
No. 24-60395

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Republican National Committee, Mississippi Republican Party, James Perry,
Matthew Lamb,

Plaintiffs - Appellants,

v.

Justin Wetzel, in his official capacity as the clerk and registrar of the Circuit Court of Harrison County; Toni Jo Diaz, in their official capacities as members of the Harrison County Election Commission; Becky Payne, in their official capacities as members of the Harrison County Election Commission; Barbara Kimball, in their official capacities as members of the Harrison County Election Commission; Christene Brice, in their official capacities as members of the Harrison County Election Commission; Carolyn Handler, in their official capacities as members of the Harrison County Election Commission; Michael Watson, in his official capacity as the Secretary of State of Mississippi,

Defendants - Appellees,

Vet Voice Foundation; Mississippi Alliance for Retired Americans,

Intervenor Defendants – Appellees.

Libertarian Party of Mississippi,

Plaintiff - Appellant,

v.

Justin Wetzel, in his official capacity as the clerk and registrar of the Circuit Court of Harrison County; Toni Jo Diaz, in their official capacities as members of the Harrison County Election Commission; Becky Payne, in their official capacities as members of the Harrison County Election Commission; Barbara Kimball, in their official capacities as members of the Harrison County Election Commission; Christene Brice, in their official capacities as members of the Harrison County

Election Commission; Carolyn Handler, in their official capacities as members of the Harrison County Election Commission; Michael Watson, in his official capacity as the Secretary of State of Mississippi,

Defendants – Appellees.

On Appeal from the United States District Court
for the Southern District of Mississippi
Hon. Louis Guirola, Jr.

Case Nos. 1:24-cv-25-LG-RPM; 1:24-cv-37-LG-RPM

**PETITION OF INTERVENOR DEFENDANTS - APPELLEES
VET VOICE FOUNDATION AND THE
MISSISSIPPI ALLIANCE FOR RETIRED AMERICANS FOR
REHEARING EN BANC**

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CERTIFICATE OF INTERESTED PERSONS

No. 24-60395, *Republican National Committee et al. v. Wetzel et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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RULE 35(b) STATEMENT

This case involves a question of exceptional importance: whether federal statutes designating a national “election day” preempt Mississippi’s law allowing election officials to count ballots cast on or before that day, if received within five days after. That law is critical to protecting the voting rights of members of the Armed Services when stationed away from home, whose ballots may otherwise arrive too late to be counted. The panel’s decision further dramatically upsets the balance between state and federal election administration struck by the Constitution’s Elections Clause, by reading into the federal statutes an unspoken limitation on state power that has no grounding in text or history. Every other court that has considered the question—including the district court here—has rejected this argument.

The panel’s decision incorrectly suggested that post-election day ballot receipt deadlines are a recent invention. It jettisoned any recognizable methodology for discerning the plain meaning of statutory text and ignored contemporaneous dictionary definitions that undermined its conclusion. It misinterpreted the precedents of this Court and the Supreme Court. And it perplexingly cast aside Congress’s explicit and favorable acknowledgment of these laws as “congressional silence.”

In fact, the practice of counting ballots cast by election day but received

afterward goes back to the Civil War, when many states permitted soldiers to vote in the field before sending their ballots to soldiers' home precincts. Presently, more than half the states—including two of the three within this Circuit—have such laws. Far from making any attempt to preempt these laws, Congress has acknowledged and approved of them for more than five decades.

The Court should grant rehearing en banc to carefully consider this issue of exceptional importance.

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ISSUE MERITING EN BANC CONSIDERATION

Whether Congress preempted states' power under the Elections Clause to establish the manner of elections as it relates to counting timely-cast mail ballots received after election day.

THE COURSE OF THE PROCEEDINGS

The Elections Clause empowers states to set the “Times, Places and Manner of holding Elections for Senators and Representatives,” reserving for Congress the right to, “at any time by Law make or alter such Regulations.” U.S. Const., art. I, §4, cl.1; *see also id.*, art. II, §1, cl.4; *id.* §1, cl.2 (same, for presidential electors). Congress set the time for the general election for federal offices as the Tuesday after the first Monday in November in the Election Day Statutes. 2 U.S.C. §7; 3 U.S.C. §§1, 21. Exercising its authority to set the “Manner” for these elections, Mississippi enacted the Ballot Receipt Deadline, Miss. Code §23-15-637(1)(a), ensuring mail 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” are counted, notwithstanding mail delays.

The Republican National Committee, Mississippi Republican Party, James Perry, and Matthew Lamb, and then separately, the Libertarian Party, sued to enjoin

the Ballot Receipt Deadline. [ROA.23](#), [ROA.1281](#).¹ Appellants allege that it is preempted by the Election Day Statutes. *See* [ROA.33-34](#); [ROA.36](#); [ROA.1293](#). Vet Voice Foundation and the Mississippi Alliance for Retired Americans were granted intervention to defend the rights of military voters, veterans, and elderly voters who rely on absentee voting in Mississippi. [ROA.389](#).

