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

RESPONSE OF VET VOICE FOUNDATION AND MISSISSIPPI ALLIANCE FOR RETIRED AMERICANS IN SUPPORT OF PETITION

MARC E. ELIAS
Counsel of Record
ELISABETH C. FROST
DAVID R. FOX
CHRISTOPHER D. DODGE
RICHARD A. MEDINA
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW,
Suite 400
Washington, DC 20001
(202) 968-4490
eliasm@elias.law

Counsel for Respondents Vet Voice Foundation and the Mississippi Alliance for Retired Americans

RULE 29.6 DISCLOSURE STATEMENT

I, Marc E. Elias, counsel for Vet Voice Foundation and the Mississippi Alliance for Retired Americans, and a member of the Bar of this Court, certify that Vet Voice Foundation and the Mississippi Alliance for Retired Americans have no parent corporation, and that no publicly held company owns 10% or more of their stock.

Marc E. Elias
Counsel of Record
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW,
Suite 400
Washington, DC 20001
(202) 968-4490
eliasm@elias.law

Counsel for Vet Voice Foundation and the Mississippi Alliance for Retired Americans

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INTRODUCTION

Respondents Vet Voice Foundation and the Mississippi Alliance for Retired Americans intervened in this case to defend Mississippi's sensible law allowing mail ballots that are postmarked by election day to be counted as long as they are received within five business days after. The Vet Voice Respondents agree with Petitioner that the Fifth Circuit's decision invalidating that law is both deeply wrong and exceptionally important, and that if the decision stands, it will warrant the Court's review.

The Court should not grant review quite yet, however. Less than a week before this Petition was filed, the Court granted certiorari in *Bost v. Illinois State Board of Elections*, No. 24-568 (U.S. June 2, 2025), to resolve the Article III standing requirements for a case like this one. As the petitioners in *Bost* explained, that case and this one "involve[] nearly identical claims and injuries." Pet. for Cert. 30 n.12, *Bost*, No. 24-568 (Nov. 19, 2024) ("*Bost* Pet."). The Court's resolution of the question presented in *Bost* is therefore very likely to affect the standing analysis in this case, "a threshold question that must be resolved . . . before proceeding to the merits." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88–89 (1998). And standing is far from a sure thing—except for this case, every similar challenge to a state ballot receipt deadline has been dismissed for lack of standing.

The Court should therefore hold this Petition in abeyance pending a decision in *Bost*, and then grant,

vacate, and remand this case for further consideration by the Fifth Circuit in light of the additional standing guidance that a decision in *Bost* is likely to provide. Doing so will also carry the additional benefit of allowing more time for the important merits questions that the Petition raises to percolate in the many cases pending in the lower courts, which may give rise to a second merits decision from an additional court of appeals before this Court is called upon to review the question.

If the Court does not hold the Petition in abeyance, however, it should grant it. The Fifth Circuit's decision invalidating Mississippi's reasonable mail ballot receipt deadline is unsupported by text, precedent, or longstanding history. And while the decision has limited effect in the Fifth Circuit, broadly applying its reasoning nationwide would invalidate election laws in more than half the states and badly disrupt voters' and election officials' settled expectations about how votes may be cast. When the time comes, the Court should reverse.

BACKGROUND

I. The Elections Clause and the Election Day Statutes

The Elections Clause grants states the principal power to set the "Times, Places and Manner of holding Elections for Senators and Representatives," but it reserves the right of Congress to "at any time by Law make or alter such Regulations." U.S. Const. art. I,

§ 4, cl. 1. Similarly, Article II, Section 1, Clause 4 provides that "Congress may determine the Time of ch[oo]sing the [presidential] Electors, and the Day on which they shall give their Votes," *id.*, art. II, § 1, cl. 4, while the Electors Clause reserves to the states the power to choose the "Manner" of appointing electors, *id.* § 1, cl. 2.

Beginning after the Civil War, Congress enacted a series of statutes establishing a uniform federal election day. *See* 2 U.S.C. § 7; 3 U.S.C. §§ 1, 21. These Election Day Statutes specify "the day for the election," 2 U.S.C. § 7, and provide that electors must "be appointed . . . on election day," 3 U.S.C. § 1, but they do not specify the procedures to be used in casting and tabulating votes. They "simply regulate the time of the election." *Foster v. Love*, 522 U.S. 67, 71–72 (1997). States retain "wide discretion in the formulation of a system for the choice by the people of representatives in Congress." *United States v. Classic*, 313 U.S. 299, 311 (1941).

The Election Day Statutes have never been understood to require that all acts related to voting occur on election day itself. Courts across the country have repeatedly upheld early and absentee voting procedures as consistent with the Election Day Statutes, as long as they do not cause the final selection of an officeholder *before* election day. *See Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1176 (9th Cir. 2001); *Millsaps v. Thompson*, 259 F.3d 535, 547 (6th Cir. 2001); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776–77 (5th Cir. 2000); *see Foster*, 522 U.S. at 68–

69. This unanimous consensus reflects the centuries-long history of absentee voting, which "all states currently provide for . . . in some form." *Bomer*, 199 F.3d at 776. And, of course, the process of counting and canvassing votes routinely stretches for days or weeks after the polls close on election day. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 116 (2000) (Rehnquist, C.J., Scalia & Thomas, JJ., concurring) (cataloguing administrative actions occurring in Florida after election day to conclude the election process).

