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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case presents a clean, unrushed opportunity to decide whether the federal election-day statutes preempt a state law allowing absentee ballots cast by election day to be received shortly after that day. Respondents agree that this question is important. RNC 1; LP 2. They do not contest that the court of appeals' answer to that question would invalidate laws in most States, will spark nationwide litigation, and will risk chaos in the next federal elections. Pet. 30-32. They do not contest that this case is a stronger candidate for certiorari than *Foster v. Love*, 522 U.S. 67 (1997)—which presented a splitless issue on a one-of-a-kind state law that this Court took up anyway. Pet. 32. They do not deny that the opinions below air the key arguments in a case that boils down to construing plain statutory text. *Ibid.* Nor do respondents deny that the question presented has profound practical ramifications. Pet. 30-31, 33.

In resisting review, respondents instead argue that the decision below is correct. But they offer no sound defense of that decision and fail to overcome the powerful plain-text and precedent-based view that federal law does not preempt Mississippi's absentee-ballot law. Amici on both sides of the question presented agree that this Court should grant review now. D.C. Amicus 1-4; CEC Amicus 3-5. Every practical consideration favors granting review now. This Court should grant certiorari now and reverse.

ARGUMENT

I. The Decision Below Is Wrong.

The court of appeals erred in holding that the federal election-day statutes (2 U.S.C. § 7, 2 U.S.C.

§ 1, and 3 U.S.C. § 1) preempt Mississippi's mail-in absentee-ballot law, Miss. Code Ann. § 23-15-637(1)(a). Pet. 16-30. Respondents' defense of that decision (RNC 18-31; LP 9-20) fails.

A. Start with plain meaning. An *election* requires a final choice of officers, voters make that choice when they cast their ballots, and under Mississippi law *all* voters make that choice by election day because they must cast their ballots by that day. Pet. 16-18, 19-20, 21-22; *contra* RNC 18-22; LP 9-11, 18-20.

The RNC attributes to petitioner the view that an *election* "refers only to a final selection by individual voters" and does not require that this selection be made as part of "the State's process of facilitating voting." RNC 19, 20. That is not petitioner's view. His view is that voters must make a final selection by *casting* their ballots—"mark[ing] and submit[ting] their ballots as state law requires." Pet. 18; *see* Pet. 16-18, 22-23. Petitioner thus agrees that an election requires not just that voters make "selection[s]" but that they do so as part of—and in line with—"the State's process of facilitating voting." RNC 20.

The RNC next faults petitioner's cited definitions of *election*. RNC 19-20. It says that dictionary definitions do not support petitioner because "none ... say anything about 'marking and submitting' a ballot." RNC 19. But those definitions emphasize that the voters' collective choice is central to an *election*, Pet. 16-17, 21-22; RNC 18-20; LP 11, and (as the RNC does not dispute) marking and submitting a ballot is the common, longstanding method for voters to "make their *choice* of officers." Pet. 17. The RNC next says that petitioner's definitions "emphasize that an election requires a final or definitive choice" and

faults petitioner for claiming that "finality requires drawing the line after 'submitting' the ballot as opposed to earlier (marking the ballot) or later (receiving the ballot)." RNC 19. But drawing the line at ballot casting flows from the plain meaning of *election*. Definitions cited in this case emphasize both the voters' collective choice and the need for that choice to be expressed as part of an official process. *E.g.*, Pet. 17 ("selecting"; "as by ballot") (emphasis omitted); RNC 18 ("public choice"). That supports the view that ballot casting marks finality but mere ballot marking does not. And while these definitions emphasize the voters' choice, not one mentions ballot receipt—let alone states respondents' view that ballot receipt *defines* an election. Pet. 16-17, 21-22; RNC 18-20; LP 11. That rules out the view that ballot receipt marks finality. Last, the RNC says that an election requires "a public act to make the decision final," which is "the closing of the ballot box." RNC 20. But it cites no authority saying that. And a public act occurs when ballots are cast as part of the State's official election process.