The district court granted summary judgment for Defendants, 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.” [ROA.1181](#). On October 24, 2024, a panel of this Court reversed. Doc.191.

ARGUMENT

The panel’s decision will disenfranchise lawful voters, including Americans serving their country away from home. In doing so, it ignores well-trod methods of statutory interpretation, infringing on the proper constitutional roles of Congress and the states in election administration. Nothing in the Election Day Statutes’ text prohibits states from counting timely-cast ballots received after election day. Congress has long been aware that many states have such laws, and has repeatedly acknowledged them, including in the Uniformed and Overseas Citizens Absentee

¹ The cases were consolidated. [ROA.307](#). Plaintiffs are referred to collectively as “Appellants.”

Voting Act (“UOCAVA”), which creates a federal absentee ballot for military and overseas voters to be “*processed in the manner provided by law for absentee ballots in the State involved.*” [52 U.S.C. §20303\(b\)](#) (emphasis added). That “manner” includes extended receipt deadlines in states with such laws. The voting rights of our service members and the balance of state and federal power over elections are matters of exceptional importance that warrant full Court review.

I. This case presents a question of exceptional importance.

The practice of accepting ballots cast before election day but received by officials afterward dates to the Civil War. *See* Fortier & Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 500 (2003). As absentee voting became more widespread, more states adopted post-election receipt deadlines, ranging from one day to several weeks. *Compare* [Tex. Elec. Code Ann. §86.007\(a\)\(2\)](#), with 10 Ill. Comp. Stat. §§5/19-8 & 5/18A-15.

When Congress passed UOCAVA, it was aware that “[t]welve [states] ha[d] extended the deadline for the receipt of voted ballots to a specific 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). And it directed that UOCAVA ballots were to be “processed in the manner provided by law for absentee ballots in the State

involved,” including in accordance with the state’s ballot receipt deadline. 52 U.S.C. §20303(b); *see also id.* §20303(b)(3) (a federal write-in ballot shall not count if a UOCAVA voter’s state absentee ballot is received “no later than the deadline for receipt of the State absentee ballot under State law”). Congress again recognized these state laws when it passed the MOVE Act in 2009, which requires military officials to ensure that overseas servicemembers’ ballots are delivered to 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) (emphasis added); Pub. L. No. 111-84, div. A, tit. V., subtit. H, §580(a), 123 Stat. 2190.

By the time this case was filed, at least 28 states and several U.S. territories had extended ballot-receipt deadlines. *See Tbl. 11: Receipt & Postmark Deadlines for Absentee/Mail Ballots*, Nat’l Conf. of State Legs. (June 12, 2024), perma.cc/H9ZG-P92W. This includes the “18 states and the District of Columbia” that the panel acknowledged “permit post-Election Day receipt” for all mail voters, Op.15, as well as another ten states that permit it for military and overseas voters. *See Ala. Code §17-11-18(b)*; *Ark. Code §7-5-411(a)(1)(A)(ii)*; *Fla. Stat. §101.6952(5)*; *Ga. Code §21-2-386(a)(1)(G)*; *Ind. Code §3-12-1-17(b)*; *Mich. Comp. Laws §168.759a(18)*; *Mo. Rev. Stat. §115.920(1)*; *25 Pa. Cons. Stat.*

§3511(a); R.I. Gen. Laws §17-20-16; S.C. Code §7-15-700(A).²

As the United States emphasized, laws like Mississippi’s “provide critical protection for UOCAVA voters.” U.S. Amicus Br., Doc. 148-1, at 28. “[A]bsentee voting laws generally are the only means by which American citizens deployed in the uniformed services or otherwise living overseas can exercise their right to vote.” *Id.* Historically, the “single largest reason for disenfranchisement of military and overseas voters was State failure to provide adequate ballot transit time.” *Id.* at 28-29 (quoting UOCAVA House Report 10). The UOCAVA House Report expressly noted that “several States accept absentee ballots, particularly those from overseas, for a specified number of days after election day,” praising those laws as “aid[ing] in protecting the voting rights” of military and overseas voters. H.R. Rep. 99-765 at 8 (1986). And the U.S. Attorney General repeatedly has brought suit “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. at 30-31.

The panel concluded that the Election Day Statutes silently and entirely preempt the widespread and longstanding practice of counting ballots under laws like Mississippi’s. That decision offends the Elections Clause, which “gives states

² It is therefore not correct that, “[e]ven today, a substantial majority of States prohibit officials from counting ballots received after Election Day.” Op.15.

the responsibility for establishing the time, place, and manner of holding congressional elections, *unless Congress acts to preempt state choices.*” *Voting Integrity Project, Inc. v. Bomer*, [199 F.3d 773, 775](#) (5th Cir. 2000) (citation omitted) (emphasis added). Under this constitutional edict, “a state’s discretion and flexibility in establishing the time, place and manner of electing its federal representatives *has only one limitation: the state system cannot directly conflict with federal election laws on the subject.*” *Id.* (emphasis added).

