No. 24-1260

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

BRIEF OF THE DISTRICT OF COLUMBIA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the federal election day statutes—2 U.S.C. § 7, 2 U.S.C. § 1, and 3 U.S.C. § 1—preempt a Mississippi state law that allows mail-in absentee ballots that are postmarked by election day to be received and counted by state election officials after that day. *See* Miss. Code Ann. § 23-15-637(1)(a).

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The District of Columbia, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington (collectively, "*Amici* States") file this brief as *amici curiae* in support of petitioner Michael Watson, the Mississippi Secretary of State. In the decision below, the Fifth Circuit wrongly decided a question of exceptional importance to states and their citizens. *Amici* States thus urge this Court to grant the petition and reverse the judgment of the Fifth Circuit before the next federal election.

In our federalist system, the Constitution reserves to the states the primary "power to regulate elections." *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991)). "Unless Congress acts," *Foster v. Love*, 522 U.S. 67, 69 (1997) (quoting *Roundebush v. Hartke*, 405 U.S. 15, 24 (1972)), it is the states' responsibility to prescribe the manner of elections and ensure that they are "fair and honest and [in] some sort of order," *Storer v. Brown*, 415 U.S. 724, 730 (1974). States thus "are given, and in fact exercise a wide discretion" in establishing systems to guarantee that elections are fair and efficient. *United States v. Classic*, 313 U.S. 299, 311 (1941).

To meet those objectives, states have made different choices about how to count mail-in absentee ballots that are postmarked on or before—but delivered after—election day. In doing so, states

balance the desire to count all timely, lawfully cast ballots with the reality that states must certify their election results by certain deadlines. *See Election Certification Deadlines*, Nat'l Conf. of State Legislatures (Jan. 20, 2025), tinyurl.com/mpzxc9s3 (surveying state deadlines); 3 U.S.C. §§ 5, 7 (setting federal deadlines).

In striking this balance, a majority of jurisdictions have decided to count some timely cast mail-in ballots that arrive after election day. The District of Columbia and 17 states count all absentee ballots so long as they are mailed on or before but arrive some specified number of days after election day. An additional 14 states count absentee ballots so long as they are timely mailed by designated individuals residing outside the United States and arrive within a set number of days after election day. Nineteen other states, in contrast, have chosen to require that absentee ballots arrive on or before election day.

Despite the practices adopted by most states, the Fifth Circuit recently decided that all mail-in absentee ballots must arrive by election day to count. Specifically, the Fifth Circuit held that Congress foreclosed any flexibility in the timing of receiving mail-in absentee ballots when it passed the federal election day statutes over 150 years ago. *See* 2 U.S.C. § 1; 2 U.S.C. § 7; 3 U.S.C. § 1. These federal statutes, according to the Fifth Circuit, do not permit states to count timely mailed absentee ballots that arrive after election day. As a result, the Fifth Circuit invalidated Mississippi's mail-in ballot provision, which permits state election officials to count absentee ballots postmarked on or before election day but received

within five business days after that day. Miss. Code Ann. § 23-15-637(1)(a).

The Fifth Circuit's decision is both wrong and destabilizing. States maintain the authority to set the "Times, Places and Manner of holding Elections" absent congressional preemption. U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. The text of the federal election day statutes do not speak to—let alone *clearly* preempt—states' ability to determine when to receive and count absentee ballots that are timely cast by mail. The history and purpose of those statutes confirm as much. Rather, the Constitution and the federal election day statutes provide Mississippi—like all states—the authority to make the "policy choice" to "require only that absentee ballots be *mailed* by election day," not that they be *received and counted* by that date. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring in the denial of the application to vacate stay).

Worse yet, the decision invites chaos nationwide. Its faulty reasoning, if adopted by other courts, could call into question ballot-receipt deadlines in 31 states and the District of Columbia, including laws that aim to ensure military service members overseas can vote. The Fifth Circuit's unprecedented ruling could also trigger a wave of litigation that would sow confusion in the affected states. That wave would likely crest during the next federal election, forcing states—and courts—to resolve emergency election-related legal challenges when the stakes are highest. State legislatures may also be forced to make difficult decisions to amend ballot-receipt deadlines on an

expedited timeframe. And election administrators would be left puzzling over how to "communicate to voters how, when, and where they may cast their ballots" so that "the rules of the road [are] clear and settled." *Id.* at 31. That last-minute election-related limbo is the last thing states and courts need.