Moving to what it calls "context," the RNC says that ballot receipt is "essential for a State to conduct an election" because an election is "the State's process of facilitating voting." RNC 20 (emphasis omitted); *see* RNC 20-21. But if an election is the State's process of "facilitating voting" then a State conducts an election when it gives voters a ballot and sets a method to cast it: that facilitates voting. Pet. 22. The RNC claims that "[c]ourts have long understood that '[n]othing short of the delivery of the ballot to the election officials for deposit in the ballot box constitutes casting the ballot.'" RNC 21 (quoting *Maddox v. Board of State Canvassers*, 149 P.2d 112, 115 (Mont. 1944)).

Court*s* have not held that: the one court the RNC cites did not even hold that. *Maddox* holds that, when *state law* directs that a ballot is cast (and *voting* occurs) *only when* election officials receive the ballot, then ballots must be received by federal election day because otherwise voting would extend beyond that day. 149 P.2d at 115.

The RNC says that petitioner's view of *election* is "at odds with" Mississippi's law because that law "doesn't treat all ballots 'marked and submitted' as valid, final votes" but also requires that ballots be "postmarked" and timely "received by the registrar." RNC 21 (quoting Pet. 18). But petitioner's view is that an election occurs when voters have "marked and submitted their ballots *as state law requires*." Pet. 18 (emphasis added). State law requires that ballots be postmarked. Pet. 19-20. And even if some ballots are not timely received—which can also occur under laws requiring election-day ballot receipt—that does not mean that the *election* has not occurred.

Last, respondents turn to other federal statutes. RNC 21-22; LP 18-20. The RNC applauds the court of appeals for rejecting the argument—which petitioner did not make—that other federal statutes "implicitly amended Congress's election-day deadline." RNC 22. But the RNC does not defend that court's bolder (and flawed, Pet. 26-28) claim: that these statutes "show that Congress knew how to authorize post-Election Day voting when it wanted to do so." App.20a. Take the Help America Vote Act, 52 U.S.C. § 20901 *et seq*. The court of appeals said that HAVA "authorized a narrow exception" to the election-day ballot-receipt deadline. App.21a. But HAVA's text is silent on ballot-receipt deadlines and so, on the court of appeals' own view of congressional silence, HAVA

does not authorize post-election-day ballot receipt—which means that 48 States' laws authorizing such receipt are preempted. Pet. 27. To that, the RNC has no answer. The Libertarian Party has an answer: it disagrees with the court of appeals. It says that HAVA "does not allow post-Election Day receipt" and instead "mandates Election Day receipt." LP 19 (emphasis omitted); *see* LP 18-19. Now take the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20301 *et seq.* The Libertarian Party agrees with the court of appeals that UOCAVA creates "a limited exception" to the election-day ballot-receipt deadline "to allow the Attorney General to seek remedies to enforce the Act." LP 19. But nothing in UOCAVA authorizes post-election-day ballot receipt, so—again on the court of appeals' reasoning—the many court rulings extending UOCAVA ballot-receipt deadlines were all unlawful. Pet. 27-28. To that, respondents have no answer.

B. Now take history. Nothing in history shows that the federal election-day statutes block States from allowing post-election-day ballot receipt. Pet. 25-26; *contra* RNC 22-26; LP 11-14.

Respondents claim that for much of our Nation's history the States received ballots by election day. RNC 22-24; LP 13-14. But respondents have "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." Pet. 25. The point is not that respondents' historical account fails for lack of "a sole legislator's one-off opinion." RNC 24. It is that respondents cite *nothing* that says or shows that federal law *requires* election-day ballot receipt. They

have shown "[a]t most" "that many States have viewed election-day ballot receipt as good policy." Pet. 25. This fundamental point dooms all their historical arguments. RNC 22-26; LP 11-14.