To find conflict, the panel rejected the ordinary tools of plain meaning statutory interpretation, misinterpreted precedent, misconstrued relevant history, and ignored Congress’s explicit and favorable acknowledgment of these laws. The panel’s roadmap for evaluating whether Congress has preempted a state’s constitutional power to regulate the “Manner” of its elections is befuddling. And the Americans whose voting rights are most threatened by the panel’s ruling are those who volunteer to protect those rights—with their lives if necessary.

II. The panel’s opinion breaks with other courts.

Until the panel’s decision, *every* court to address the merits of the question concluded that the Election Day Statutes operate harmoniously with laws like Mississippi’s.

The Pennsylvania Supreme Court rejected the argument (made by the Republican Party of Pennsylvania) in 2020, when it ordered the extension of

Pennsylvania’s ballot receipt deadline to account for postal delays during the pandemic. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 368 n.23 (Pa. 2020) (concluding Election Day Statutes are consistent with extended ballot receipt deadlines).

The Third Circuit dismissed a federal challenge to that decision, explaining “Federal law does not provide for *when* or *how* ballot counting occurs,” and extended receipt deadlines and the Election Day Statutes “can, and indeed do, operate harmoniously.” *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 353-54 (3d Cir. 2020), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *see also id.* at 345-46 (finding “receipt” akin to routine post-election actions—like counting and canvassing—distinct from voting). Accordingly, the plaintiffs lacked standing because they alleged only a violation of state—not federal—law. *Id.* at 354-55.³

Also in 2020, a federal court rejected the RNC’s (and others’) challenge to a similar New Jersey law. *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 369 (D.N.J. 2020). It concluded, because the Election Day Statutes “are silent on methods of determining the timeliness of ballots,” New Jersey’s method of determining whether ballots are cast on or before election day “is not preempted.”

³ The Supreme Court vacated *Bognet* as moot on appeal, not on the merits. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). It remains persuasive. *See Melot v. Bergami*, 970 F.3d 596, 599 n.11 (5th Cir. 2020).

Id. at 372.

Recently, a federal court in Illinois rejected a challenge to that state’s 14-day ballot receipt deadline. *Bost v. Ill. State Bd. of Elections*, 684 F. Supp. 3d 720, 736 (N.D. Ill. 2023). The court found the plaintiffs lacked standing, but also would have rejected the claim on the merits. *Id.* at 736-37.⁴

Thus, until now, courts have uniformly recognized that allowing absentee ballots to “be *mailed* by election day” and received by some specified date thereafter is a “policy choice” left to the states. *DNC v. Wisconsin State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring); *cf. Harris v. Fla. Elections Canvassing Comm’n*, 122 F. Supp. 2d 1317, 1325 (N.D. Fla. 2000) (recognizing some states “allow post-election-day acceptance of absentee ballots” and concluding “Congress did not intend 3 U.S.C. § 1” to preclude such laws), *aff’d sub nom. Harris v. Fla. Elections Comm’n*, 235 F.3d 578 (11th Cir. 2000).

III. The panel decision is at odds with the Election Day Statutes’ plain text and ignores original public meaning.

The panel’s conclusion that Mississippi’s Ballot Receipt Deadline was

⁴ The Seventh Circuit affirmed on standing and did not reach the merits. *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634 (7th Cir. 2024). Two similar cases were dismissed on standing. *Splonskowski v. White*, 714 F. Supp. 3d 1099, 1103 (D.N.D. 2024); *Republican Nat’l Comm. v. Burgess*, 2024 WL 3445254, at *1 (D. Nev. July 17, 2024), *appeal filed* No. 24-5071 (9th Cir. Aug. 19, 2024).

preempted finds no grounding in the text of the federal statutes or the original public meaning of the term “election.”

As the panel acknowledged, contemporaneous dictionary definitions of “election” refer to the public’s “choice” of a candidate for office. Op.7 n.5; *see also Foster v. Love*, 522 U.S. 67, 71 (1997); *Newberry v. United States*, 256 U.S. 232, 250 (1921). When the voter places a marked absentee ballot in the mail, they have made their “choice.” Mississippi’s Ballot Receipt Deadline is accordingly consistent with the contemporaneous and ordinary meaning of “election.” The panel swept aside these definitions in a footnote because they “make no mention of deadlines or ballot receipt.” Op.7 n.5. But that proves the point: 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, in setting the day of the “election,” has not “acted” to preempt laws like Mississippi’s because, as the panel acknowledged, the ordinary meaning of the term “election” does not encompass ballot receipt.

The Election Day Statutes do not answer every conceivable election administration question. The panel’s assumption that they must is directly at odds with the Elections Clause and caselaw interpreting it. Congress’s Elections Clause power preempts inconsistent state laws, “so far as it is exercised, and no farther[.]” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (quotation

omitted). Thus, Courts should “read Elections Clause legislation simply to mean what it says,” *id.* at 15, with “the reasonable assumption” “that the statutory text accurately communicates the scope of Congress’s pre-emptive intent,” *id.* at 14. As the panel acknowledged, the Election Day Statutes say nothing about ballot receipt and thus do not preempt them.