II. Absentee Voting in Mississippi

Like every other state, Mississippi offers absentee voting. Unlike many states, however, Mississippi limits its absentee voting to just a few categories of voters: the elderly, the disabled, those away from their home county on election day, and military servicemembers. *See* Miss. Code §§ 23-15-713, 23-15-673.

In 2020, nearly unanimous bipartisan majorities of the Mississippi legislature enacted the Ballot Receipt Deadline challenged here, which provides that absentee ballots returned by mail 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(a)(1).[1] The Deadline ensures that ballots completed and placed in the mail by elec-

[1] *See* H.R. Roll Call Vote, H.B. 1521, 2020 Reg. Sess. (Miss. Mar. 10, 2020), perma.cc/56WK-5HYE; S. Roll Call Vote, H.B. 1521, 2020 Reg. Sess. (Miss. June 15, 2020), perma.cc/2CZR-7MQX.

tion day are not rejected because of minor mail delivery delays, and it gives absentee voters the same deadline to make their choices as in-person voters.

At present, fifteen U.S. states plus three territories and the District of Columbia have similar laws, allowing for the counting of mail ballots that are mailed by election day and received by mail shortly thereafter.[2] An additional fifteen states apply a similar rule to military servicemembers specifically.[3] In total, at least 30

[2] Alaska Stat. § 15.20.081(e); Cal. Elec. Code § 3020(b); D.C. Code § 1-1001.05(a)(10B); Guam Code Ann. tit. 3, § 10114; 10 Ill. Comp. Stat. 5/19-8; Code of Md. Regs. 33.11.03.08(B)(4); Mass. Gen. Laws ch. 54 § 93; Miss. Code § 23-15-637(1)(a); Nev. Rev. Stat. § 293.269921(1)(b), (2); N.J. Stat. § 19:63-22(a); N.Y. Elec. Law § 8-412(1); Ohio Rev. Code § 3509.05(D)(2)(a); Or. Rev. Stat. § 253.070(3)(b); P.R. Code Ann. 16 § 4736; Tex. Elec. Code § 86.007(a)(2); V.I. Code Ann. § 665; Va. Code § 24.2-709(B); Wash. Rev. Code § 29A.40.091; W. Va. Code § 3-3-5(g)(2). Kansas, North Dakota, and Utah have recently amended their election laws to require receipt by election day. *See* KS Laws 2025, Ch. 8, § 1 (eff. Jan. 1, 2026); N.D. Legis. H.B. 1165 (2025) (eff. Aug. 1, 2025); 2025 Utah H.B. 300 (eff. May 7, 2025).

[3] Ala. Code § 17-11-18(b); Ark. Code § 7-5-411(a)(1)(A)(ii); Colo. Rev. Stat. § 1-8.3-113(2); Fla. Stat. § 101.6952(5); Ga. Code § 21-2-386(a)(1)(G); Ind. Code § 3-12-1-17(b); Iowa Code § 53.44; Mich. Comp. Laws § 168.759a(18); Mo. Rev. Stat. § 115.920(1); N.C. Gen. Stat. § 163-258.12(a); N.D. Cent. Code § 16.1-07-24; 25 Pa. Cons. Stat. § 3511(a); R.I. Gen. Laws § 17-20-16; S.C. Code § 7-

states, the District of Columbia, and several U.S. territories permit the counting of mail ballots that are sent by election day and received afterwards for at least some categories of voters.[4] Only two of those states are in the Fifth Circuit: Mississippi, whose law is at issue here, and Texas, where ballots must be postmarked by election day and received by 5:00 p.m. the next day. Tex. Elec. Code § 86.007(a)(2).

III. Proceedings Below

In early 2024, nearly four years after the Ballot Receipt Deadline was enacted, the Republican National Committee, the Mississippi Republican Party, an individual Mississippi voter, and a Commissioner for the George County Election Commission (collectively, the "RNC") sued to enjoin Mississippi officials from counting ballots that were postmarked before election day but received by mail after election day.

The RNC argues that the Ballot Receipt Deadline is preempted by the Election Day Statutes because it allows ballots received after election day to be counted, and that various constitutional rights are violated as a result. Several weeks after the RNC filed suit, the Libertarian Party of Mississippi filed its own complaint bringing nearly identical claims. The district court consolidated the cases and granted

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15-700(A). Montana has similar laws for federal write-in absentee ballots and military-overseas ballots transmitted electronically. Mont. Code Ann. §§ 13-21-206(1)(c), 13-21-226(1).

[4] See *supra* nn. 2 & 3.

the Vet Voice Respondents leave to intervene to defend Mississippi's law alongside Mississippi. Pet. App. 61a, *Republican Nat'l Comm. v. Wetzel*, 742 F. Supp. 3d 587 (S.D. Miss. 2024).

