.* at 190. In a similar vein, Nevada required that "[o]n election day the vote was to be taken under the direction of the commanding officers," with words such as "Constitution yes" or "Constitution no" used to signify each soldier's vote. *Id.* at 171. Once the ballots arrived in the Silver State—undoubtedly after a days-long trek across the Great Plains—they were duplicated for verification purposes, assessed for eligibility, and then counted. *Id.* at 171–72.

Rhode Island's laws were even more explicit: "on the day of such elections," a solider was allowed to "deliver a written or printed ballot with the names of the persons voted for . . . to the officer commanding the regiment or company to which he belongs." *Id.* at 186–87. Once all soldiers had voted, the commanding officer was tasked with returning each ballot "to the Secretary of State *within the time prescribed by law for counting votes in such elections*." *Id.* at 187 (emphasis added). These three states, in turn, represent at least a third approach intended to facilitate Civil War suffrage: soldiers completed their ballots on Election Day in the field, *without* the presence of local election officials, and then those ballots were transported by proxy—necessarily arriving *after* Election Day—to home precincts for counting.

Rhode Island's approach also highlights a second distinction that further undercuts the opinion's skewed recollection of Civil War suffrage. Many states attempted to facilitate voting among soldiers by allowing battlefield ballots to be counted if they arrived before a post-Election Day deadline. A quartet

of Confederate states illustrates this principle: Alabama waited until at least November 26 to count soldiers' ballots; North Carolina directed that votes be counted "twenty days after they were cast in the field"; Georgia required that soldiers' votes be counted "within fifteen days after the election, that is, after the day on which they were cast"; and Florida tabulated such ballots on "the twentieth day after the election." *Id.* at 317–18. Among Union states, Maryland required its canvassing officer, the Governor, to wait "fifteen days after the election . . . to allow the returns of the soldiers' vote to be made." *Id.* at 318. And other northern states generally understood that "a sufficient period would elapse between the day of the election, which was the day on which the soldiers were to vote on the field, and the counting of the votes of the State by the officers who were to count them, to enable the votes to reach them." *Id.* The post-Election Day receipt and counting of these Civil War ballots are consistent with absentee ballot procedures currently present in twenty-eight states and the District of Columbia: ballots that are timely cast by eligible voters are counted if received within an established time period after Election Day.

The varying approaches that states adopted to facilitate suffrage during the Civil War separately encapsulates a "clearly established" principle: "the policy of Congress for so great a part of our constitutional life has been, and now is, to leave the conduct of the election of its members to state laws." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). As Madison remarked at the Constitutional Convention, the Elections Clause left "the regulation of [federal elections], in the first place, to the state government, as being best acquainted with the

situation of the people." 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 312 (M. Farrand ed., 1911). States accordingly hold a "constitutional duty to craft the rules governing federal elections," *Moore*, 600 U.S. at 29, and are tasked with crafting regulations for a variety of ancillary tasks, including the "counting of votes." *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

Congress, of course, has the power to preempt a state's election regulations through the Elections Clause. U.S. CONST. art. I, § IV. But when it chooses to, "it has done so by *positive* and *clear* statutes." *Gradwell*, 243 U.S. at 485 (emphases added). We should refrain from "giv[ing] an unduly broad interpretation to ambiguous" language and risk "overextending a federal statute's pre-emptive reach." *Inter Tribal*, 570 U.S. at 21 (Kennedy, J. concurring in part and concurring in judgment). And we should be especially wary of adopting an ambitious—if not strained—reading of a statute that is also inconsistent with historical practice at the time of the law's enactment.

IV.

"Legislative history" can also help "ascertain the intent of the legislative authority" that enacted a statute. *Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.*, 760 F.3d 405, 410 (5th Cir. 2014) (quoting *In re Hammers*, 988 F.2d 32, 34 (5th Cir. 1993)). Fortunately, the Supreme Court has already spoken as to Congress's intent when it crafted the statute that set a uniform day for federal elections. 2 U.S.C. § 7 was enacted to address two concerns: "the distortion of the voting process threatened when the results of an early federal election in one State can influence later voting," and "the burden on citizens

forced to turn out on two different election days to make final selections of federal officers." *Foster*, 522 U.S. at 73. Construing the statute to compel ballot receipt by the end of Election Day does not redress (or even implicate) either concern. As one of our sister circuits has noted, "there is no reason to think that simply because Congress established a federal election day it displaced all State regulation of the times for holding federal elections." *Millsaps v. Thompson*, 259 F.3d 535, 549 (6th Cir. 2001).

Subsequent legislative developments are also useful in determining whether a statute was intended to achieve a preemptive effect on state laws. In particular, "the case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989) (quoting *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 256 (1984)). And candidly, a legislative history review illustrates that Congress has not been merely "aware[]" or "tolera[nt]" of post-Election Day receipt deadlines. *Id.* Instead, the body has accommodated each state's distinct ballot receipt laws while crafting federal legislation to improve the ability for overseas citizens to vote.

In 1986, for example, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), a bill that requires states to provide eligible overseas voters with absentee ballots. If an eligible voter fails to timely receive a ballot from the state they are registered to vote in, UOCAVA directs the state to accept a substitute ballot, known as the

Federal Write-In Absentee Ballot. The key feature for this discussion relates to ballot receipt: the statute requires that states accept and count a Federal Write-In Absentee Ballot unless a state-issued ballot is received from the same voter "by the deadline for receipt of the State absentee ballot under State law." 52 U.S.C. § 20303(b)(3). Instead of setting Election Day as a backstop receipt deadline for overriding ballots, Congress chose to expressly incorporate each state's independent ballot receipt deadline within the statute.

More recently, Congress amended UOCAVA's provisions by passing the Military and Overseas Voter Empowerment Act ("MOVE"). The 2009 law requires federal and state designees to facilitate and streamline the delivery of overseas absentee ballots. *Id.* §§ 20302(a)(10), 20304(b)(1). Once again, Congress was intentional in selecting the target date by which ballots were to be returned to home states: no later than whatever "date by which an absentee ballot must be received in order to be counted in the election." *Id.* § 20304(b)(1).

UOCAVA and MOVE are strong examples of a "long history of congressional tolerance, despite the federal election day statute, of absentee" voting procedures and post-Election Day receipt deadlines. *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001). Indeed, when presented with multiple opportunities to disable, or at least condemn, this "universal, longstanding practice," Congress chose instead to incorporate post-Election Day ballot receipt deadlines into its statutes. It is this court's stated policy that we not "read the federal election day statutes in a manner that would prohibit such a universal, longstanding practice of which

Congress was obviously well aware." *Bomer*, 199 F.3d at 776. Yet the panel opinion reneges on that principle, and unabashedly dismisses a panoply of state laws establishing ballot receipt deadlines.