Given the Fifth Circuit's misguided decision on an exceptionally important issue, this Court should grant the petition and reverse the judgment next Term, before states must administer the 2026 federal election.

SUMMARY OF ARGUMENT

1. States have the constitutional authority to make individualized judgments on how best to receive and count votes in federal elections. Exercising that authority, states have chosen various deadlines by which voters must postmark and election officials must receive mail-in absentee ballots, and states have selected which voters can make use of those deadlines. Currently, Mississippi, along with 30 other states and the District of Columbia, accept and count at least some absentee ballots that are postmarked on or before—but received after—election day.

Allowing the Fifth Circuit's decision to stand throws into doubt the settled practices in those states and invites a wave of potential litigation challenging ballot-receipt deadlines and individual ballots that are timely cast but arrive sometime after election day. That cloud of uncertainty hampers states' ability to predictably manage the sensitive task of administering federal *and* state elections. And the

Fifth Circuit's reasoning jeopardizes the ability of military service members and their families stationed abroad to have their timely cast ballots counted.

2. Mississippi's ballot-receipt statute is not preempted by federal law. The method for counting votes is left to the states by the Constitution, unless Congress explicitly says otherwise. Congress has not enacted any law that clearly regulates the deadline for receiving and counting all absentee ballots. It has passed statutes that mandate which day federal elections must occur, but an election is simply the time when voters make their *final choice*. The federal election day statutes say nothing about Mississippi's and other states' laws that regulate *receiving* and *counting* ballots timely cast by that designated day. Moreover, Congress has legislated in the field of absentee voting for those voters residing overseas but has declined to impose a uniform mail-in ballot-receipt deadline, opting instead to incorporate state practices—implicitly approving states' varied ballot-receipt deadlines, which have existed for decades.

ARGUMENT

I. The Fifth Circuit's Decision Threatens Ballot-Receipt Laws In A Majority Of States, Risking Chaos And Uncertainty In The Next Federal Election.

A. Most states and the District of Columbia count at least some absentee ballots that are mailed by—but arrive after—election day.

The Fifth Circuit invalidated Mississippi's law permitting election officials to count mail-in absentee ballots that are "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). "[A]ny" ballots "received after such time," Mississippi has decided, "shall not be counted." *Id.* Mississippi's ballot-receipt deadline is not unique; the Fifth Circuit's decision could call into question similar laws in the majority of states.

In addition to Mississippi, 16 states and the District of Columbia accept and count absentee ballots that are mailed on or before election day but received after that date, no matter who cast them. Washington, for example, counts ballots that "bear[] a postmark on or before the date" of the election and that are "receive[d] no later than the day before certification," which occurs 21 days after the general election. Wash. Rev. Code § 29A.60.190. Illinois counts ballots that are "postmarked no later than election day" and received "before the close of the period for counting provisional ballots," 10 Ill. Comp. Stat. 5/19-8(c), meaning up to 14 days after election

day, *id.* 5/18A-15.[1] Alaska and the District of Columbia count ballots received up to ten days after election day. Alaska Stat. § 15.20.081(e); D.C. Code § 1-1001.05(a)(10B). California and Oregon each count ballots postmarked on or before election day and received up to seven days after election day, Cal. Elec. Code § 3020(b); Or. Rev. Stat. § 254.470(6)(e)(B), while New York extends the deadline to seven days so long as the ballots are "in envelopes showing a cancellation mark . . . with a date which is ascertained to be not later than the day of the election," N.Y. Elec. Law § 8-412(1). New Jersey counts ballots postmarked by election day that are received "within 144 hours [6 days] after the time of the closing of the polls," N.J. Stat. Ann. § 19:63-22(a), and West Virginia requires receipt within five days of election day, W. Va. Code § 3-3-5(g)(2); *id.* § 3-6-9(a)(1). Similarly, Nevada counts ballots up to four days after election day, so long as the ballot is postmarked by election day, Nev. Rev. Stat. § 293.269921(1), and three days after election day if "the date of the postmark cannot be determined," *id.* § 293.269921(2).[2] And Kansas, Massachusetts, and

[1] This Court recently agreed to review a decision of the Seventh Circuit that found that a group of Illinois voters and political candidates lacked standing to challenge Illinois's ballot-receipt law. *Bost v. Ill. Bd. of Elections*, No. 24-568, *cert. granted*, — S. Ct. —, 2025 WL 1549779 (June 2, 2025).