IV. The panel decision misreads precedent.

In lieu of relying on the ordinary meaning of “election,” the panel purported to distill “three definitional elements” to the term from the Supreme Court’s decision in *Foster v. Love*: “(1) official action, (2) finality, and (3) consummation.” Op.8. But *Foster* expressly declined to pare “the term ‘election’ ... down to the definitional bone,” limiting its holding to the narrow circumstances of that case. *See id.* at 72 & n.4 (“This case thus does not present the question whether a state must always employ the conventional mechanics of an election. We hold today only that if an election does take place, it may not be consummated prior to federal election day.”).

Further, the panel’s assertion that “receipt” is the only relevant “official action” is pulled from thin air, buttressed by outlandish hypotheticals imagining laws where the voter never relinquishes custody and control—all distinctly different from Mississippi’s Ballot Receipt Deadline. *See* Op.8. The panel’s claimed distinction between the “voter’s selection” and the “public’s election,” *id.* at 9, is equally misplaced. The “public” or “polity,” *id.*, is made up of individual voters. Under the

Ballot Receipt Deadline, every voter, comprising the “electorate as a whole,” *id.*, must make their “final choice” on or before election day.⁵ *Supra* at 9. The panel’s sole basis for this invented distinction was a 1944 Montana Supreme Court decision that relied on *state* law. Op.10 (citing *Maddox v. Board of State Canvassers*, 149 P.2d 112 (Mont. 1944)). That court held, as a matter of *Montana* law, that “voting is done not merely by marking the ballot but by having it delivered to the election officials and deposited in the ballot box before the closing of the polls on election day.” *Maddox*, 149 P.2d at 115. But even the Montana Supreme Court acknowledged that other states disagreed. New Hampshire, for example, provided that “the elector parts with all control over his ballot and *has in fact voted* when the ballot is marked and deposited in the mail addressed to the proper election officer.” *Goodell v. Judith Basin Cnty.*, 224 P. 1110, 1113 (Mont. 1924) (citing *In re Opinion of the Justices*, 113 A. 293 (N.H. 1921)) (emphasis added). Likewise, Kansas provided that a “vote is cast when the ballot is marked ... [and] placed in envelopes and mailed on election day.” *Burke v. State Bd. of Canvassers*, 107 P.2d 773, 778 (Kan. 1940). In other

⁵ The panel also relied on a Mississippi regulation to conclude that a ballot is not “final” until “absentee processing by the Resolution Board,” when “the ballot is marked as accepted.” Op.9-10 (quoting 01-17 Miss. Admin. Code R2.1). But under Mississippi law, “absentee processing by the Resolution Board” involves more than “receipt.” It requires the board to, for example, examine the ballot envelope and match the signature. Miss. Stat. §23-15-639. The panel acknowledged such actions can and often do take place *after* election day. Op.11-12.

words, this was, and continues to be, a question of state law.⁶

Finally, the panel relied on *Bomer* to conclude that an election is “consummated” when all ballots are received. Op.11. If this reading were correct, a state could require voters to cast their ballots in person or by mail *before* election day, with no voting to be done on election day itself—so long as ballots are still being received on election day. *Bomer*, of course, means no such thing. The critical fact was that, while some voters could cast ballots early, the “final selection” was “not made before the federal election day” because voters were still *voting*. 199 F.3d at 776.⁷ The same is true here.

V. The panel decision misconstrues the historical record.

The panel’s decision is further flawed because it prohibits a longstanding practice Congress was well aware of. *See Bomer*, 199 F.3d at 776. As early as the Civil War, many states permitted soldiers to vote at polling sites in the field on election day and have the ballots “sent to the [soldier’s] home precinct.” Fortier & Ornstein, *supra*, at 500. This practice differs little from Mississippi’s law—both require ballots to be *cast* by election day and *received* by officials by sometime after.

⁶ Montana has since adopted a post-election receipt law for military-overseas voters—a law the panel’s reasoning would find preempted. *See* Mont. Code §13-21-226(1).

⁷ Notably, when *Bomer* was decided, Texas allowed timely-voted ballots from military and overseas voters to be counted if they arrived within two days of election day in federal elections. *See* Tex. Elec. Code §86.007(d)(3)(B) (2000).

The panel dismissed this history, writing that the “act of voting simultaneously involved receipt by election officials.” Op.13. That is not accurate. While some states deputized military officers as election officials for field voting, others did *not*. Nevada, Rhode Island, and Pennsylvania allowed ballots to be placed under the charge of high commanding officers without any such designation and they were not *received* by election officials until later. 1866 Nev. Stat. 215; Benton, *Voting in the Field: A Forgotten Chapter of the Civil War* 171-73, 186-87, 190 (1915).

Absentee voting laws proliferated in the early twentieth century. Op.14-15. The panel claims those laws “universally foreclosed the possibility of accepting and counting ballots received *after* Election Day.” *Id.* at 15. Wrong again. 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.” Kans. 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).