V.

Two other portions of the panel opinion deserve scrutiny. First, the opinion suggests that any contrary conclusion could allow a state to extend its ballot receipt deadline by "100 days." 120 F.4th at 215. Limiting principles—both statutory and practical—already prevent such an absurd outcome. In presidential and vice-presential election years, states must certify election results by December 31. 3 U.S.C. § 5(a)(1) (requiring certification "6 days before the time fixed for the meeting of the electors"); 3 U.S.C. § 15(a) (setting January 6 as the meeting date). And states that delay tabulation for House and Senate races risk disenfranchising constituents and losing representation in a new Congress. These reasons are perhaps why, to my knowledge, no state—in the near quarter-millennial history of our nation—has risked the undemocratic gambit that the panel opinion postulates.[6]

Second, the opinion intimates that the only constitutionally-acceptable form of absentee voting is "the practice . . . that arose during the Civil War," and criticizes attempts to expand the benefits of absentee

[6] In the 2024 election, for example, the latest state ballot receipt deadlines were ten days (Alaska and Maryland) and fourteen days (Illinois) after Election Day. *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 22, 2025), https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots.

voting to common citizens as "late-in-time outliers." 120 F.4th at 211 (quoting *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 70 (2022)). But the Supreme Court has not required that the *Bruen-Rahimi* historical analysis be applied to election litigation—and even if such an exacting standard applied, the panel's intimation is "as mistaken as applying the protections [of the Second Amendment] only to muskets and sabers." *United States v. Rahimi*, 602 U.S. 680, 692 (2024).

Moreover, our role as judges is not to determine whether these so-called "late-in-time outliers"—referring to broadened access to absentee voting—are efficacious or desirable. 120 F.4th at 211. It is axiomatic that "federal courts are supposed to leave policy-preference choices to Congress—not invoke them to rewrite statutes." *Hoyle v. City of Hernando*, No. 23-60451, 2024 WL 4039746, at *5 (5th Cir. Sept. 4, 2024) (Oldham, J., concurring). And "when judges test their individual notions . . . against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges." *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in judgment).

Within the context of election regulations, the "American tradition" that Justice Scalia spoke to is clear: "the policy of Congress for so great a part of our constitutional life has been, and now is, to leave the conduct of the election of its members to state laws." *Id.*; *Gradwell*, 243 U.S. at 485. That tradition delegates to the states the responsibility of "provid[ing] a complete code for federal elections"—including the "counting of votes." *Smiley*, 285 U.S. at 366. And this responsibility—which "involves lawmaking in its essential features and most

important aspect," should be left to our state legislators, absent clear and express federal language to the contrary. *Id.*

* * *

The panel opinion holds that ballot receipt laws in at least twenty-eight states and the District of Columbia are preempted by federal laws that merely designate the day on which an election must occur. The strained statutory interpretation that the opinion employs runs counter to all the traditional tools of statutory interpretation—plain meaning, dictionary definitions, common parlance, historical practice, congressional intent, and congressional history—that we deploy on a daily basis. We should have reheard *Wetzel* en banc, and I respectfully dissent from this court's failure to do so.

STEPHEN A. HIGGINSON, *Circuit Judge*, dissenting from the denial of rehearing en banc:

I join in full Judge Graves's comprehensive dissenting opinion from our denial of the petition for full court rehearing. To add further credit for *my* assessment that this case deserves rehearing, I write to acknowledge Attorney Adam Unikowsky's critique of our court's decision. *See* Adam Unikowsky, *The soul of "election day"*, ADAM'S LEGAL NEWSLETTER (Nov. 3, 2024), https://adamunikowsky.substack.com/p/the-soul-of-election-day.

We benefit from lawyer insight and criticism. Though we receive amicus curiae briefs less frequently than the Supreme Court, they provide primary opportunity for non-party lawyers to give insight, albeit with stringent requirements. It is rarer that topflight lawyers,[1] like Unikowsky, have time to offer scholarly critique of a case neither he, nor Bernstein, was retained to handle.

Chief Justice Roberts recently reminded that "public engagement with the work of the courts results in a better-informed polity and a more robust democracy." CHIEF JUSTICE JOHN G. ROBERTS, JR., 2024 YEAR END REPORT ON THE FEDERAL JUDICIARY 4 (2024), https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf. It is for this reason that the judiciary depends on lawyers, not just as party advocates, but also for all forms of engagement

[1] Unikowsky, in turn, credits Attorney Richard Bernstein's analysis for the Society for the Rule of Law. Richard Bernstein, *The Fifth Circuit Was Wrong–Counting Timely-Cast Remote Votes That Are Received After Election Day is as Old as the Founding*, SOC'Y FOR THE RULE OF L. (Nov. 1, 2024), https://societyfortheruleoflaw.org/fifth-circuit-wrong/.

with courts. "[I]nformed criticism" of court opinions from lawyers unaffiliated with the parties is in that vital tradition. *Id.* at 5 (quoting CHIEF JUSTICE WILLIAM H. REHNQUIST, 2004 YEAR END REPORT ON THE FEDERAL JUDICIARY 5 (2004), https://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf).

I regret that I have not made Attorney Unikowky's critique convincingly to my colleagues. Nevertheless, remembering the Supreme Court's acknowledgements when scholars are instructive,[2] this case provides opportunity for me to acknowledge lawyers like Unikowsky and Bernstein, whose vigilant criticism of our court's work product should help the growth of the law.

[2] *See, e.g.*, *Feist Pub'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991) (O'Connor, J.); *Harrington v. Purdue Pharma L. P.*, 603 U.S. 204, 229 (2024) (Kavanaugh, J., dissenting).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
SOUTHERN DIVISION

[Filed July 28, 2024]

REPUBLICAN NATIONAL COMMITTEE; MISSISSIPPI REPUBLICAN PARTY; JAMES PERRY; and MATTHEW LAMB **PLAINTIFFS**

v. **CAUSE NO. 1:24cv25-LG-RPM**

JUSTIN WETZEL, in his official capacity as the clerk and register of the Circuit Court of Harrison County, et al. **DEFENDANTS**

consolidated with

LIBERTARIAN PARTY OF MISSISSIPPI **PLAINTIFF**

v. **CAUSE NO. 1:24cv37-LG-RPM**

JUSTIN WETZEL, in his official capacity as the clerk and register of the Circuit Court of Harrison County, et al. **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

BEFORE THE COURT in these consolidated cases is a challenge to a portion of Mississippi's

absentee-balloting procedures. At issue is Mississippi Code Ann. § 23-15-637(1)(a) which provides in part for the counting of absentee ballots postmarked on or before the date of the election and received by mail no more than five business days after the election. Plaintiffs contend that Mississippi law conflicts with federal statutes establishing a national uniform "election day." Defendants argue that Plaintiffs lack standing and that Mississippi law is in harmony with federal statutes and the Constitution. In the opinion of the Court Plaintiffs have Article III standing to proceed. However, for the reasons stated below the Court finds that Defendants are entitled to judgment as a matter of law on the merits of Plaintiffs' claims.