The RNC tries to liken its historical account to what this Court called for and provided in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). RNC 22, 23, 24, 25, 26 (citing *Bruen*). But *Bruen* shows why respondents' historical argument falls short. *Bruen* relied on history that addressed the question at issue: whether a modern firearm regulation "is consistent with this Nation's historical tradition of firearm regulation." 597 U.S. at 17; *see id.* at 26-31. There is a rich history—reflected in many laws and judicial decisions—answering that question. *See id.* at 38-70. Respondents have nothing like that. Their history does not even address the question at issue: whether States received ballots on election day because they thought that an election requires that practice. And respondents have cited no historical source that says what they need: that an election requires ballot receipt. Their only case purportedly on point—*Maddox*—was decided decades after the federal election-day statutes were enacted and does not help them. *Supra* pp. 3-4.

C. Next, precedent. It confirms the plain-text view that an election requires ballot casting but not ballot receipt. Pet. 18-19, 20, 22-25; *contra* RNC 26-29; LP 14-18.

1. Respondents argue that *Foster v. Love*, 522 U.S. 67 (1997)—and its official-action, finality, and consummation elements—shows that federal law requires election-day ballot receipt. RNC 26-28; LP 14-17.

First, respondents claim that, without ballot receipt, voters casting ballots are engaging only in "a unilateral act" that lacks the "official action" that an election requires. RNC 26-27; *see* LP 15-16. But when voters submit a ballot to election officials as state law requires, they are not engaging in a "unilateral act." They are acting within "the State's process of facilitating voting." RNC 20. In doing so, "voters and officials" are taking the "combined actions" that an election requires. *Foster*, 522 U.S. at 71. On respondents' view, there is no difference between: (a) a voter writing down his favored candidates on a napkin and then throwing it out a window; and (b) a highly regulated state-created process under which the State gives each voter a ballot and voters then mark and submit their ballots as the State has directed. *See*, *e.g.*, RNC 27 (resurrecting the court of appeals' discredited "leave[ ] [the ballot] in a drawer" example). That view is unsound.

Second, respondents claim that ballot casting does not supply the finality that an election requires because casting reflects only "an individual voter's selection on her ballot" rather than the actions of "the electorate as a whole." RNC 27; *see* RNC 27-28; LP 16-17. But the electorate as a whole makes its final selection when all voters cast their ballots by a common deadline. Pet. 23. Respondents suggest that the ability to recall mail shows that "mailing a ballot isn't a 'final selection.'" RNC 27; *see* LP 16. That entirely speculative possibility does not defeat finality. *Cf. Foster*, 522 U.S. at 71 (possibility of a run-off election does not defeat finality). And that claim is indeed forfeited (*contra* RNC 27): respondents do not dispute that they failed to raise it until their appellate reply briefs in this case that was decided on summary

judgment. Pet. 24. Respondents also cite agency regulations, RNC 21; LP 16-17, but petitioner already showed the folly in their argument. Pet. 23-24. Last, respondents never explain why finality requires ballot receipt but not ballot counting. Pet. 23.

Third, the RNC claims that ballot casting does not provide the "consummation" that an election requires and that only closing the ballot box achieves that. RNC 28. But the election is just as consummated when no more ballots can be cast: it is then finished and decided. Pet. 24.

2. Respondents dispute that *Republican National Committee v. Democratic National Committee*, 589 U.S. 423 (2020) (per curiam), confirms that ballot casting is fundamental to an election but ballot receipt is not. RNC 28-29; LP 17-18. They say that *RNC* involved a primary election, did not interpret the federal election-day statutes, and did not address all their arguments. RNC 28-29; LP 17-18. But they ignore what matters. *RNC* applied the plain meaning of *election* to distinguish ballot "cast[ing]" from ballot "recei[pt]" and repeatedly emphasized that "allow[ing] voters to mail their ballots after election day" "would fundamentally alter the nature of the election by allowing voting ... after the election." 589 U.S. at 424, 426; *see* Pet. 19, 24-25. To that, respondents have no answer.

D. Last, Congress's aims. Mississippi law harmonizes with the federal election-day statutes' aims. Pet. 29-30; *contra* RNC 29-31; LP 20.