The panel’s conclusion that, in 1938, only one state retained a post-election-day receipt deadline, Op.15, is contradicted by its cited source. See Paul G. Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898, 905-

06 (1938). It says that—among the 42 states with absentee voting laws—all but one had express “limits within which the ballot must be received . . . to be counted.” *Id.* at 905. “These limits range[d] from six days before to six days after the date of the election.” *Id.* at 905-06; *see also id.* at 905 n.38 (referring to “those *states* where the time limit extends beyond the day of election”) (emphasis added). And just five years later—after the United States entered the Second World War—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, and Representatives in Congress, 78th Cong. 100, 102 (Oct. 26, 1943) (identifying eight states); 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. The Act required these ballots to be received by election day, Act of Sept. 16, 1942, ch. 561, 56 Stat. 753, §9, precisely because no existing federal law imposed such a requirement. And, in 1944, Congress amended the Act, requiring war ballots be received by 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, §311(b)(3). That 1944 amendment was not an “exception” to the Election Day Statutes, but a clarification of the 1942 Act to explicitly incorporate already-existing extended receipt deadlines. Congress further

provided that soldiers could continue to vote absentee in accordance with state law, which included post-election receipt deadlines. *Id.* at §3.

The panel further ignored that, in a series of related statutes, Congress expressly recognized that state ballot receipt deadlines are a question of *state*, not federal law—except where Congress has explicitly said otherwise, as in the Soldier Voting Act. This includes UOCAVA, discussed *supra* at 3-4, which directed that its newly-created “Federal write-in absentee ballot” was to be “processed in the manner provided by law for absentee ballots in the State involved,” including in accordance with “the deadline[s] for receipt of the State absentee ballot *under State law.*” 52 U.S.C. §20303(b)(3) (emphasis added). It also includes the MOVE Act, *see supra* at 4 (requiring military officials ensure that overseas servicemembers’ ballots for federal general elections are delivered to election officials “not later than *the date by which an absentee ballot must be received in order to be counted in the election*”) (citations omitted).

Far from “congressional silence,” this history demonstrates that in a series of enactments stretching back over a century, Congress has evidenced its clear understanding that post-election-day receipt does *not* conflict with the Election Day Statutes. The panel’s contrary conclusion flips the preemption analysis on its head, effectively requiring that federal law expressly authorize any state law addressing election administration. This is wrong as a matter of law, and unless corrected will

disenfranchise lawful voters and bring into doubt election laws that states have duly enacted in full accordance with their power to do so under the Constitution.

CONCLUSION

The Court should grant rehearing en banc, vacate the panel decision, and affirm the judgment of the district court.

Dated: November 8, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for all parties are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: November 8, 2024

/s/ Elisabeth C. Frost
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limits of Federal Rule of Appellate Procedure 35(b)(2) because it contains 3,896 words, excluding parts exempted by Federal Rule of Appellate Procedure 32(f). This document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a) because it has been prepared in a proportionally spaced, serifed typeface using Microsoft Word in 14-point Times New Roman font.

Dated: November 8, 2024

/s/ Elisabeth C. Frost
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United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 25, 2024

Lyle W. Cayce
Clerk

No. 24-60395

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

Plaintiffs—Appellants,

versus

JUSTIN WETZEL, *in his official capacity as the clerk and registrar of the Circuit Court of Harrison County*; TONI JO DIAZ, *in their official capacities as members of the Harrison County Election Commission*; BECKY PAYNE, *in their official capacities as members of the Harrison County Election Commission*; BARBARA KIMBALL, *in their official capacities as members of the Harrison County Election Commission*; CHRISTENE BRICE, *in their official capacities as members of the Harrison County Election Commission*; CAROLYN HANDLER, *in their official capacities as members of the Harrison County Election Commission*; MICHAEL WATSON, *in his official capacity as the Secretary of State of Mississippi,*

Defendants—Appellees,

VET VOICE FOUNDATION; MISSISSIPPI ALLIANCE FOR RETIRED AMERICANS,

Intervenor Defendants—Appellees.

LIBERTARIAN PARTY OF MISSISSIPPI,

Plaintiff—Appellant,

versus

JUSTIN WETZEL, *in his official capacity as the clerk and registrar of the Circuit Court of Harrison County*; TONI JO DIAZ *in their official capacities as members of the Harrison County Election Commission*; BECKY PAYNE, *in their official capacities as members of the Harrison County Election Commission*; BARBARA KIMBALL, *in their official capacities as members of the Harrison County Election Commission*; CRISTENE BRICE, *in their official capacities as members of the Harrison County Election Commission*; CAROLYN HANDLER, *IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE HARRISON COUNTY ELECTION COMMISSION*; MICHAEL WATSON, *in his official capacity as the Secretary of State of Mississippi*,

Defendants—Appellees,

VET VOICE FOUNDATION; MISSISSIPPI ALLIANCE FOR RETIRED AMERICANS,

Intervenor Defendants—Appellees.

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

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

ANDREW S. OLDHAM, *Circuit Judge*:

Congress statutorily designated a singular “day for the election” of members of Congress and the appointment of presidential electors. Text, precedent, and historical practice confirm this “day for the election” is the day by which ballots must be both *cast* by voters and *received* by state officials. Because Mississippi’s statute allows ballot receipt up to five days after the

federal election day, it is preempted by federal law. We reverse the district court’s contrary judgment and remand for further proceedings.