[2] Last year, a group of political organizations and voters challenged Nevada's ballot-receipt law, but the district court found that the plaintiffs lacked standing. *RNC v. Burgess*, No. 3:24-cv-198, 2024 WL 3445254 (D. Nev. July 17, 2024). The case is now pending before the Ninth Circuit. *RNC v. Burgess*, No. 24-5071 (9th Cir. filed Aug. 16, 2024).

Virginia count ballots received three days after election day. Kan. Stat. Ann. § 25-1132(b); Mass. Gen. Laws ch. 54, § 93; Va. Code Ann. §§ 24.2-702.1(B), -709(B).[3]

Some states have chosen a slightly different model, requiring absentee ballots to be postmarked *before* election day to be counted if they arrive after election day. Ohio, for example, counts ballots received "through the fourth day" after the election if they were postmarked "prior to the day of the election." Ohio Rev. Code Ann. § 3509.05(D)(2)(a). And Texas will count votes that arrive "not later than 5 p.m. on the day after election day," so long as they were "placed for delivery by mail . . . before election day and bear[] a cancellation mark . . . indicating a time not later than 7 p.m." on election day. Tex. Elec. Code Ann. § 86.007(a)(2).

Other states have adopted less definite ballot-receipt deadlines. North Dakota, for instance, counts ballots postmarked before election day if they are received before canvassing, N.D. Cent. Code § 16.1-07-09, which occurs "[n]ot later than seventeen days next following" the election, *id.* § 16.1-15-35.[4] And Maryland law provides that mail-in ballots are timely if received in accordance with regulations

[3] Kansas has amended its ballot-receipt deadline to, as of January 1, 2026, require receipt of mail-in absentee ballots "by 7:00 p.m. on the day of the election." S.B. 4, 2025-2026 Legis. Sess. (Kan. 2025), tinyurl.com/2xcxttt7.

[4] North Dakota has amended its ballot-receipt deadline to, as of August 1, 2025, require receipt of mail-in absentee ballots by the time the polls close on election day. H.B. 1165, 69th Legis. Assemb., Reg. Sess. (N.D. 2025), tinyurl.com/4retvc7x.

established by the State Board of Elections, Md. Code Ann., Elec. Law § 11-302(c)(1), which currently require ballots to be received "on or before 10 a.m. on the second Friday after" election day if postmarked on or before election day, Md. Code Regs. 33.11.03.08.

Finally, 14 states that do not accept late-arriving absentee ballots for *all* eligible voters still accept them from some eligible voters, such as overseas members of the military and their families.[5] Of these states, Arkansas, Florida, and Indiana have extended the receipt deadline to ten days after election day. Ark. Code. Ann. § 7-5-411(a)(1)(A)(ii); Fla. Stat. § 101.6952(5); Ind. Code § 3-12-1-17(b). Colorado provides eight days, Colo. Rev. Stat. §§ 1-8.3-111, -113(2); Alabama, Pennsylvania, and Rhode Island each provide seven days, Ala. Code § 17-11-18(b); 25 Pa. Cons. Stat. § 3511(a); R.I. Gen. Laws § 17-20-16; and Michigan provides six days, Mich. Comp. Laws § 168.759a(18). Georgia and Missouri have set their deadlines as the Friday after election day, Ga. Code Ann. § 21-2-386(a)(1)(G); Mo. Rev. Stat. § 115.920(1), while Iowa accepts ballots with valid postmarks dated "not later than the day before the election" if "received by the commissioner not later than noon on the Monday following the election," Iowa Code § 53.44(2). North Carolina and South Carolina set their deadlines for "valid military-overseas ballot[s]" as the close of business on the business day before the county canvass, which is "on the tenth day after [the] election" in North Carolina,

[5] The states that allow ballots to arrive after election day for *all* voters often also have statutes that more specifically cover overseas voters. *See, e.g.*, Mass. Gen. Laws ch. 54, § 99.