BACKGROUND

In cause number 1:24cv25-LG-RPM, the Republican Plaintiffs — the Republican National Committee ("RNC"), the Mississippi Republican Party, James "Pete" Perry, and Matthew Lamb[1] — filed a Complaint for declaratory and injunctive relief against the Mississippi Secretary of State, Michael Watson; Justin Wetzel, the clerk and registrar of the Circuit Court of Harrison County, Mississippi; and the members of the Harrison County Election Commission. Plaintiffs allege that Miss. Code Ann. § 23-15-637(1)(a) violates federal law. They assert these claims:

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[1] Mr. Perry is the former chair of the Hinds County Republican Party and a current member of the Mississippi Republican Party's executive committee and the Hinds County Republican Executive Committee. Compl. ¶ 16. Mr. Lamb is the District 4 Commissioner for the George County Election Commission. *Id.* ¶ 17.

(1) violation of 3 U.S.C. § 1, 2 U.S.C. § 1, and 2 U.S.C. § 7, which designate the election day for the offices of President and Vice President, seats in the Senate, and seats in the House of Representatives, respectively.

(2) a 42 U.S.C. § 1983 claim for violation of the right to stand for office; and

(3) a 42 U.S.C. § 1983 claim for violation of the right to vote.

The Libertarian Party of Mississippi in cause number 1:24cv37-LG-RPM makes essentially the same claims. The Court consolidated the two cases and granted Vet Voice Foundation and Mississippi Alliance for Retired Americans' Motion for Permission to Intervene as Defendants.[2]

The Mississippi Secretary of State has moved for summary judgment separately against [51] the Republican Plaintiffs and [53] the Libertarian Party, and both sets of Plaintiffs have filed their own [55, 58] motions for summary judgment. The individual Defendants have [63, 64] adopted the secretary's briefs, and the intervenor Defendants have [61] filed their own separate Rule 56 motion.

[2] The Court [47] denied Motions for Permission to Intervene as Defendants that were filed by Disability Rights of Mississippi, the League of Women Voters, and the Democratic National Committee, but granted them leave to file amicus curiae briefs. The United States also filed a [84] Statement of Interest in support of the statute.

DISCUSSION

I. STANDING

The Constitution gives federal courts the power to adjudicate only genuine "cases" and "controversies." Art. III, § 2. "For there to be a case or controversy under Article III, the plaintiff must have a personal stake in the case — in other words, standing." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (internal quotation marks & citation omitted).

"To prove Article III standing, a plaintiff must show that he or she 'h[as] (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Ortiz v. Am. Airlines, Inc.*, 5 F.4th 622, 628 (5th Cir. 2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)). At the summary-judgment stage, a plaintiff can establish standing only by "setting forth by affidavit or other evidence specific facts, which, taken as true, support each element" of the standing analysis. *Id.* (quoting *Texas v. Rettig*, 987 F.3d 518, 527–28 (5th Cir. 2021)) (cleaned up). In other words, [a] plaintiff "must point to specific summary judgment evidence showing that it was 'directly affected' by" the Mississippi statute. *Texas State LULAC v. Elfant*, 52 F.4th 248, 255 (5th Cir. 2022) (citation omitted).

Every plaintiff need not demonstrate standing in this case. *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015) (holding only one plaintiff need succeed because one party with standing satisfies Article III's case-or-controversy requirement); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 178 (5th Cir. 2020) ("[I]n the context of injunctive relief, one

plaintiff's successful demonstration of standing is sufficient to satisfy Article III's case-or-controversy requirement.") (cleaned up).

Groups like the RNC, the Republican Party, and the Libertarian Party can satisfy the injury-in-fact requirement by demonstrating organizational standing, sometimes also called direct standing. See *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006). This form of standing applies when the "defendant's actions perceptibly impair the organization's activities and consequently drain the organization's resources." *Vote.org v. Callanen*, 89 F.4th 459, 470 (5th Cir. 2023) (cleaned up). However, a "setback to an organization's abstract social interests is insufficient." *Id.* (alterations omitted).

A political party's "need to raise and expend additional funds and resources" satisfies the injury-in-fact requirement of organizational standing because "economic injury is a quintessential injury upon which to base standing." *Benkiser*, 459 F.3d at 586 (citations omitted).[3] An organization's diversion of "significant resources to counteract the defendant's

[3] Defendants argue that *Benkiser* is inapplicable because it pertained to competitive standing, which is means "a candidate or his political party has standing to challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election." *Townley v. Miller*, 722 F.3d 1128, 1135 (9th Cir. 2013) (citation omitted). But competitive standing was an alternative finding in *Benkiser*, separate from its finding of economic loss. 459 F.3d at 586 ("A *second* basis for the TDP's direct standing is harm to its election prospects.") (emphasis added).

conduct" will also satisfy this requirement, *Vote.org*, 89 F.4th at 470 (quoting *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010)), as long as the organization "identifie[s] any specific projects that [it] had to put on hold or otherwise curtail in order to respond" to the defendant's actions. *City of Kyle*, 626 F.3d at 238. Vague assertions and speculation that the organization could have spent the funds elsewhere are insufficient. *Id.* For example, in *City of Kyle*, the Fifth Circuit held that a plaintiff organization's conjecture that resources would need to be diverted in response to city ordinance could not establish an injury in fact. *Id.* at 238–39. The organization did not identify any specific projects that it had to put on hold or curtail, and it cited activities that did not "differ from its routine lobbying activities." *Id.* at 239. The court contrasted the vague assertions of the *City of Kyle* plaintiff with the following proof submitted by an organization in an Eleventh Circuit case, *Florida State Conference of the NAACP v. Browning*:[4]

> The organizations reasonably anticipate[d] that they [would] have to divert personnel and time to educating volunteers and voters on compliance with [a state statute] and to resolving the problem of voters left off the registration rolls on election day. These resources would otherwise be spent on registration drives and election-day education and monitoring. SVREP anticipates that it will expend many more hours than it otherwise

[4] In *Browning*, the plaintiff organizations challenged a Florida statute that established a new verification process for first-time voter registrants. 522 F.3d at 1158.