I

A

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

The second relevant constitutional provision is the Elections Clause. It provides: “The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” U.S. CONST. art. I, § 4, cl. 1. The Elections Clause imposes a “duty” upon States to hold elections for federal officers. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). It also vests “power” in Congress to “alter those [state] regulations or supplant them altogether.” *Ibid.* In the early Republic, congressional elections occurred at varying times, providing some States with an “undue advantage” of “indicating to the country the first sentiment on great political questions.” Cong. Globe, 42d Cong., 2d. Sess., 141, 116 (1871). And the establishment of a uniform day for

presidential elections resulted in many States having two separate days for federal elections. *Id.* at 141. As a result, Congress scheduled all House elections to occur on the presidential election day. Act of Feb. 2, 1872, ch. 11, § 3, 17 Stat. 28 (to be codified at 2 U.S.C. § 7).¹

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

B

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

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

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

Plaintiffs and defendants jointly moved to schedule briefing on cross-motions for summary judgment. The district court granted defendants' motion for summary judgment on July 28. Plaintiffs timely appealed. We granted Plaintiff-Appellants' motion to expedite the appeal on August 9. Jurisdiction is proper under 28 U.S.C. § 1291.³

II

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

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

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

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

A

The constitution struck a delicate balance between state and federal power to regulate elections. The Elections Clause creates a “default” presumption of state regulation, subject to Congress’s powerful check. *Foster*, 522 U.S. at 69. States can regulate many elements of federal elections, “but only so far as Congress declines to preempt state legislative choices.” *Ibid*. Congress retains the power under the Elections Clause to “override state regulations by establishing uniform rules for federal elections, binding on the States.” *Ibid*. (quotation omitted). When Congress exercises that power, “any regulations it may make necessarily supersede inconsistent regulations of the State” given its “paramount” constitutional authority in this area. *Ex Parte Siebold*, 100 U.S. 371, 372 (1879). The question, then, is whether Mississippi’s law is “inconsistent with” federal statutes establishing “the day for the election.” *Inter Tribal*, 570 U.S. at 15.⁴

We generally apply a presumption against preemption when Congress “legislate[s] in areas traditionally regulated by the States.” *See, e.g., Gregory*

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

v. Ashcroft, 501 U.S. 452, 460 (1991). That presumption does not apply under the Elections Clause, however. “Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress’s pre-emptive intent.” *Inter Tribal*, 570 U.S. at 14. *See also Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012), *aff’d sub nom. Inter Tribal*, 570 U.S. 1 (2013) (“In contrast to the Supremacy Clause . . . the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections.”). Unlike other subjects of federal legislation, election law “*always* falls within an area of concurrent state and federal power.” *Inter Tribal*, 570 U.S. at 14 n.6 (emphasis in original). We therefore need not employ any presumption against preemption.

B

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

The Supreme Court’s decision in *Foster v. Love* guides our understanding of the statutory text.⁵ That case involved Louisiana’s open primary

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

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

1

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

The State’s problem is that it thinks a ballot can be “cast” before it is received. What if a State changes its law to allow voters to mark their ballots and place them in a drawer? Or what if a State allowed a voter to mark a ballot and then post a picture on social media? The hypotheticals are obviously

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

absurd. But it should be equally obvious that a ballot is “cast” when the State takes custody of it.

2

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

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

That is not to say all the ballots must be counted on Election Day. Even if the ballots have not been counted, the result is fixed when all of the ballots are received and the proverbial ballot box is closed. The selections are done and final. By contrast, while election officials are still receiving ballots, the election is ongoing: The result is not yet fixed, because live ballots are still being received. Although a single voter has made his final selection upon marking his ballot, the entire polity must do so for the overall election to conclude. So the election concludes when the final ballots are received and the *electorate*, not the individual *selector*, has chosen.

Mississippi’s regulations further confirm this result. The absentee-ballot statute authorizes the Secretary of State to issue rules and regulations to effectuate the State’s absentee voting scheme. MISS. CODE § 23-15-637(3). And those regulations state that “an absentee ballot is the final vote

of a voter when, during absentee ballot processing by the Resolution Board, *the ballot is marked accepted.*” 01-17 MISS. ADMIN. CODE R2.1 (emphasis added). For absentee ballots submitted by mail, the ballot “shall be final, if accepted by the Resolution Board” after receipt, processing, and deposit into a secure ballot box. *Id.* at R.2.3(a). Thus, Mississippi’s own law belies its mailbox-rule theory of finality. *See* Red Br. at 2 (“Voters make a *conclusive choice*—a *final selection* that *concludes* and *consummates* the election—when they mark and submit their ballots as required by law. The final selection is then made.” (emphasis in original)).