N.C. Gen. Stat. §§ 163-258.10, -258.12, -182.5(b), and the Friday after election day in South Carolina, S.C. Code Ann. § 7-15-700(A); *id.* § 7-17-10. Likewise, Utah accepts "military-overseas ballot[s]" if "submitted for mailing . . . not later than 12:01 a.m. . . . on the date of the election," Utah Code Ann. § 20A-16-404, and "delivered by the end of business on the business day before the latest deadline for completing the canvass," *id.* § 20A-16-408(1), which must take place between seven and 14 days after the election, *id.* § 20A-4-301(1)(b).

All told, 31 states and the District of Columbia extend the receipt deadline for some mail-in absentee ballots. Although these states have enacted rules that provide different deadlines and encompass different groups of voters, each has made a judgment to provide for the counting of at least some ballots arriving after election day.

B. The Fifth Circuit's decision risks chaos for upcoming elections, creates uncertainty in state election administration, and could undermine the ability of military service members stationed abroad to vote.

The Fifth Circuit's rule risks destabilizing election administration and harming voters in the majority of states, in at least three distinct ways.

First, if left uncorrected, the decision invites a wave of potential litigation challenging both ballot-receipt deadlines facially and the validity of individual ballots that are timely cast but arrive sometime after election day. If this Court does not resolve the question presented in advance of the next

federal general election, that question could arrive at this Court's doorstep anyway, but in an emergency posture. Indeed, election-related litigation often arises in an emergency posture and seeks time-sensitive relief. Such litigation is taxing for states and courts and can result in outcome-altering judgments without adequate time for full briefing and sustained deliberation. *See, e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879, 887 (2022) (Mem.) (Kagan, J., dissenting from grant of applications for stays) (explaining that "serious and sustained consideration" on election-related claims is "impossible to give 'on a short fuse'" (quoting *Does v. Mills*, 142 S. Ct. 17, 18 (2021) (Mem.) (Barrett, J., concurring in denial of application for injunctive relief))).

Moreover, state and county election officials require significant time before an election to allocate sufficient resources to source voting machines, fund election workers, and educate the public about election deadlines and procedures. If the rules change late in the game—so that states cannot timely adjust their laws or properly educate the public about new deadlines—states may be forced to discard votes for federal offices on ballots that arrive after election day. That could provoke significant confusion during the time-sensitive process of counting votes and complicate the timely certification of results. *See Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring in the denial of the application to vacate stay) (explaining that federal courts should avoid "late-in-the-day judicial alterations to state election laws" that could erode "confidence in the fairness of the election"); *see also*

Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006) (per curiam); Pet. 33.

Second, to the extent that other courts embrace the Fifth Circuit's flawed rationale, it could also lead to potential voter confusion, with state and federal elections—which are usually held during the same time period using the same ballots—subject to different deadlines. Under the Fifth Circuit's reading, ballot-receipt deadlines like Mississippi's would be preempted with respect to elections for *federal* offices, but states would still be required to count timely cast ballots for *state* offices that were received after election day under the ballot-receipt deadlines currently on the books. *See generally Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 819 (2015) (explaining that the Elections Clause does not affect states' regulation of state elections). Each state, then, could be faced with a Hobson's choice: bifurcate the ballot process in otherwise overlapping federal and state elections, or amend the state's ballot-receipt deadline even for state elections, over which Congress has no control.

Making matters worse, applying two sets of rules for elections may well be practically impossible—particularly with respect to ballots. "Ballots and elections do not magically materialize. They require planning, preparation, and studious attention to detail if the fairness and integrity of the electoral process is to be observed." *Perry v. Judd*, 471 F. App'x 219, 226 (4th Cir. 2012) (opinion of Wilkinson, Agee, & Diaz, JJ.). States usually craft one, unified ballot for both federal and state offices. *See, e.g.*, Minn. Stat. Ann. § 204D.11(1). Practically, then, adopting the

Fifth Circuit's rule for federal but not state elections could mean double the printing and counting of ballots, additional voter education to avoid confusion, increased risk of error, and other significant costs on the states.