The parties filed cross-motions for summary judgment, and the district court granted summary judgment to defendants. Pet. App. 84a. The district court held that the RNC and the Libertarian Party had standing "in the form of economic loss and diversion of resources," based on declarations attesting that they spent more money on "ballot-chase programs" and poll-watching as a result of the challenged law. *Id.* at 70a. But the district court rejected the claims on the merits, holding that precedent, legislative history, statutory purpose, and historical practice all show that the Ballot Receipt Deadline "operates consistently with and does not conflict with the Electors Clause or the election-day statutes." *Id.* at 82a.

The Fifth Circuit reversed on the merits. Pet. App. 3a, *Republican Nat'l Comm. v. Wetzel*, 120 F.4th 200 (5th Cir. 2024). The Fifth Circuit acknowledged that early and absentee voting is lawful even though it involves the state receiving ballots *before* election day. Pet. App. 12a. And the Fifth Circuit also acknowledged that not *all* steps related to the election need to take place on election day, and that "it can take additional time" after election day to count ballots and tabulate the results. *Id.* at 13a. But the Fifth Circuit held that receiving ballots after election day—even ones that were completed and placed in the mail before election day—is different. *Id.*

The Fifth Circuit denied Vet Voice Respondents' petition for rehearing en banc, over five dissents. Pet. App. 29a, *Republican Nat'l Comm. v. Wetzel*, 132 F.4th 775 (5th Cir. 2025). Among other things, the dissenting judges emphasized the oddity of the Fifth Circuit's ruling 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." Pet. App. 41a (Graves, J., dissenting).

ARGUMENT

I. The Court should hold the Petition for *Bost v. Illinois State Board of Elections.*

The Court should hold the Petition in abeyance until it issues a decision in *Bost v. Illinois Bd. of Elections*, No. 24-568, in which the Court granted certiorari on June 2. *Bost* is the Illinois version of this case—a challenge, on substantially identical grounds, to Illinois's post–election day mail ballot receipt deadline. Just like in this case, the plaintiffs in *Bost* argue that counting absentee ballots received after election day violates the Election Day Statutes. And just like in this case, the plaintiffs in *Bost* rely for their standing on allegedly higher campaign expenditures caused by the post–election day deadline, along with allegations that the deadline disadvantages them relative to their competitors. *See Bost* Pet. 3. These similarities

are no coincidence—counsel for the Libertarian Party in this case also represents the petitioners in *Bost*.[5]

Unlike in this case, however, the court of appeals in *Bost* held that the *Bost* petitioners lack standing. *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634 (7th Cir. 2024). In doing so, the Seventh Circuit rejected the precise theory of standing that was accepted here, reasoning that voluntarily spending funds to "contest any objectionable ballots" and "monitor the counting of the votes after Election Day to ensure that any discrepancies are cured" were not injury-in-fact absent a certainly impending effect on the outcome of an election. *Id.* at 642–43; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (holding that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending"). The Seventh Circuit also held that any competitive injury was speculative. *Id.* at 643.

[5] In fact, several of the key standing allegations from the RNC's and the Libertarian Party's complaints mirror *word for word* the complaint in *Bost*. *Compare* ROA 35 & 1291 (alleging the Ballot Receipt Deadline "forc[es]" them "to spend money, devote time, and otherwise injuriously rely on unlawful provisions of state law in organizing, funding, and running their campaigns"), *with Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720, 739 (N.D. Ill. 2023) ("Plaintiffs allege that the Ballot Receipt Deadline Statute forces Congressman Bost and other candidates 'to spend money, devote time, and otherwise injuriously rely on unlawful provisions of state law in organizing, funding, and running their campaigns.'" (quoting *Bost* Complaint ¶ 46)).

The Seventh Circuit's ruling that there is no standing in a case like this one is unsurprising. Every recent challenge to a post-election day ballot receipt deadline other than this one has been dismissed for lack of standing. *Id.*; *Republican Nat'l Comm. v. Burgess*, No. 3:24-cv-00198-MMD-CLB, 2024 WL 3445254, at *4 (D. Nev. July 17, 2024), *appeal pending*, No. 24-05071 (9th Cir.); *Splonskowski v. White*, 714 F. Supp. 3d 1099 (D.N.D. 2024). Lower courts' near-unanimity on that question reflects the difficulty of plausibly identifying how counting ballots mailed by election day and delivered shortly afterwards foreseeably harms anyone in particular.

The Court granted certiorari in *Bost* to address that threshold standing question, not to address the merits question raised by the Petition in this case. *See Bost* Pet. But if the Court grants certiorari in this case, it will have to address that threshold standing question here, too. Article III standing is a jurisdictional requirement that "must be resolved . . . before proceeding to the merits." *Steel Co.*, 523 U.S. at 88–89. That requirement "can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002). The Court will have "an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

Given the similarities between the relevant allegations, a decision from this Court affirming the Seventh Circuit's ruling that the *Bost* petitioners lack

standing may be dispositive of this case. And regardless of the outcome, *Bost*'s analysis of standing is almost certain to bear directly on the proper analysis of whether the RNC and the Libertarian Party have standing here.

