TO ELECT IS TO CHOOSE:
ELECTION DAY SETS BY WHEN MAIL-IN VOTERS MUST MAIL THEIR CHOICES, NOT BY WHEN OFFICIALS MUST RECEIVE THE MAIL

By Richard D. Bernstein[1]

Perhaps the legal issue that will affect the most votes in upcoming federal elections is whether, in a federal election, a statute of a state or D.C. may permit the counting of mail-in ballots that are postmarked by the federal election day – November 3 in 2026 – but received by a later deadline set by the state or D.C. statute.[2] The Supreme Court is currently considering whether to decide this issue in *Watson v. Republican National Committee,* No. 24-1260 ("*Watson*"), a case involving Mississippi's statute. Even if the Supreme Court declines to decide this issue in *Watson*, this issue is also pending in the lower federal courts as part of the challenges to President Trump's Executive Order 14248, which purports to bar counting mail-in ballots postmarked by but received after election day. One federal district court has struck down that portion of the Executive Order, but that ruling is on appeal. *See California v. Trump*, 2025 WL 1667949, at *13 (D. Mass June 13, 2025), *appeal pending*, No. 25-1726 (1st Cir. Aug. 1, 2025).

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[2] This article refers to "postmarked" for ease of reference, although a few states allow additional means of proving that mailing occurred by election day. *See* 10 Ill. Comp. Stat. 5/19-8 (ballot was postmarked or certified); Wash Rev. Code § 29A.40.110(3) (postmarked or "ballot declaration"); Nev. Rev. Stat. § 293.26991(1)(b)(2) & (2) (postmarked or rebuttable presumption if ballot received by 5 p.m. on third day after election). These alternative means are not preempted because all the federal election day statutes require is the fact that a mail-in ballot was submitted by election day. *See infra*, at 5-21. A fact can be proved by a certification, declaration, or rebuttable presumption, as well as by a postmark. *See, e.g., United States Post Ser. Bd. Of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983) (rebuttable presumption). Even *assuming, arguendo,* that the federal statutes required a postmark as the only means to prove the fact of mailing by election day, these state statutes would not be facially invalid as to all ballots received after election day. Any invalidity would affect only ballots lacking a postmark date of election day or earlier.

Fifteen states and D.C. have statutes that count mail-in ballots if they are postmarked by election day and received by a specified later date. *See* Response of Vote Vet Foundation, at 5 & n.2, filed July 10, 2025, in *Watson*. Fifteen other states have statutes that count military and sometimes all overseas votes mailed by election day if received by a specified later date. *Id.* at 5 & n.3.

Everyone agrees that election day means the same thing for presidential elections as for congressional elections. The legal debate is between whether the federal election day statutes set a requirement for (a) by when voters must mail their choices versus (b) by when the state election officials must receive the mailed ballots. So, by when voters choose versus by when election officials receive.[3] This article demonstrates that the text and history of the pertinent constitutional provisions and federal election day statutes resolve the debate – election day is by when voters choose.

The Constitution is the place to start because Article II, Section 1, Clause 4 empowered Congress to set "the Time of *chusing* the Electors." (Emphasis added.) Every subsequent federal statute that has set a time for popular voting for president has implemented this constitutional provision. Indeed, the first presidential election statute, enacted in 1792, described when "electors shall be appointed" as "the time of choosing electors." 1 Stat. 239 ("1792 Election Time Statute"). The phrase "the time of choosing electors" has remained in the governing federal statutes continuously until today, now codified in 3 U.S.C. § 3.

In 1845, the first federal election day statute to set a single day did so for "an election for the purpose of *choosing* the [presidential] electors." 5 Stat. 721 (emphasis added) ("1845 Election Day Statute"). This continued to reflect the understanding that in each state where

[3] According to the proponents of the official-receipt argument, receipt by a government postal employee is irrelevant because postal employees are not election officials.

electors are "appointed," *id.*, by a popular election, the election happens by when "the electors are *chosen … by the people.*" 3 J. Story, *Commentaries on the Constitution* § 1466 (1833) (emphasis added).

Foster v. Love held that the federal statutory day first enacted in 1872 for electing members of Congress must be interpreted to align with the earlier 1845 presidential election statute. 522 U.S. 67, 70, 73-74 (1997). Therefore, election day for congressional elections must also be the day by when voters choose.

Independently, the text of Article I, Section 1 of the Constitution compels the same result. Article I, Section 2, Clause 1, requires members of the House to be "*chosen* every second Year *by the People*." (Emphasis added.) And Article I, Section 3, Clause 1 required that Senators be "*chosen* by the Legislature." (Emphasis added.) The Seventeenth Amendment now requires Senators to be "elected *by the people*." (Emphasis added.) Accordingly, when *United States v. Classic,* 313 U.S. 299 (1941), interpreted "*elections*" in Clause 1 of Section 4 of Article I (the "Elections Clause"), the Court examined "the words of the Constitution in their historical setting," *id.* at 317 (emphasis added), and concluded that: "From time immemorial an *election* to public office has been in point of substance *no more or no less than the expression by qualified electors [voters] of their choice* of candidates." *Id.* at 318 (emphasis added).