Third, the Fifth Circuit's rule jeopardizes the ability of states to count lawfully cast ballots from military service members and their families who are stationed abroad. For the more than 1.3 million active duty service members, voting absentee by mail poses unique complications that most civilian voters do not face. Because in-person voting is not available for those members and their families serving abroad, *see Voting for Military & Overseas Voters*, Nat'l Conf. of State Legislatures (Aug. 16, 2024), tinyurl.com/usd38zpc, those voters must request mail-in absentee ballots well in advance of an election and are "often require[d] . . . to vote earlier than their civilian counterparts due to long [international] mailing timelines," Joseph Clark, *Researchers Set Out to Tackle Voting Challenges of Military Members*, U.S. Dep't of Def. News (Feb. 12, 2024), tinyurl.com/yck9dzv5. Those challenges, in part, result in "lower turnout by military members when compared with civilian voters." *Id.* (in 2020, "military voter turnout was 27 percentage points lower than civilian voters with similar characteristics"). The choice of most states to allow timely mailed ballots from these voters to be counted after election day

increases the likelihood that their lawfully cast votes will be counted.[6]

Notably, states' ballot-receipt laws, especially in the 14 states that specifically tailor their laws to overseas voters and military service members, *see supra* at pp. 9-10, continue this country's long tradition of providing flexibility to ensure that military service members can vote. In 1775, election officials in 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, *Hollis, New-Hampshire, In the War of the Revolution*, in 30 The New-Eng. Hist. & Genealogical Reg. 288, 293 (1876), tinyurl.com/47ryjnd4. Similarly, in 1813, Pennsylvania "passed the Military Absentee Act . . . to allow members of the state militia and those in the service of the United States to vote as long as the company the solider was serving was more than two miles from his polling place on election day."

[6] The Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") provides some rules that protect the ability of Americans abroad to vote, including requiring that they receive their ballots 45 days before election day in most circumstances. *See* 52 U.S.C. § 20302. But UOCAVA does not create a single, uniform ballot-receipt deadline for all eligible overseas voters; Congress, instead, appears to have incorporated state ballot-receipt deadlines, impliedly acknowledging the varying practices among the states. *Id.* § 20303(b) ("process[ing] in the manner provided by law for absentee ballots in the State involved"); *see also id.* § 20302(a)(10); *id.* § 20304(b)(1). Nothing about the Fifth Circuit's reasoning limits its decision to civilian ballots. Thus, if the Fifth Circuit is correct, even state laws that allow military service members abroad to have their late-arriving ballots counted could be preempted by federal law. *See* Pet. 27-28.

John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 497 (2003) (citing Act of Mar. 29, 1813, ch. 171, 1813 Pa. Laws 213-14). States continued to allow soldiers to vote by mail or proxy during the Civil War. *Id.* at 500. The Fifth Circuit's inflexible rule casts aside that historical tradition and harms military voters and their families in the process.

In short, if permitted to stand and adopted by other courts, the Fifth Circuit's decision undermines the ability of military service members and their families to exercise their fundamental right to vote. To avoid this outcome, the Court should grant the petition, reverse the judgment of the Fifth Circuit, and provide "clear and settled" "rules of the road" in advance of the 2026 federal general election. *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring in the denial of the application to vacate stay).

II. The Fifth Circuit's Decision Is Wrong.

On top of these practical problems, the Fifth Circuit's conclusion that Mississippi's ballot-receipt deadline is preempted by federal law is wrong. Mississippi's ballot-receipt deadline fits neatly into the election framework that both the Constitution's Framers and the federal election statutes' drafters created.

The regulation of federal elections is a federal power delegated to the states because "the Framers recognized that state power and identity were essential parts of the federal balance." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 841 (1995)

(Kennedy, J., concurring). For congressional elections, states have the authority to regulate their "Times, Places and Manner," unless clearly preempted by Congress. U.S. Const. art. I, § 4, cl. 1. And states establish the "Manner" of choosing presidential electors, *id.* art. II, § 1, cl. 2, while Congress "determine[s] the Time of chusing the Electors, and the Day on which they shall give their Votes," *id.* art. II, § 1, cl. 4. Among the "Manner[s]" left for the states to decide is how to best conduct the "counting of votes." *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

Congress did not preempt state ballot-receipt deadlines when it enacted the election day statutes. These federal statutes set 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. In enacting the original versions of these statutes, Congress chose to act "to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States." *Foster*, 522 U.S. at 73 (quoting *Ex parte Yarbrough*, 110 U.S. 651, 661 (1884)). Specifically, Congress was concerned with the fact that some states were voting *earlier* than others, leading to elections being effectively decided by those earlier-voting states. *Id.* at 73-74.