The Court should therefore hold the Petition in abeyance until it issues a decision in *Bost*. Once the Court decides *Bost*, it will likely be appropriate for the Court to grant, vacate, and remand this case to the Fifth Circuit for further consideration of the RNC's and Libertarian Party's standing in light of *Bost*'s guidance on the appropriate standing analysis. The Court has "broad power to GVR," *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 166 (1996), and it often uses that power to remand cases for further consideration in light of intervening precedent, *see, e.g.*, *Stern v. United* States, 584 U.S. 1030 (2018). Such a remand is particularly appropriate where, as here, "clarification of the opinion below is needed to assure [the Court's] jurisdiction." *Stutson v. United States*, 516 U.S. 163, 192 (1996) (Scalia, J., dissenting).

Deferring consideration of the Petition pending *Bost* would also carry a collateral benefit here. The Fifth Circuit's decision is the first and only court of appeals decision to reach the merits of whether post–election day mail ballot receipt deadlines are preempted by the Election Day Statues. But others may issue relatively soon. The RNC's appeal of the dismissal of its challenge to Nevada's ballot receipt deadline is fully briefed in the Ninth Circuit and tentatively set for argument in the fall, with the briefs

addressing both standing and the merits. *See Burgess*, No. 24-5071. The U.S. District Court for the District of Massachusetts held last month that nineteen state plaintiffs were likely to succeed in arguing that their post–election day receipt deadlines were consistent with the Election Day Statutes—a decision that could still be appealed. *California v. Trump*, No. 25-cv-10810, 2025 WL 1667949, at *12–13 (D. Mass. June 13, 2025). Deferring consideration of the Petition pending a decision in *Bost* would therefore provide time for additional lower courts to address the merits—percolation that may aid the Court in resolving this case on the merits if and when the time comes.

The Court should therefore defer consideration of the Petition pending a decision in *Bost* and then grant the Petition, vacate the judgment below, and remand the case to the Fifth Circuit for reconsideration of the plaintiffs' standing in light of *Bost*.

II. Alternatively, the Court should grant the Petition and reverse.

If the Court declines to hold the Petition in abeyance pending *Bost*, it should grant the Petition and reverse. For the reasons given in the Petition, Mississippi's Ballot Receipt Deadline is a lawful exercise of the state's constitutional authority to set the "Times, Places, and Manner of holding" federal elections that is not preempted by the Election Day Statutes. U.S. Const. art. I, § 4, cl. 1. The Fifth Circuit erred in holding otherwise.

A. Mississippi's ballot receipt rule is straightforwardly lawful. Under the Constitution, States enjoy the principal power to set the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl.1, as well as the "Manner" of appointing presidential electors, *id.* § 1, cl. 2. These provisions grant the states "wide discretion in the formulation of a system for the choice by the people of representatives in Congress." *Classic*, 313 U.S. at 311.

Mississippi's legislature, by wide bipartisan margins, exercised this authority to enact a law permitting ballots *cast* by election day—but *received* shortly thereafter—to count. *See* Miss. Code § 23-15-637(1)(a). Congress has never exercised its Elections Clause power to displace such laws, which exist throughout the country. Instead, it has long left the question of ballot receipt deadlines as a "policy choice" for the states. *See Democratic Nat'l Comm. v. Wis. State Leg.* ("*DNC*"), 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring); *see also* Pet. 19–21.

While Congress has set a uniform federal election day, *see* 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1, those Election Day Statutes do not "communicate" any "pre-emptive intent" towards ballot receipt laws like the one in Mississippi. *Arizona v. Inter Tribal Council of Ariz., Inc.* ("*ITCA*"), 570 U.S. 1, 14 (2013). By setting a day for the "election" of federal officers, those laws merely set a deadline for the "act of choosing a person to fill an office." *Foster*, 522 U.S. at 71 (quoting N. Webster, *An American Dictionary of the English Language* 433

(Charles Goodrich & N. Porter eds. 1869)); *see also Newberry v. United States*, 256 U.S. 232, 250 (1921) (defining "election" as the "final choice of an officer by the duly qualified electors"); *Classic*, 313 U.S. at 318 (explaining "election" refers to "the expression by qualified electors of their choice of candidates"). Mississippi's ballot receipt law readily complies with the Election Day Statutes by requiring mail ballot voters to make their final "choice" by election day, as evidenced by a "postmark[] on or before the date of the election." Miss. Code § 23-15-637(1)(a); *see also* Pet. 16–19.

B. The Fifth Circuit's contrary holding that the Election Day Statutes preempt Mississippi's ballot receipt law suffered from a host of analytical errors. The problems begin with (1) a lack of any meaningful textual analysis—an error addressed in greater detail in the Petition. Pet. 16–25. They also include two errors of particular importance to the Vote Voice Respondents: (2) an improper construction of the Uniformed and Overseas Citizens Voting Act (UOCAVA), which expressly defers to laws like Mississippi's, and (3) a long history of states adopting post-election ballot receipt deadlines, particularly for active servicemembers.