> would have conducting follow-up work with registration applicants because voters will have their applications denied due to matching failures. In HAGC's case, compensating for the new obstacles created by [the statute] would divert substantial resources away from helping voters who may need language-translation assistance on election day.

522 F.3d 1153, 1165–66 (11th Cir. 2008), *cited with approval in City of Kyle*, 626 F.3d at 238.

The Fifth Circuit has provided helpful analysis distinguishing the *City of Kyle* case from a subsequent case, *OCA-Greater Houston v. Texas:*

> The *City of Kyle* plaintiffs were dedicated lobbying groups who claimed their lobbying and litigation-related expenses as their injury. It is fundamental that no plaintiff may claim as injury the expense of preparing for litigation, for then the injury-in-fact requirement would pose no barrier. The key fact in *City of Kyle* was that every claimed "injury" either was undertaken to prepare for litigation (such as the commissioning of a $15,000 study on the impact of the ordinances—a study that the plaintiffs then relied on at trial to demonstrate disparate impact) or was no different from the plaintiffs' daily operations (such as the vice president's spending time reviewing ordinances).
>
> Here, by contrast, OCA is not a lobbying group. It went out of its way to counteract the effect of Texas' allegedly unlawful voter-interpreter restriction — not with a view toward litigation, but toward mitigating its

> real-world impact on OCA's members and the public. For instance, it undertook to educate voters about Texas's assistor-versus-interpreter distinction to reduce the chance that other voters would be denied their choice of interpreter . . .[,] an undertaking that consumed its time and resources in a way they would not have been spent absent the Texas law. Hence, the Texas statutes at issue "perceptibly impaired" OCA's ability to "get out the vote" among its members.

867 F.3d at 611–12 (footnote omitted).

RNC Political Director James Blair maintains that Mississippi's acceptance of ballots five days after election day "forces the RNC to spend more money on ballot-chase programs and poll-watching activities." (Resp., Ex. A ¶ 3, ECF No. 75- 1).[5] He further testifies by declaration:

> Specifically, Mississippi's post-election deadline for the receipt of mail-in ballots requires the RNC to divert more resources toward a longer period of ballot chasing. Absentee-ballot chasing requires establishing

[5] In a separate declaration, the RNC's Deputy Political Director, Ashley Walukevich, testifies that ballot chasing is a "labor[-]intensive" program "whereby [the party] contacts voters, educates them about the mail-in voting process, informs them of key deadlines and rules, reminds them to return their mail-in ballots in a timely manner, and encourages them to cure any defects . . . ." (Motion, Ex. A ¶ 11, ECF No. 58-1). She adds that this program is more costly due to Mississippi's counting of ballots received by mail after election day and that the RNC must engage in this program in order to "protect its electoral interests and maintain competitive parity with other political parties. (*Id.* ¶ 12).

> and executing a separate, parallel get-out-the-vote effort supported by training, voter education, and voter outreach. Those activities require the RNC to divert resources away from traditional get-out-the-vote operations such as encouraging and assisting people [to] vote in person. But for Mississippi's post-election receipt of mail-in ballots, the RNC would spend more money on traditional get-out-the-vote operations.

(*Id.* ¶ 5). He claims that this required diversion of resources "directly harms the RNC's mission" because "[t]raditional get-out-the-vote operations are critical to the RNC's mission to represent the interests of the Republican Party and secure the election of Republican candidates." (*Id.* ¶¶ 6, 8). He further explains that more resources must be devoted to "additional poll-watcher coverage," including training of poll watchers, "preparation of relevant materials, payment to attorneys for review, and securing additional volunteer time." (*Id.* ¶ 7). These efforts and expenditures, he claims, divert resources "away from other election integrity efforts to educate voters, monitor state and local compliance with election laws, and increase confidence in the election." (*Id.*).

Frank Bordeaux, chair of the Mississippi Republican Party, has also submitted a declaration concerning the effect of the Mississippi statute on its mission. (Pls.' Resp., Ex. B, ECF No. 75-2). He testifies that "[t]he MSGOP can afford to expend resources on ballot-chase programs and poll-watching activities in response to Mississippi's mail-in ballot deadline only by diverting them from the pursuit of its mission in other areas." (*Id.* ¶ 4). These "other areas" include "efforts to facilitate voter registration,

increase in-person turnout, promote and secure election integrity," and "educate voters, among other activities." (*Id.* ¶ 5) Mr. Bordeaux states: "These activities are critical to the MSGOP's mission to represent the interests of the Republican Party and secure the election of Republican candidates for state and federal office in Mississippi." (*Id.*). He explains, "[i]f not for Mississippi's late-ballot-receipt deadline, the MSGOP would spend more money registering Republican voters" and "increasing in-person voter turnout in Mississippi." (*Id.* ¶¶ 6–7).[6]

Along with providing evidence of economic loss, these Plaintiffs allege that the Mississippi statute will cause them to curtail and divert resources away from specific activities and projects — registration of Republican voters and efforts to increase in-person turnout — in order to perform more extensive and expensive ballot-chasing and poll-watching efforts necessitated by the acceptance of absentee ballots received after election day. *See Browning*, 522 F.3d at 1165–66; *see also Martin v. Kemp*, 341 F. Supp. 3d 1326, 1335 (N.D. Ga. 2018) (holding that political organizations had established standing by showing they would have to divert resources from "phone banking, finding canvassing volunteers, in-person and written 'get-out-the-vote' efforts" to cautioning voters about rejection of absentee-ballot applications and ballots). This diversion of resources frustrates and impedes the Republican Party's mission of "represent[ing] the interests of the Republican Party and secur[ing] the election of Republican candidates

[6] In analyzing standing, the Court must assume that the testimony given in these declarations is truthful. *See Ortiz*, 5 F.4th at 628.

for state and federal office in Mississippi." *See Democratic Cong. Campaign Comm. v. Kosinski*, 614 F. Supp. 3d 20, 45 (S.D.N.Y. 2022) (collecting cases and holding that diversion of resources away from "engaging and mobilizing voters" to educate them about ballot-rejection practices and "mobilize volunteers to assist those [voters]" frustrated a Democratic committee's mission of electing Democratic candidates). Since "[a]bsentee-ballot chasing requires establishing and executing a separate, parallel get-out-the-vote effort supported by training, voter education, and voter outreach" according to Mr. Blair, these are not the types of routine activities that the Fifth Circuit warned about in *City of Kyle*. *See* 626 F.3d at 238-29.