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

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

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

Similarly, we have blessed a Texas early-voting law that permitted “unrestricted” early voting up to 17 days before Election Day. *See Voting Integrity Proj., Inc. v. Bommer*, 199 F.3d 773, 774 (5th Cir. 2000). We held that scheme not preempted because election results would not be “decided or consummated before federal election day.” *Id.* at 776 (quotation omitted). The *Bommer* panel emphasized that Texas’s early voting scheme left polls open on federal election day and that most voters cast their ballots on that day. *Id.* at 775–76. In other words, so long as the State continued to *receive* ballots, the election was ongoing and had not been consummated. Other circuits have agreed. *See Voting Integrity Proj., Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001) (“But we have a Supreme Court decision which we must follow . . . emphasizing that it found a violation of the statute only because there was no act of officials or voters left to be done on federal election day.”); *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001) (“*Foster*’s narrow holding suggests that, so long as a State does not conclude an election prior to federal election day, the State’s law will not ‘actually conflict’ with federal law.”). Thus, the election is consummated when the last ballot is received and the ballot box is closed.

Of course, it can take additional time to tabulate the election results. *Cf. Bush v. Gore*, 531 U.S. 98, 116 (2000) (Rehnquist, C.J., concurring). It has become a “routine[]” practice for election officials to count (or recount) ballots after Election Day. *Harris v. Fla. Elections Canvassing Comm’n*, 122 F.

Supp. 2d 1317, 1325 (N.D. Fla. 2000), *aff'd sub nom. Harris v. Fla. Elections Comm'n*, 235 F.3d 578 (11th Cir. 2000); *see also Millsaps*, 259 F.3d at 546 n.5 (“[O]fficial action to confirm or verify the results of the election extends well beyond federal election day . . .”). The election is nonetheless consummated because officials know there are X ballots to count, and they know there are X ballots to count because the proverbial ballot box is closed. In short, *counting* ballots is one of the various post-election “administrative actions” that can and do occur after Election Day. *Millsaps*, 259 F.3d at 546 n.5. *Receipt* of the last ballot, by contrast, constitutes consummation of the election, and it must occur on Election Day.

C

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

By necessity, early American voting occurred contemporaneously with receipt of votes. Voting typically occurred *viva voce*, by showing hands, or by using handwritten ballots that voters physically brought to the polls for submission and counting. *Burson v. Freeman*, 504 U.S. 191, 200 (1992). Later, political parties started to print and disseminate ballots, which voters would take and submit. *Ibid.* Polling places became “akin to entering an open auction place,” rife with “bribery and intimidation.” *Id.* at 201–02. Adoption of

the “Australian system” (including universal ballots and private polling booths) in the early 1890s addressed these issues. *Id.* at 202–05. The Australian system bifurcated the voting process so that a voter could express his preference non-contemporaneously with receipt and counting. But at the time Congress established a uniform election day in 1845 and 1872, voting and ballot receipt necessarily occurred at the same time.

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

States authorized absentee voting for soldiers using two methods. First, voting in the field. Election officials brought ballot boxes to the battlefield, where soldiers cast their ballots. *Id.* at 15. In such cases, the voter’s “connection with his vote ended when he put it in the box, precisely as it would have ended if he had put it into the box . . . at home.” *Ibid.* Unlike Mississippi’s mailbox-rule analogy, field voting involved soldiers directly placing their ballots into official custody with no carrier or intermediary. The act of voting simultaneously involved receipt by election officials. The second method, proxy voting, allowed soldiers to prepare ballots in the field and send them to a proxy for deposit in the ballot box of the soldier’s home precinct. *Ibid.* When proxy voting occurred, “the voter’s connection with his ballot did

not end until it was cast into the box at the home precinct, and therefore [] the soldier really did vote, not in the field, but in his precinct at home.” *Ibid.* Here, again, the voter voted when the vote was received by election officials. Both methods underscore that official receipt marked the end of voting.

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

Around this time, States that permitted civilian absentee voting imposed the same Election Day deadline for receiving ballots. Washington State permitted voters to return ballots to be counted in a voter’s home county after Election Day, but those ballots were still collected by state officials by Election Day. P. Orman Ray, *Absent-Voting Laws, 1917*, 12 AM. POL. SCI. REV. 251, 253 (1918). Three States required voters to swear that they would return ballots on or before Election Day. *Id.* at 255. Minnesota did not count ballots received in the voter’s home district after Election Day. *Id.* at 256. Of the States permitting absentee ballots, only Illinois addressed what to do with ballots received too late: It provided for their destruction. *Id.* at 259. These

early absentee voting laws universally foreclosed the possibility of accepting and counting ballots received *after* Election Day because they specified that ballots would be counted on Election Day.