1a. The Fifth Circuit's mode of analyzing the Election Day Statutes diverged sharply from this Court's approach in *Foster*, where the Court undertook a textual analysis of those statutes that focused on contemporaneous dictionary definitions. *See Foster*, 522 U.S.

at 71. The Fifth Circuit acknowledged that contemporaneous dictionary definitions of "election" refer to the public's "choice" of a candidate for office. Pet. App. 8a n.5 (citing dictionary definitions); *see also Foster*, 522 U.S. at 71; *Newberry*, 256 U.S. at 250. But the Fifth Circuit discarded these definitions because they "make no mention of deadlines or ballot receipt." Pet. App. 8a n.5.

This misses the point. A voter who has completed his ballot and deposited it in the mail by election day has, undeniably, made his "choice" of candidate by the federal deadline. And contrary to the Fifth Circuit's reasoning, focusing on "the public's *election* of the candidate" rather than "each voter's *selection*" does nothing to change this. *Id.* at 10a. Every Mississippi voter must comply with the Ballot Receipt Deadline and thus the entire public is required to make its choice of candidate by election day. The "choice" has therefore been made—all that remains is the receipt and counting of those already-cast ballots.

That the contemporaneous definitions do not explicitly reference ballot receipt only proves that the Election Day Statutes do not preempt Mississippi law. The Elections Clause "gives states the responsibility for establishing the time, place, and manner of holding congressional elections, unless Congress acts to preempt state choices." *Bomer*, 199 F.3d at 775 (emphasis added). Congress's deployment of its Elections Clause power reaches only "so far as it is exercised, and no farther[.]" *ITCA*, 570 U.S. at 9. In discerning

how far Congress has exercised such power, "the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Id.* at 14. The Fifth Circuit correctly reasoned that the ordinarily meaning of "election" does not address ballot receipt, but that only means that Congress, in setting the day of the "election," has not "acted" to preempt Mississippi's setting of a ballot receipt deadline.

1b. Rather than sticking with the contemporaneous definitions, the Fifth Circuit divined three "elements" of an "election" from this Court's decision in *Foster*: "official action," "finality," and "consummation." Pet. App. 9a. That selective distillation of *Foster* is doubtful from the get-go. *Foster* declined to pare "the term 'election' . . . down to the definitional bone," and limited its holding to the narrow circumstances of that case. *See* 522 U.S. at 72 & n.4; *see also* Pet. App. 39a (Graves, J., dissenting). And the Fifth Circuit's ensuing articulation of each element is unmoored from the text of the Election Day Statutes and the plain meaning of the term "election." *See* Pet. 22–25.

On "official action," the Fifth Circuit concluded that "receipt" by election officials is the *sine qua non* of determining when a ballot is "cast." Pet. App. 9a. But the court drew this requirement from thin air; it cited *nothing* to support this "receipt" requirement. *Id.* at 40a–42a (Graves, J., dissenting). Instead, the court buttressed its conclusion solely with a series of outlandish hypotheticals in which the voter never relinquishes custody and control of her ballot, Pet. App.

10a—all distinctly different from Mississippi's law, which requires voters to establish by postmark that they relinquished their ballots on or before election day. *See* Miss. Code § 23-15-637(1)(a).

On "finality," the Fifth Circuit reasoned that the election does not occur until "all voters' selections are received." Pet. App. 10a. But this is just question-begging, and the Fifth Circuit provided no adequate reason for concluding that the voter's selections must be received, rather than merely made. Mississippi's ballot receipt law guarantees that the "polity's final choice" is made by election day because all voters must make their "final selection" by that day. *Id.* at 10a–11a; *see* Miss. Code § 23-15-637(1). And the only authority the Fifth Circuit cited for requiring that those choices be received was a 1944 Montana Supreme Court decision that relied on state law. *Id.* (citing *Maddox v. Bd. of State Canvassers*, 149 P.2d 112 (Mont. 1944)).[6]

Finally, the Fifth Circuit adopted a "consummation" element, explaining that an "election" is "consummated when the last ballot is received and the ballot box is closed." Pet. App. 13a. As with each of the

[6] In an ironic twist, Montana has since changed its own laws to permit post-election ballot receipt law for certain military-overseas ballots—laws the Fifth Circuit's reasoning would find preempted. *See* Mont. Code §§ 13-21-206(1)(c); 13-21-226(1). Montana's experience thus illustrates the lower court's error—state ballot receipt laws are not set in amber by the Election Day Statutes; states retain the discretion to amend them as a "policy choice." *DNC*, 141 S. Ct. at 34 (Kavanaugh, J., concurring).

prior elements, the Fifth Circuit cited no authority for this contrived element of an "election." It acknowledged that some aspects of the electoral process—tabulating and canvassing ballots, matching signatures, conducting recounts, and the like—occur after election day. *Id.* And it offered no principled reason why those necessary acts may occur after election day, but ballot receipt must occur before.

2. Beyond its contorted textual analysis, the Fifth Circuit also misconstrued several important federal statutes concerning elections. Pet. App. 19a–23a. Most significant is the Fifth Circuit's inconsistent approach to UOCAVA. The Fifth Circuit held *both* that UOCAVA is "silent" on ballot receipt rules and says "nothing about the date or timing of ballot receipt," *id.* at 19a, and *also* that UOCAVA's "statutory text" "permits post-Election Day balloting," *id.* at 22a. Those irreconcilable conclusions highlight the Fifth Circuit's contorted statutory analysis.