Nothing in the text of the federal election day statutes, however, suggests that states are prohibited from receiving and counting ballots that were timely mailed on or before election day. The key word in the statutes is "election." As this Court said more than 100 years ago, "the word 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) (emphasis added); *see Foster*, 522 U.S. at 71 (election is "[t]he act of choosing a person to fill an office" (internal quotation omitted)). At its core, "the election" in the federal statutes "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).

Thus, as Mississippi explains, an election occurs when voters make their *choice* or *selection* of who to elect, which is *final* and cannot be altered. Pet. 17. The federal election day statutes set the day by which voters must make that choice. But *receiving* and *counting* timely cast ballots after election day does not alter the day of the election—*i.e.*, the day of this choice. After all, absentee voters cast their votes by mailing their ballots no later than election day—at which point they are stuck with their choice, just like someone who drops their ballot in a box or pulls a lever in a booth. The text of the federal election day statutes does not speak to when these ballots must be received and counted, and "there 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, 14-15 (2013); *see also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) ("[M]atters left unaddressed in [a comprehensive federal] scheme are presumably left subject to the disposition provided by state law.").

Moreover, extended ballot-receipt deadlines are consistent with this Court's decision in *Foster*. There,

the Court held that a Louisiana law that allowed "a contested selection of candidates for a congressional office" to "conclude[] 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 [2 U.S.C.] § 7." 522 U.S. at 72. Determining that an election is "the combined actions of voters and officials meant to make a final selection of an officeholder," the Court held that the federal statutes required "only that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 71-72 & n.4. This holding does not require that the receipt and counting of timely cast votes must end on federal election day. Under the ballot-receipt deadline at issue, Mississippi voters must still "make a final selection of an officeholder" by election day. *Id.* at 71; *see* Pet. 18-19.

Finally, the history of congressional inaction over ballot-receipt deadlines further demonstrates the incorrectness of the Fifth Circuit's decision. To be sure, congressional inaction is not the most persuasive indicator of congressional intent—the text is. *See Brown v. Gardner*, 513 U.S. 115, 121 (1994). But Congress's decision not to expressly address ballot-receipt deadlines in federal law for decades, despite being aware of state laws and contemplating federal legislation, is notable. For instance, during consideration of the 1977 amendments to various aspects of federal election law, several witnesses proposed that ballot-receipt deadlines be extended for overseas voters until after election day. *See, e.g.*, *Overseas Absentee Voting: Hearing on The Overseas Citizens Voting Rights Act of 1975, The Federal Voting Assistance Act of 1955 & S. 703 Before the S. Comm.*

on Rules & Admin., 95th Cong. 17, 67, 74 (1977) (suggesting between ten and 20 days after election day). The congressional record also shows that, at the time, two states counted overseas ballots that arrived after election day. *Id.* at 33-34 (listing Nebraska and Washington). Nevertheless, Congress did not enact any federal ballot-receipt deadline, leaving states the flexibility to enact such provisions that best met their voters' and election officials' needs.

Then, when passing UOCAVA, Congress once again left state systems in place. As noted, the law requires states to allow "absent uniformed services voters and overseas voters . . . to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 52 U.S.C. § 20302(a)(1). Notably, however, the Act does not set a uniform receipt deadline for those ballots, instead instructing the appropriate agency only to "implement procedures that facilitate the delivery of marked absentee ballots . . . 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). Elsewhere, UOCAVA provides that "a Federal write-in absentee ballot shall be submitted and processed *in the manner provided by law* for absentee ballots *in the State involved*." *Id.* § 20303(b) (emphasis added). Thus, while the law implicitly acknowledges different receipt deadlines between states, Congress did not set a nationwide deadline, let alone indicate that the deadline is election day.

And most recently, in 2022, Congress amended 3 U.S.C. § 1 to use the words "election day," which it then defined. 3 U.S.C. §§ 1, 21(1). Again, Congress

was surely aware that the majority of states at the time counted mail-in votes that were cast on or before, but received after, election day. Yet it remained silent on ballot-receipt deadlines.

With Congress aware that at least some states were counting some ballots that arrived after election day, repeated congressional inaction at least suggests congressional approval of the status quo. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) ("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." (internal quotation marks omitted)). Thus, all the relevant indicia of congressional intent—text and history alike—indicate that Congress had no desire to preempt the laws of 31 states and the District of Columbia.

CONCLUSION

This Court should grant the petition and reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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