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

Even today, a substantial majority of States prohibit officials from counting ballots received after Election Day. In January 2020, before the COVID-19 pandemic, only 14 States and the District of Columbia accepted ballots postmarked by Election Day—with the other 36 requiring *receipt* on or before that date. Nat’l Conf. of State Legislatures, *Table 6: The Evolution of Absentee/Mail Voting Laws, 2020–22* (Oct. 26, 2023), <https://www.ncsl.org/elections-and-campaigns/the-evolution-of-absentee-mail-voting-laws-2020-through-2022> [<https://perma.cc/8ABZ-YFXC>]. In advance of the 2020 general election, seven States extended their ballot-receipt deadlines, including Mississippi. *See ibid.* Of those seven, two already allowed post-election day receipt (California and North Carolina). *Ibid.* While Mississippi and Massachusetts retained their 2020 ballot-receipt dates, every other State that changed their receipt deadline subsequently reverted to earlier deadlines. *Ibid.* All told, as of November 2022, 18 States and the District of Columbia permit post-Election Day receipt. *See ibid.*

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

III

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

A

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

First, the Uniform and Overseas Citizens Absentee Voting Act (“UOCAVA”) provides procedures for voting by military members and civilians living abroad. *See* 52 U.S.C. § 20301 *et seq.* The Act requires federal officials to submit ballots to state election officials “not later than the date by which an absentee ballot must be received in order to be counted in the election.” *Id.* § 20304(b)(1). It also creates a fail-safe federal absentee ballot for voters who do not receive their state ballots on time. *Id.* § 20303(a)(1). But

those, too, must be submitted in the same manner and on the same timeline as absentee ballots in the voter’s State. *Id.* § 20303(b).

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

Nothing in these statutes says that States are allowed to accept and count ballots received after Election Day. Other statutes invoked by both parties and *amici* suffer from the same deficiencies: All are silent on ballot receipt and Election Day timing. At bottom, the very best Mississippi and its *amici* can muster is that some federal election statutes are silent about—and hence do not expressly prohibit—receiving and counting ballots after Election Day. And if all we had was congressional silence, it would be difficult or impossible for the plaintiffs to show preemption of state law.

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

Congress’s silence is particularly unhelpful to the State because other statutes show that Congress knew how to authorize post-Election Day voting when it wanted to do so. For example, the United States as *amicus* proffers the Help America Vote Act of 2002 (“HAVA”). *See* Brief for United States as *Amicus Curiae* 15–16; *see also* 52 U.S.C. § 20901 *et seq.* HAVA establishes a procedure for provisional voting when a voter’s eligibility is in question. 52 U.S.C. § 21082. The voter casts a ballot and transmits it to appropriate election officials, who then determine his eligibility to vote under state law. *Id.* § 21082(a)(1)–(3). Upon that verification, “the individual’s provisional ballot shall be counted as a vote in that election in accordance with State law.” *Id.* § 21082(a)(4). All jurisdictions that issue such ballots accept them after Election Day. *See* Brief for United States as *Amicus Curiae* 16.

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

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

Epic Sys. Corp. v. Lewis, 584 U.S. 497, 510 (2018) (quotation and citations omitted). The United States as *amicus* cannot come close to showing that HAVA displaces or impliedly repeals the longstanding general rule that the federal Election Day is the singular day on which the ballot box closes. Rather, the best way to harmonize HAVA with the other statutes governing the federal Election Day is that the former is a narrow exception that authorizes States to receive a certain small number of provisional ballots after Election Day from potentially unqualified voters. Not that it allows States to extend the federal Election Day by one day, five days, or 100 days for all voters.

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

So too with the other Election Day exceptions. For instance, 2 U.S.C. § 8 permits States to hold congressional elections on days other than the federal Election Day in the event of a vacancy, including those caused by "death," "resignation," "incapacity," or "failure to elect" a candidate on Election Day (i.e., permitting runoff elections). *Id.* at § 8(a). As such, it "creates an exception to section 7's absolute rule." *Busbee v. Smith*, 549 F. Supp.

494, 526 (D.D.C. 1982). Likewise, 3 U.S.C. § 21(1) permits States to “modif[y] the period of voting” in presidential elections for “force majeure events.” Where Congress wants to make exceptions to the federal Election Day statutes, it has done so. All of this further proves Congress did not abrogate the uniform Election Day in other, non-expected circumstances.

B

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

Mississippi further points to a recent Supreme Court opinion discussing election deadlines as support for its proposed mailbox rule. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 589 U.S. 423 (2020) (per curiam). In response to COVID, a federal district court in Wisconsin issued a preliminary injunction extending the State’s primary election, such that ballots mailed and postmarked up to six days after the State’s deadline would be counted. *Id.* at 423–24. The Court’s opinion states the injunction at issue “would allow voters to *mail their ballots* after election day, which is extraordinary relief and would fundamentally alter the nature of the election by allowing *voting* for six additional days after the election.” *Id.* at 426 (emphasis added). Mississippi claims that this statement proves the act of mailing

ballots equates to voting, and it further reads the Supreme Court as embracing a mailbox rule for voting. MS Red Br. at 29.

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

C

Today’s decision says nothing about remedies. We decline to grant plaintiffs’ initial request for a permanent injunction, which they have not renewed before this court. *See* GOP Reply Br. at 2, MSLP Reply Br. at 22. Instead, we remand to the district court for further proceedings to fashion appropriate relief, giving due consideration to “the value of preserving the status quo in a voting case on the eve of an election.” *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 567 (5th Cir. 2020); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006).⁶

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

IV

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

* * *

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

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