In reality, UOCAVA reflects Congress's long approval of—and express deference to—state laws allowing post-election ballot receipt. UOCAVA creates an easy-to-use federal absentee ballot for military and overseas voters as a backstop to state absentee ballots in federal elections. *See* 52 U.S.C. § 20303(a)(1). The federal UOCAVA ballot must be "processed in the *manner provided by law for absentee ballots in the State involved*." *Id.* § 20303(b) (emphasis added). That manner includes any deadlines for receipt, as UOCAVA further provides that the federal absentee

ballot shall not count if a UOCAVA voter's *state* absentee ballot is received by the "*deadline for receipt of the State absentee ballot under State law*." *Id.* § 20303(b)(3); *see also id.* § 20303(e)(2) (explaining federal UOCAVA ballot not valid if the state's absentee ballot "is made available . . . at least 60 days before *the deadline for receipt of the State ballot under State law*." (emphasis added)). In other words, UOCAVA creates a federal fallback ballot that will be set aside if an ordinary state absentee ballot arrives before a state's own "deadline for receipt." *Id.*

If the Election Day Statutes required that all ballots nationwide be received by election day, as the Fifth Circuit held, it would make no sense for Congress—in 1986—to have repeatedly referenced state "deadline[s] for receipt." Respondents attempted to wave this point away by suggesting these references are to state laws requiring receipt *before* election day. But that is ahistorical. At the time Congress adopted UOCAVA in 1986, it heard testimony that at least "[t]welve [states] ha[d] extended the deadline for the receipt of voted ballots to a specified number of days after the election." *Uniformed and Overseas Citizens Absentee Voting: Hearing on H.R. 4393*, 99 Cong. 21 (Feb. 6, 1986) (Statement of Henry Valentino, Director, Federal Voting Assistance Program). The UOCAVA House Report also noted that "several States accept absentee ballots, particularly those from overseas, for a specified number of days *after election day*," and praised those laws as "aid[ing] in protecting the voting rights" of military and overseas voters.

H.R. Rep. 99-765 at 8 (1986) (emphasis added). Congress knowingly incorporated these state ballot receipt deadlines into UOCAVA by referencing state deadlines, thereby allowing military and overseas voters to benefit from them.

The 2009 Military and Overseas Voter Empowerment (MOVE) Act confirms the point. It requires federal officials to help "facilitate the delivery" of UOCAVA ballots to ensure their delivery "to the appropriate election officials . . . not later than the date by which an absentee ballot must be received in order to be counted in the election." 52 U.S.C. § 20304(b)(1). Congress again incorporated default state-law ballot receipt deadlines into the federal UOCAVA scheme.

The Fifth Circuit badly misread UOCAVA and the MOVE Act, suggesting these laws are "*silent* on the deadline for ballot receipt." Pet. App. 19a. Wrong. UOCAVA *twice* incorporates a "deadline for receipt of the State absentee ballot under State law," 52 U.S.C. §§ 20303(b)(3), (e)(2), and elsewhere incorporates "the date by which an absentee ballot must be received in order to be counted in the election," *id.* § 20304(b)(1). Neither of those phrases makes sense if *federal law* already supplies a universal "deadline for receipt." Because federal law does *not* supply such a default deadline, Congress prudently chose to employ already existing state laws of which it was well aware. This is therefore not a "congressional silence" case, as the Fifth Circuit puzzlingly suggested. Pet. App. 19a–20a.

The Fifth Circuit's misreading of UOCAVA is highly consequential to military and overseas voters.

Many states authorize post-election ballot receipt *specifically* for military and overseas voters. *See supra* n.3. But nothing in the Fifth Circuit's flawed interpretation of the Election Day Statutes permits exemptions for certain groups of voters, meaning these state laws are invalid under the Fifth Circuit's reasoning too.[7] The Fifth Circuit attempted to alleviate these concerns by suggesting that UOCAVA "permits post-Election Day balloting . . . through its statutory text." Pet. App. 22a; *see also id.* at 33a (Oldham, J., concurring in denial of rehearing en banc) (suggesting that "federal statutes like [UOCAVA] . . . authorize [post-election day] receipt for narrow classes of voters"). But there is no such text, aside from the references to state-law deadlines: Nothing in UOCAVA enacts a *federal* post-election day receipt deadline for military and overseas voters; it simply permits voters to enjoy the benefit of *state* extended receipt laws where they exist. *See* 52 U.S.C. § 20304(b)(1).

In arguing otherwise, the Fifth Circuit cited 52 U.S.C. § 20307(a), which permits the Attorney General to "bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this chapter." To be sure, the

[7] The Fifth Circuit was therefore simply wrong in suggesting that a "majority of States prohibit officials from counting ballots received after Election Day." Pet. App. 17a. Most states and territories—over thirty—permit just that, at least for some categories of voters, because the Election Day Statutes have never been understood to prohibit them from doing so.