The Libertarian Party has submitted a declaration signed by Vicky Hanson, who is a lifetime member, the Membership Committee Chairperson, and "the most recent past Secretary of the Libertarian Party of Mississippi." (Libertarian Mot., Ex. 3 ¶¶ 2, 12, ECF No. 55-3). She testifies that "[t]he receipt of absentee ballots after Election Day inhibits [the] Party's ability to monitor counties' receipt of those ballots, as it must sparingly use limited resources during the post-election certification process." (*Id.* ¶ 22). She also states:

> In 2020, due to the change in Mississippi's election code allowing an additional five business days to receive absentee ballots, the Party's ability to monitor the canvassing of ballots diminished. The Party didn't field monitors for all five extra business days in any election held after the law changed, and it is very unlikely it will be able to do so in the near future. The Democrat[ic] and Republican

> parties, by contrast, can afford to do this extra monitoring, so the Libertarian Party is now in an even worse position compared to them.

(*Id.* ¶ 26). In a supplemental declaration, she testifies:

> . . . Mississippi's Receipt Deadline adds time and duties to our campaigns[,] and we are going to have to use the existing level of volunteer hours to try to fill them. Our other option is to drop the ball — that is, to not do — either post-election canvassing, or some other campaign[-]related task.

(Libertarian Resp., Ex. 1 ¶ 4, ECF No. 79-1).

Additionally, as the Libertarian Party noted in its Memorandum:

> Whatever tasks a Mississippi political party or candidate performs during the course of a campaign, and however much time is devoted to them, the Receipt Deadline increases those tasks and that time by five business days. Staffing a campaign for an additional five business days necessarily costs more than not doing so. This cost constitutes economic harm that confers standing. . . . If, in the alternative, Plaintiff must forgo this monitoring because it simply cannot afford it, Plaintiff is also harmed.

(Pl.'s Mem. at 6–7, ECF No. 80).

The RNC and the Mississippi Republican Party have established that they suffered concrete injuries in the form of economic loss and diversion of resources. (Resp., Ex. A at 2, ECF No. 75-1). Their injuries are not "generalized grievances" because the general population will not experience these losses. *See Lujan*, 504 U.S. at 575; *see also McMahon v.*

Fenves, 946 F.3d 266, 271 (5th Cir. 2020) ("An injury is particularized if it affects the plaintiff in a personal and individual way."). The injuries are also imminent as the statute currently requires five more business days for receipt, processing, and counting of absentee ballots following the next election in November. The Libertarian Party has shown through declarants that the Mississippi statute has harmed its mission to secure votes for its candidates. According to the testimony, it has already significantly curtailed efforts to monitor the counting of absentee ballots, and at the next election, the Libertarian Party will need to choose between post-election canvassing for additional days and other tasks such as getting out its vote on election day.[7] The injuries alleged by the political parties — economic injury as well as diversion of resources — in this case are specific to each party, such that these parties have shown they have a direct stake in the outcome of this lawsuit. *See also Voice of the Experienced v. Ardoin*, 2024 WL 2142991 (M.D. La. May 13, 2024) (holding that plaintiffs' alleged diversion of resources adequately to satisfy injury in fact). The injuries threatened to Plaintiffs are fairly traceable to the Mississippi statute's five-day receipt requirement for absentee ballots, and a decision from this Court granting Plaintiffs' requests for declaratory and injunctive relief would redress these injuries by overturning the portion of the statute that will cause Plaintiffs injury at the next election. Plaintiffs have sufficiently

[7] Though the injuries to the Libertarian Party are somewhat different, the Court finds that the analysis it applied to the Republican Plaintiffs also applies to the Libertarian Party.

alleged standing, and the Court has federal-question jurisdiction to hear this suit.

II. Does Mississippi's Absentee Voting Statute Conflict with Federal Law?

Both sides have filed motions for summary judgment, indicating that they discern no material questions of fact to be resolved on the merits. The Court agrees. "Summary judgment is appropriate where the only issue before the court is a pure question of law." *Sheline v. Dun & Bradstreet Corp.*, 948 F.2d 174, 176 (5th Cir. 1991).

The Electors Clause of the United States Constitution states that Congress can "determine the Time of chusing the Electors [for President and Vice President], and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." Art. II, § 1, cl. 4. The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* art. I, § 4, cl. 1. Thus, the Elections "Clause empowers Congress to pre-empt state regulations governing the 'Times, Places and Manner' of holding congressional elections." *Arizona v. Inter Tribal Council of Ariz.*, Inc., 570 U.S. 1, 8 (2013). "The Clause's substantive scope is broad," because "Times, Places, and Manner" are "comprehensive words, which embrace authority to provide a complete code for congressional elections." *Id.* at 8–9. The Clause "invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-

empt state legislative choices." *Id.* at 9 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)).

Congress's power over the time, place, and manner of elections is "paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith." *Inter Tribal*, 570 U.S. at 9 (quoting U.S. Const. art. I, § 4, cl. 1). Pursuant to this very power, Congress enacted three statutes establishing a single election day for federal elections: 3 U.S.C. § 1, 2 U.S.C. § 1, and 2 U.S.C. § 7. The statute establishing an election day for the offices of President and Vice President provides that "[t]he electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day." 3 U.S.C. § 1. Congress later defined "election day" in that statute to mean "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State . . . ." *Id.* § 21(1).

Likewise, the statute applicable to selection of members of the House of Representatives provides: "The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter." 2 U.S.C. § 7. Finally, the statute pertaining to Senate elections provides:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State

> in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

Id. § 1.[8]

The legislative history "indicates that Congress wanted a uniform election day to prevent earlier elections in some states unduly influencing the later voters, to prevent fraudulent voting in multiple state elections, and to remove the burden of voting in more than one federal election in a given year." *Love v. Foster*, 90 F.3d 1026, 1029 (5th Cir. 1996) (citing *Cong. Globe*, 42d Cong., 2d Sess. 112 (1871)), *aff'd*, 522 U.S. 67 (1997).[9] "By establishing a particular day as 'the day' on which these actions must take place, the statutes simply regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say." *Foster*, 522 U.S. at 71–72.