Respondents claim that election-day ballot receipt promotes "uniformity." RNC 29 (formatting omitted); LP 20. But so does election-day ballot casting: all voters make a conclusive choice of officers on election

day. Pet. 29-30. Respondents repeat the claim that without election-day ballot receipt States could "'engage in gamesmanship,'" "'experiment with deadlines,'" and "'renew'" problems of "'fraud, uncertainty, and delay.'" RNC 31 (quoting App.34a); LP 20. Like the panel members, respondents offer no support for that claim. The RNC says that the federal election-day statutes seek to prevent "the distortion of the voting process" that "occurs when the election drags on for weeks in States that are still accepting ballots, while others are announcing their results the evening of election day." RNC 29; *cf.* LP 20. But that state of affairs does not show a "distortion of the voting process" from post-election-day ballot receipt. When all ballots must be cast by election day, the *voting process* ends on that day: delays in "announcing ... results" do not change the *election*'s results—those results are set on election day. To the extent that the RNC's complaint is that it takes weeks after election day for States to announce the election's results, RNC 30-31, that is true under its rule too. The RNC agrees that "canvassing," "counting ballots," and "certifying results" can and do lawfully occur after election day. RNC Br. 21 (CA5 Dkt. 71). States that allow post-election-day ballot receipt are not allowing the election to "continue" for "[w]eeks after" election day (RNC 30) any more than are States that canvass, count, and certify in the weeks after election day.

The RNC cites Congress's decision to reject "multi-day voting" in adopting in 1872 a uniform day for congressional elections. RNC 29-30. But post-election-day ballot receipt is not "multi-day voting" any more than pre-election-day absentee voting—which the RNC embraces, RNC 28—is multi-day voting. In both cases, ballots must be cast by—and the election thus

occurs on—election day. The RNC's argument also disregards what Congress was doing when it adopted a uniform election day. Congress was not addressing a problem of ballot receipt. It was addressing a practice under which "different states elected members of the House of Representatives during *different months*." *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1173 (9th Cir. 2001) (emphasis added). Different voting days risked "fraud" (people could vote in one State in an early election and then in a different State in a later election) and "undue advantage" (results in an early State could influence later States). *Ibid.*; *see Foster*, 522 U.S. at 73-74. Respondents cite nothing to show that Mississippi's law produces those evils.

Last, the RNC says that there are "important reasons"—such as providing "clear notice" and avoiding "suspicion[ ]"—for a "single" ballot-receipt deadline. RNC 30. Petitioner agrees. 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).

II. The Decision Below Warrants Review.

Respondents agree that the question presented is important, do not dispute that this Court should resolve it, and do not contest many reasons why this Court should resolve it now. *Supra* p. 1; Pet. 30-33. Their argument against review rests largely on their merits view, RNC 18-31; LP 9-20, but they offer no sound defense of that view. *Supra* Part I. The rule the court of appeals adopted would invalidate not just state laws allowing post-election-day ballot receipt for voters generally but also state laws allowing post-election-day ballot receipt for overseas and military

voters—all told, the laws of about 30 States and the District of Columbia. Pet. 30-31; D.C. Amicus 2, 6-10. Respondents focus on the former set of laws, RNC 8-9; LP 21 & n.1, but they do not deny that the court of appeals' rule would require scrapping the latter set.

Intervenor Vet Voice argues that the Court should hold the petition for *Bost v. Illinois State Board of Elections*, No. 24-568. VV 8-12; *see also* LP 22. The RNC gives several reasons why that is not warranted. RNC 15-18. The two cases involve different theories of standing. *Bost* concerns federal-candidate standing—whether a federal candidate may sue to challenge certain election regulations. *Bost* Pet. i. The district court here ruled that respondent organizations have organizational standing based on "economic loss and diversion of resources," App.70a; *see* App.62a-72a, and the court of appeals ruled that this conclusion fits "comfortably" within organizational-standing precedent, App.6a n.3. So this case concerns organizational standing as understood in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982)—a decision that neither the petitioner in *Bost* nor petitioner here has asked this Court to revisit. The Court should not hold the petition for *Bost*.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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