United States sometimes brings suit under this provision "against States that transmitted ballots late, to prevent military and overseas voters from being disenfranchised in federal elections," by "extending the receipt deadline beyond Election Day." U.S. Amicus Br. 30–31, No. 24-60395 (7th Cir. Sep. 10, 2024), Doc. 148-1 ("U.S. Amicus Br."). But that case-by-case remedial effort hardly authorizes the more than a dozen state laws *guaranteeing* a post-election ballot receipt deadline to military and overseas voters in *every election*.[8] State laws extending ballot receipt deadlines for military-overseas voters are not lawful because of the Attorney General's UOCAVA enforcement authority, as the Fifth Circuit suggested. They are lawful because nothing in federal law—including the Election Day Statutes—preempts them. The Fifth Circuit's contrary holding imperils these military-overseas voter specific laws, which cannot be saved by the lower court's flimsy reliance on 52 U.S.C. § 20307(a). *See also* Pet. 27–28.

Furthermore, the United States previously pursued those enforcement efforts based on its own understanding that the Election Day Statutes imposed no ballot receipt deadline. U.S. Amicus Br. 30–31. As the Petition notes, the decision below raises the specter that the United States may not be able to pursue such relief in the future, as federal courts are typically

[8] Indeed, the United States itself pointed out that it has brought only 29 such cases since 2000—a drop in the bucket relative to the thousands of statewide elections for federal offices held in that time. U.S. Amicus Br. 30–31.

unable to grant equitable relief that clashes with other federal laws. *See* Pet. 28; *see also INS v. Pangilinan*, 486 U.S. 875, 883 (1988) (explaining that even courts of equity cannot "disregard statutory [] requirements" or "create a remedy in violation of law" (quotations omitted))

3. The decision below also glossed over more than a century of state practice. The Fifth Circuit claimed that, since Congress adopted the Election Day Statues, "States [have] understood those statutes to" require that "ballots must be *received* no later than [election day]." Pet. App. 14a. That assertion is demonstrably wrong.

During the Civil War, many states adopted laws to permit service members to vote in the field. Oftentimes these soldiers cast their ballots in the field on election day, typically before their own officers. But their votes were not added to the full count until conveyed back to their home states for a canvass. *See* Josiah Henry Benton, *Voting in the Field: A Forgotten Chapter of the Civil War* 317–18 (1915). Many states, in both the North and South, extended their canvassing deadlines to accommodate this. *Id.* This was necessary because of "the difficulty of getting the votes home to the various States in season to be counted with the other votes." *Id.* at 316. Under these systems, election officials would not receive the results of these in-the-field elections until well after election day. *Id.* at 318.

The Fifth Circuit dismissed this practice by suggesting that this form of "field voting involved soldiers

directly placing their ballots into official custody with no carrier or intermediary," such that the "act of voting simultaneously involved receipt by election officials." Pet. App. 15a. Not so. While some states deputized military officers as election officials for field voting, others did not. Nevada, Rhode Island, and Pennsylvania, for example, allowed ballots to be placed under the charge of high commanding officers without any such designation, meaning they were not *received* by election officials until after the election. 1866 Nev. Stat. 215; Benton, *supra,* 171–73, 185–87, 190. Ballots cast through field voting in these states were thus not received by election officials until well after election day.

Absentee voting expanded during and following World War I. The Fifth Circuit concluded that laws enacted during this time provided that "a ballot could be counted only if *received* by Election Day." Pet. App. 16a. This is also wrong. In the wake of World War I, California required absentee ballots be received "within fourteen days" after election day, Cal. Political Code § 1360 (James H. Derring ed. 1924), and Kansas required military ballots be returned "before the tenth day following [the] election." Kan. Rev. Stat. § 25-1106 (Chester I. Long, et al., eds. 1923). New York and Minnesota had similar laws. *See* P. Orman Ray, *Military Absent-Voting Laws*, 12 Am. Pol. Sci. Rev. 461, 464, 468–69 (1918).

Other states at the time permitted voters to cast ballots outside their home precincts on election day and have them mailed back for counting afterward.

See P. Orman Ray, *Absent Voters*, 8 Am. Pol Sci. Rev. 442, 442–43 (1914) (Kansas, Missouri); P. Orman Ray, *Absent-Voting Laws, 1917*, 12 Am. Pol. Sci. Rev. 251, 253 (1918) (Washington); Joseph P. Harris, *Election Administration in the United States* 287–288 (1934) (Oregon, Florida). In Washington, for example, voters who were unable to vote in their home counties could cast a ballot in another county which would then be "sealed and returned to the voter's home county." Ray, *Absent-Voting Laws, 1917*, 12 Am. Pol. Sci. Rev. at 253. "In order to be counted the ballot must have been received by the [home] county auditor *within six days from the date of the election or primary*." *Id.* at 253-54 (emphasis added). In other words, under Washington's law, the election official responsible for official receipt of a ballot did not need to receive it until six days after the election.