Plaintiffs maintain that Miss. Code Ann. § 23-15-637(1)(a) violates these statutes because it permits receipt of absentee ballots by mail for up to five

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[8] A discussion of the Framers' intent behind the Elections Clause can be found in the Supreme Court's opinion in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–34 (1995), and the Sixth Circuit's opinion in *Millsaps v. Thompson*, 259 F.3d 535, 539–40 (6th Cir. 2001).

[9] In a separate statute, Congress created two exceptions to the election-day requirement: (1) in states that required a majority vote for election, a runoff could be held between the federal election day and the January when officials take office; and (2) an election could be held on a different date if a vacancy occurred in the office. 2 U.S.C. § 8.

business days after the election day established by the federal statutes. Defendants respond that the federal statutes merely require that a vote be cast, not received, on or before election day. The Mississippi statute provides:

> Absentee *ballots and applications received by mail*, except for fax or electronically transmitted ballots as otherwise provided by Section 23-15-699 for UOCAVA ballots, or common carrier, such as United Parcel Service or FedEx Corporation, *must be postmarked on or before the date of the election and received by the registrar no more than five (5) business days after the election; any received after such time shall be handled as provided in Section 23-15-647 and shall not be counted*.

Miss. Code Ann. § 23-15-637 (emphasis added).[10]

The Fifth Circuit has yet to consider whether ballots received after election day may be counted, but it has held that "[a]llowing some voters to cast votes *before* election day does not contravene the federal election statutes because the final selection is not made before the federal election day." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000) (emphasis added), *cert. denied*, 530 U.S. 1230 (2000). In *Bomer*, while addressing Texas's early-

[10] The statute references "UOCAVA," the Uniformed and Overseas Citizens Absentee Voting Act of 1986, which requires states to accept absentee ballots in federal elections from absent uniformed-services voters and overseas voters. 52 U.S.C. § 20302(a)(1). States must send validly requested absentee ballots to these voters at least forty-five days before a federal election in order to provide them enough time to vote. *Id.* § 20302(a)(8), (g)(1)(A).

voting system, the court explained that "[s]tates are given a wide discretion in the formulation of a system for the choice by the people of representatives in Congress." *Id.* at 775. The court said it could not "conceive that Congress intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote." *Id.* at 777. Thus, the court held that "a state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot *directly conflict* with federal election laws on the subject." *Id.* at 775 (emphasis added). "Because the election of federal representatives in Texas [was] not decided or consummated before federal election day, the Texas scheme [was] not inconsistent with the federal election statutes." *Id.* at 776.

Defendants argue that, under *Bomer*, the Mississippi statute is not preempted by federal law because it does not "directly conflict" with the election-day statutes. *See id.* at 775. Plaintiffs counter that the appropriate standard — as set forth in the later Supreme Court case *Inter Tribal* — is whether the state statute is "inconsistent" with the federal statutes. *See* 570 U.S. at 9. According to Plaintiffs, the *Inter Tribal* standard "is a less demanding preemption standard than the 'directly conflict' standard" because it "does not require a textual or 'facial conflict.'"[11] (Reply at 6, ECF No. 91). Thus,

[11] Plaintiffs cite no authority that distinguishes between "direct conflict" and "inconsistency." It appears that the Fifth Circuit does not view the standards set forth in *Inter Tribal* and *Bomer* as conflicting because it cited both standards in *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013). First, the

Defendants argue that the Mississippi statute is not preempted because the federal statutes do not directly address whether ballots must be received on or before election day, while Plaintiffs claim that Congress's decision to legislate the time of election "*necessarily* displaces some element of a pre-existing legal regime erected by the States." (*Id.* at 8) (quoting *Inter Tribal*, 570 U.S. at 14). Plaintiffs assert that the Mississippi statute must "give way" because it is inconsistent with the election-day statutes. (*Id.*).

Before this Court can determine whether the Mississippi statute conflicts with, or is inconsistent with, the federal election-day statutes, the Court must consider the meaning of the word "election" in those statutes. "[E]very statute's meaning is fixed at the time of enactment." *Wisc. Cent. Ltd v. United States*, 585 U.S. 274, 284 (2018) (emphasis omitted). Therefore, this Court must interpret the word "election" "consistent with [its] ordinary meaning . . . at the time Congress enacted the statute[s]." *Id.* at 277 (internal quotation marks & citation omitted).

In 1921, the Supreme Court noted that the word "election" still had "the same general significance as

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Fifth Circuit cited *Voting for America v. Andrade*, 488 F. App'x 890, 896 (5th Cir. 2012), and *Bomer* for the proposition the "state election laws cannot 'directly conflict' with federal election laws on the subject." *Id.* at 399. Later on in the same opinion, the Fifth Circuit cited the holding in *Inter Tribal* and found its facts distinguishable because "the laws do not conflict." *Id.* at 400. Therefore, "inconsistency" and "direct conflict" are essentially synonymous and do not appear to be different standards under Fifth Circuit precedent. In fact, having quoted the "inconsistent" standard from a prior case, *Inter Tribal* then goes on to say that the "straightforward textual question here is whether" the challenged statute "conflicts with" federal law. 570 U.S. at 9.

it did when the Constitution came into existence — *final* choice of an officer by the duly qualified electors." *Newberry v. United States*, 256 U.S. 232, 250 (1921) (emphasis added). More recently, while considering the election-day statutes, the Supreme Court held that "election" "refer[s] to the combined actions of voters and officials meant to make *a final selection* of an officeholder." *Foster*, 522 U.S. at 71 (emphasis added). Plaintiffs seize upon the unspecified "actions" of "officials" to argue that no vote is cast until it is received by election officials. (Mem. at 7–8, ECF No. 60). However, the *Foster* Court explained that "there is room for argument about just what may constitute the final act of selection within the meaning of the law," and it found it unnecessary to "isolat[e] precisely what acts a State must cause to be done on federal election day . . . in order to satisfy the statute." 522 U.S. at 72. The Court expressly limited its holding to the single issue of Louisiana's practice of electing most members of Congress in an open primary held before election day: "We hold today only that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 72 n.4.

In *Bomer*, the Fifth Circuit provided the following analysis of the *Foster* decision:

> [T]he plain language of the statute does not require all voting to occur on federal election day. All the statute requires is that the election be held that day. . . . Allowing some voters to cast votes before election day does not contravene the federal election statutes because the final selection is not made before the federal election day. . . . [T]his conclusion is consistent with the [*Foster*] Court's refusal to

> give a hyper-technical meaning to "election" and its refusal to "[pare] the term 'election' in § 7 down to the definitional bone."