The Fifth Circuit also erred in claiming that, by 1938, only a single state permitted post-election day ballot receipt because "it was almost impossible to count a ballot received after Election Day." Pet. App. 17a. Its own cited source contradicts that claim. *See* Paul G. Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898, 905–06 (1938). What the article says is that, of the 42 states with absentee voting laws, all but one had express "limits within which the ballot must be received . . . to be counted." *Id.* But it does not say that date certain was always election day. In fact, the same source confirms states had post-election day receipt deadlines, with limits "rang[ing] from six days before to *six days after the date of the election*." *Id.* (emphasis added); *see also id.*

at 905 n.38 (referencing "those *states* where the time limit *extends beyond the day of election*" (emphases added)). The Fifth Circuit simply ignored this text.

The Fifth Circuit then jumped from 1938 to the mid-1970s, Pet. App. 17a, skipping over the widespread enactment of ballot receipt laws during World War II. In fact, by 1943, at least nine states had post-election-day deadlines. *See Bill to Amend the Act of September 16, 1942: Hearing On H.R. 3436 Before the H. Comm. On Election of President, Vice President, & Representatives in Congress*, 78th Cong. 100, 102 (Oct. 26, 1943) (identifying eight states: California, Kansas, Maryland, Missouri, New York, Pennsylvania, Rhode Island, and Washington); *see also* Neb. Rev. Stat. § 32-838 (1943) (mail-in ballots could be received up to two days after election day).

Against this backdrop, Congress enacted the Soldier Voting Act, creating a "war ballot" for servicemembers—an early precursor to UOCAVA. The Act required war ballots to be "received by the appropriate election officials" by "the date of the holding of the election." Act of Sept. 16, 1942, ch. 561, 56 Stat. 753, 756 § 9. Why did the Soldier Voting Act supply such an express election day deadline? Because no other federal law—including the Election Day Statutes—did so at the time. In 1944, Congress amended the Act, again requiring war ballots to be received by federal election day "except that any extension of time for the receipt of absentee ballots permitted by State laws shall apply." 78 Pub. L. No. 277, 58 Stat. 136, 146

§ 311(b)(3). Congress thus recognized that the Election Day Statutes supply no default receipt deadline *and* that the states actively legislated in this field to "permit[]" "receipt of absentee ballots" beyond election day. *Id.*

Over the next half century, many states retained these laws. In Missouri in 1958, ballots needed to be "postmarked the day of the election and reach the election official the day next succeeding the election." *Elliott v. Hogan*, 315 S.W.2d 840, 848 (Mo. App. 1958) (citing Mo. Stat. § 112.050). In Alaska in 1978, ballots were required to be returned by the "most expeditious mail service, postmarked not later than the day of the election, to the election supervisor in [the voter's] district." *Hammond v. Hickel*, 588 P.2d 256, 268 (Alaska 1978) (citing Alaska Stat. § 15.20.150). Nebraska and Washington also adopted similar laws during this time. *See Overseas Absentee Voting: Hearing on S. 703 Before the S. Comm. on Rules and Admin.*, 95th Cong. 33–34 (1977) (Statement of John C. Broger, Deputy Coordinator of the Federal Voting Assistance Program, Department of Defense).

Congress continued to be aware of this practice. *See* 116 Cong. Rec. 6996 (1970) (Statement of Sen. Goldwater describing states that permit "absentee ballots of certain categories of their voters to be returned as late as the day of the election or *even later*" (emphasis added)). As noted above, by the time Congress adopted UOCAVA, it knew that at least twelve states had extended their receipt deadlines after elec-

tion day. *See supra* 19. In the wake of the 2000 presidential election, Congress again heard testimony that at least fifteen states had done so for all or some voters.[9]

In short, post-election-day ballot receipt deadlines are nothing new. "[Y]et Congress has taken no action to curb this established practice." *Bomer*, 199 F.3d at 776. The Fifth Circuit's own precedent counseled against "prohibit[ing] such a universal, longstanding practice of which Congress was obviously well aware." *Id.* The Fifth Circuit erred by doing so based on a slanted and inaccurate retelling of their longstanding use by states to help their voters, particularly those voters living or serving overseas.

CONCLUSION

The Court should hold the Petition for Certiorari pending disposition of the Petition in *Bost v. Illinois State Board of Elections*. Alternatively, it should grant the Petition for Certiorari and reverse on the merits.

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[9] *See* Testimony of David M. Walker, Comptroller General of the U.S., *Issues Affecting Military and Overseas Absentee Voters*, (May 9, 2001), GAO-01-704T, https://www.gao.gov/assets/gao-01-704t.pdf; *see also Voters with Disabilities: Access to Polling Places and Alternative Voting Methods* at 21 tbl.3 (Oct. 15, 2001), GAO-02-107, https://www.gao.gov/assets/gao-02-107.pdf (identifying 10 states permitting post-election receipt for all voters).

Respectfully submitted,

Marc E. Elias
Counsel of Record
Elisabeth C. Frost
David R. Fox
Christopher D. Dodge
Richard A. Medina
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW,
Suite 400
Washington, DC 20001
(202) 968-4490
eliasm@elias.law

Counsel for Vet Voice Foundation and the Mississippi Alliance for Retired Americans