199 F.3d at 776 (citations omitted). Likewise, no "final selection" is made *after* the federal election day under Mississippi's law. All that occurs after election day is the delivery and counting of ballots cast on or before election day. Plaintiffs argue that no ballots are "cast" until they are in the custody of election officials, but their only authority for this proposition is a Montana state-court decision from 1944. (Mem. at 9, ECF No. 60; Mem. at 7, ECF No. 56).

Several lower courts have taken a similar approach to that of the *Bomer* court in considering whether a conflict exists between the election-day statutes and state laws permitting receipt of ballots postmarked on or before election day. For example, in *Bost v. Illinois State Board of Elections*, 684 F. Supp. 3d 720 (N.D. Ill. 2023), a district court recently considered a challenge to an Illinois statute that permitted ballots postmarked or certified on or before election day to be received and counted for up to fourteen days after election day. First, the court noted:

> There is a notable lack of federal law governing the timeliness of mail-in ballots. In general, the Elections Clause delegates the authority to prescribe procedural rules for federal elections to the states. If the states' regulations operate harmoniously with federal statutes, Congress typically does not exercise its power to alter state election regulations.

Id. at 736 (citations omitted). The court found that the statute "operates harmoniously" and is "facially

compatible" with the federal statutes because only ballots postmarked no later than election day are counted under the Illinois statute. *Id.* It reasoned that many states had enacted similar statutes that had been in place for many years, but Congress "has never stepped in and altered the rules." *Id.* The court also recognized that Congress's enactment of UOCAVA and the United States Attorney General's repeated efforts in seeking court-ordered extensions of ballot-receipt deadlines for military voters "strongly suggest that statutes like the one at issue here are compatible with the Elections Clause." *Id.* at 737. As a result, the court found that the plaintiffs had "failed to state a viable challenge to the [s]tatute based on federal law." *Id.*

Plaintiffs object that one cannot infer from Congress's enacting supplemental election statutes that state statutes doing similar things are in harmony with federal law, because Congress can amend federal law but states can't. (Resp. at 28, ECF No. 75). But courts must strongly presume that acts of Congress addressing the same topics are in harmony rather than one statute's impliedly repealing the other in whole or part. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018). So if one federal statute implicitly allows post-election receipt of overseas ballots mailed by election day, that statute is presumed not to offend against the election-day statutes, from which one may infer that the similar Mississippi statute on post-election receipt is likewise inoffensive.

Much like in *Bost*, another court explained:

> [O]verseas absentee voters, like all the rest of the voters, cast their votes on election day. The

> only difference is when those votes are counted. Thus, this case comes down to having very little difference from the typical voting and vote-counting scenario. Routinely, in every election, hundreds of thousands of votes are cast on election day but are not counted until the next day or beyond.

Harris v. Fla. Elections Canvassing Comm'n, 122 F. Supp. 2d 1317, 1325 (N.D. Fla.), *aff'd sub nom. Harris v. Fla. Elections Comm'n*, 235 F.3d 578 (11th Cir. 2000). The court likewise noted that the federal government was surely aware that several states had similar practices of accepting ballots received after election day, but it had not sued any state to challenge that practice. *Id.* This, the court held,

> lends further support to the notion that Congress did not intend 3 U.S.C. § 1 to impose irrational scheduling rules on state and local canvassing officials, and certainly did not intend to disenfranchise voters whose only reason for not being able to have their ballots arrive by the close of election day is that they were serving their country overseas.

Id.

In another opinion (later vacated as moot by the Supreme Court), the Third Circuit upheld a three-day extension of the ballot-receipt deadline granted by the Pennsylvania Supreme Court in response to the Covid-19 pandemic and delays in mail delivery. *Bognet v. Sec'y Commonwealth of Penn.*, 980 F.3d 336, 344 (3d Cir. 2020), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021). The court explained that "Congress exercises its power to 'alter' state election regulations only if the

state regime cannot 'operate harmoniously' with federal election laws 'in a single procedural scheme.'" *Id.* at 353 (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012), *aff'd sub nom. Inter Tribal*, 570 U.S. 1).

The analysis in these opinions is persuasive. "The legislative history of the [election-day] statutes reflects Congress's concern that citizens be able to exercise their right to vote." *Bomer*, 199 F.3d at 777 (citing *Cong. Globe*, 42d Cong., 2d Sess. 3407–08 (1872)). According to *Foster*, Congress set a national election day to avoid the "evils" of burdening citizens with multiple election days and of risking undue influence upon voters in one state from the announced tallies in states voting earlier. 522 U.S. at 73–74. Neither of those concerns is raised by allowing a reasonable interval for ballots cast and postmarked by election day to arrive by mail. Moreover, as the Fifth Circuit has noted, it is difficult to "conceive that Congress intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote." *Bomer*, 199 F.3d at 777.

After hearing oral arguments and considering the seven sets of motions, responses, and replies submitted by the parties as well as the three amici briefs, the Court finds that case authority as well as the legislative history, combined with the Framers' intention in drafting the Elections and Electors Clauses, Supreme Court precedent, and Congress's enactment of UOCAVA support a finding that Mississippi's statute operates consistently with and does not conflict with the Electors Clause or the election-day statutes.

III. DOES THE MISSISSIPPI STATUTE VIOLATE PLAINTIFFS' CONSTITUTIONAL RIGHTS?

Counts Two and Three of the Complaint allege violations of the rights to vote and to stand for public office. But neither the Republican Plaintiffs nor the Libertarian Party rebutted Defendants' motions for summary judgment in their responses. The former did however address those issues in supporting their own Rule 56 motion. (Mem. at 18–19, ECF No. 60; Reply at 18–19, ECF No. 90). The Court will construe that discussion as also rebutting Defendants' arguments.

Essentially, both counts stand or fall on whether the Mississippi absentee-ballots statute conflicts with federal law, in which case Plaintiffs say their rights would be violated. Because the Court finds no such conflict, it finds no such violations. Summary judgment is properly granted to Defendants on Counts Two and Three and is denied as to Plaintiffs.

CONCLUSION

The Elections Clause has two functions. Upon the States it imposes the duty ("*shall* be prescribed") to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether. *Inter Tribal*, 570 U.S. at 8. In the absence of federal law regulating absentee mail-in ballot procedures, states retain the authority and the constitutional charge to establish their lawful time, place, and manner boundaries.

The Court finds that the RNC, the Mississippi Republican Party, and the Libertarian Party each have standing to proceed with these lawsuits. They have sufficiently alleged negative consequences they

suffer because of Mississippi's statute allowing post-election receipt of ballots mailed by election day. However, the Court also finds that Defendants are entitled to summary judgment as to all of Plaintiffs' claims. Mississippi's statutory procedure for counting lawfully cast absentee ballots, postmarked on or before election day, and received no more than five business days after election day is consistent with federal law and does not conflict with the Elections Clause, the Electors' Clause, or the election-day statutes.

IT IS THEREFORE ORDERED AND ADJUDGED that the [51] Motion for Summary Judgment in Consolidated Republican Party Case filed by Secretary of State Michael Watson, the [53] Motion for Summary Judgment in Consolidated Libertarian Case filed by the secretary, the [61] Motion for Summary Judgment filed by Intervenor Defendants Alliance for Retired Americans and Vet Voice Foundation, the [63] Motion for Summary Judgment in the Consolidated Republican Case filed by Christene Brice, Toni Jo Diaz, Carolyn Handler, Barbara Kimball, Becky Payne, and Justin Wetzel, and the [64] Motion for Summary Judgment in the Consolidated Libertarian Case filed by the same movants, are **GRANTED**. The Court will enter a separate judgment as required by Fed. R. Civ. P. 58(a).

IT IS FURTHER ORDERED AND ADJUDGED that the [55] Motion for Summary Judgment filed by the Libertarian Party of Mississippi and the [58] Cross Motion for Summary Judgment filed by Matthew Lamb, the Mississippi Republican Party, James Perry, and the Republican National Committee are **DENIED**.

SO ORDERED AND ADJUDGED this the 28th day of July, 2024.

s/ *Louis Guirola, Jr.*

LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

1. U.S. Const. art. I, § 4, cl. 1 provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

2. U.S. Const. art. II, § 1, cl. 2 provides:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

3. U.S. Const. art. II, § 1, cl. 4 provides:

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

4. U.S. Const. art. VI, cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5. 2 U.S.C. § 1 provides:

Time for election of Senators

At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

6. 2 U.S.C. § 7 provides:

Time of election

The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

7. 3 U.S.C. § 1 provides:

Time of appointing electors

The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.

8. 3 U.S.C. § 21 provides:

Definitions

As used in this chapter the term-

(1) "election day" means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, if the State modifies the period of voting, as necessitated by force majeure events that are extraordinary and catastrophic, as provided under laws of the State enacted prior to such day, "election day" shall include the modified period of voting.

(2) "State" includes the District of Columbia.

(3) "executive" means, with respect to any State, the Governor of the State (or, in the case of the District of Columbia, the Mayor of the District of Columbia), except when the laws or constitution of a State in effect as of election day expressly require a different State executive to perform the duties identified under this chapter.

9. Miss. Code Ann. § 23-15-637 provides:

Timely casting of ballots.

(1)(a) Absentee ballots and applications received by mail, except for fax or electronically transmitted ballots as otherwise provided by Section 23-15-699 for UOCAVA ballots, or common carrier, such as United Parcel Service or FedEx Corporation, must be postmarked on or before the date of the election and received by the registrar no more than five (5) business days after the election; any received after

such time shall be handled as provided in Section 23-15-647 and shall not be counted.

(b) All ballots cast by the absent elector appearing in person in the office of the registrar shall be cast with an absentee paper ballot and deposited into a sealed ballot box by the voter, not later than 12:00 noon on the Saturday immediately preceding elections held on Tuesday, the Thursday immediately preceding elections held on Saturday, or the second day immediately preceding the date of elections held on other days. At the close of business each day at the office of the registrar, the ballot box used shall be sealed and not unsealed until the beginning of the next business day, and the seal number shall be recorded with the number of ballots cast which shall be stored in a secure location in the registrar's office.

(2) The registrar shall deposit all absentee ballots which have been timely cast and received by mail in a secured and sealed box in a designated location in the registrar's office upon receipt. The registrar shall not send any absentee ballots to the precinct polling locations.

(3) The Secretary of State shall promulgate rules and regulations necessary to ensure that when a qualified elector who is qualified to vote absentee votes by absentee ballot, either by mail or in person with a regular paper ballot, that person's absentee vote is final and he or she may not vote at the polling place on election day. Notwithstanding any other provisions of law to the contrary, the Secretary of State shall promulgate rules and regulations necessary to ensure that absentee ballots shall remain in the registrar's office for counting and not be taken to the precincts on election day.

10. 1 Miss. Admin. Code pt. 17, R. 2.1 provides:

Absentee Ballot Cast.

For the purposes of this Chapter, an absentee ballot is the final vote of a voter when, during absentee ballot processing by the Resolution Board, the ballot is marked accepted. A rejected ballot is not a final vote, and should a ballot be rejected or a mailed absentee ballot not timely received, and that voter cast an affidavit ballot in the precinct on election day, the affidavit ballot may be counted if found legal. An affidavit ballot cast by a voter whose absentee ballot was accepted by the Resolution Board should be rejected, as the voter had already cast his/her final vote.

11. 1 Miss. Admin. Code pt. 17, R. 2.3 provides:

Absentee Ballot by mail.

(a) When a registrar mails an absentee ballot to an absent voter, SEMS will be used to document the request and issuance of the ballot. In the process of providing an absentee ballot, the registrar will use SEMS to produce pollbooks, or mark directly on the pollbook, to indicate the absent voter has been mailed an absentee ballot or absentee ballot has been received by the registrar by printing "VOTED AB" in the pollbook beside the voter's name in the Election Date/Write Voted column. If an absent elector appears at the polling place on election day, after having been mailed an absentee ballot or returned an absentee ballot and seeks to cast a regular ballot, the voter must be informed that he/she is not entitled to cast a regular ballot, but the voter may cast an

affidavit ballot. The absentee ballot, upon receipt by the registrar, processed as received in SEMS and deposited into a secure ballot box, shall be final, if accepted by the Resolution Board.

(b) In canvassing the election, the officials in charge of the election shall check the Absentee Ballot Received Report (BP-001 from SEMS) and SEMS to see whether an absentee ballot was received by the registrar, and also check to see whether the Resolution Board accepted the absentee ballot. If the absent voter's absentee ballot has been received within five (5) business days of the election and accepted by the Resolution Board, the officials in charge of the election shall reject the absent voter's affidavit ballot. If the absent voter's absentee ballot has not been received within five (5) business days after the election, or was rejected by the Resolution Board, the officials in charge of the election may accept the affidavit ballot if determined to be legal.