The word "election" in 2 U.S.C. § 7, which sets the day of a congressional election, is transplanted from "Elections" in the Elections Clause. Therefore, the holding in *Classic* that "election" under the Elections Clause means voter "choice" rebuts the argument that "election" in 2 U.S.C. § 7 instead means the "State's process." Republican National Committee Opposition ("RNC Opp.") at 20, filed Aug. 11, 2025, in *Watson*.

In our Nation, all the choosing in a federal election is done by voters. That is why our federal elections satisfy "the trust of a Nation that here, We the People rule." *Chiafalo v. Washington*, 591 U.S. 578, 597 (2020). To elect is to choose, and election officials do not choose. Rather, they count votes and announce results.

The counting and announcing by election officials, everyone agrees, need not occur within the time for the election itself. A deadline for when election official receives a mail-in ballot postmarked by election day is one of the deadlines governing the counting and announcing by election officials. Such a deadline merely cuts off the counting by officials of some timely-cast votes, so that officials may announce the final results sooner. In sum, because an election official's time of receipt of a timely-sent mail-in ballot is not part of the choosing by voters, it is not part of the time of the election – and therefore no federal statute requires that an election official receive the ballot by election day.

A. For Presidential Elections, Text Shows Election Day Means The Day By When Voters Choose The Electors.

The article begins with presidential election day because the first election statute enacted under the Constitution to set a single federal election day was the 1845 Election Day Statute and was for presidential elections only. 5 Stat. 721. The substance of the 1845 Election Day Statute, everyone agrees, remains the substance of the statute, 3 U.S.C. § 1, that today governs presidential election day. And when Congress first enacted a congressional election day in 1872, 17 Stat. 28 ("1872 Election Day Statute"), as the Supreme Court has held, Congress picked exactly the same day as under the 1845 Election Day Statute. *See Foster* 522 U.S. at 73-74. *Foster* concluded that federal statutes would never permit a state to force voters "to turn out on two different election days to make final elections of federal officials in Presidential election years." *Id*. at 73.

The Supreme Court has found history "particularly pertinent when it comes to" interpreting federal election provisions. *Moore v. Harper*, 600 U.S. 1, 32 (2023). Accordingly, this part of this article will examine, in mostly chronological order, the texts and contexts of the constitutional and statutory provisions that have governed the presidential election day.

1. Article II, Section 1, Clause 4 Of The Constitution Defines Any Subsequent Presidential Election Day As "the Time of Chusing the Electors."

Articles I and II of the Constitution give Congress less power over popular voting in presidential elections than over popular voting in congressional elections. The Elections Clause in Article I gives Congress power to set "[t]he Times, Places and Manners of holding" congressional elections. Article I, § 4, Clause 1. In contrast, the Electors Clause in Article II gives Congress no power over the "manner" of the vote for electors in presidential elections. Instead, the Legislature of "Each State" is given power over the "manner" in which in that state the electors are "appoint[ed.]" Article II, § 1, Clause 2.

Most important, the power Article II gives Congress to set an election day for appointing electors is very specific. Clause 4 of Section 1 of Article II starts: "The Congress may determine the Time of Chusing the Electors." That's it – the time of choosing the members of the Electoral College, *not* the time of any subsequent activity involving election officials.

Clause 3 of Section 1 of Article II, as readopted in pertinent part by the Twelfth Amendment, confirms that in a presidential election, to elect is to choose by voting. The bulk of Section 3 addresses what occurs when no candidate wins a majority of the electors for president. In that case, the House of Representative elects the President. The manner of doing so is to "chuse by Ballot" and "in chusing the President, the Votes shall be taken by State, the Representation from each State having one Vote." If there was a tie in the electoral vote for Vice President, "the Senate shall chuse from them by Ballot the Vice President."

With respect to what constitutes an election, the Twelfth Amendment made only spelling changes. Every "chuse" became "choose" and every "chusing" became "choosing."

Given Article II's widespread use of "chusing" and "chuse by Ballot" to describe an election, the Founding generation understood that in the many states that would use popular voting to appoint the electors, election day was when the people choose the electors.[4] At the Constitutional Convention, James Madison stated that "[t]he people at large was in his opinion the fittest in itself" for choosing the President. 2 *Records Of The Federal Convention Of 1787* 56 (M. Farrand ed. 1911). In Federalist Paper No. 39, Madison defended the proposed federal Union as meeting the criteria of a republic because "[t]he President is indirectly derived from the *choice of the people*." (Emphasis added.) On January 7, 1789, Madison's state of Virginia used popular voting as the method for choosing its electors. Five other states also used popular voting to choose their electors in the first presidential election. *See McPherson v. Blacker,* 146 U.S. 1, 29-30 (1892). Five states used appointment by the state legislature, and two had not yet ratified the Constitution. *Id.*

The January 7, 1789 day for voting for the electors had been established by the outgoing Articles of Confederation Congress after the ratification of the Constitution. That Congress had enacted a "Resolution of the Congress of September 13, 1788, fixing the Date for the *Election* of a President and the Organization of the Government under the Constitution, in the City of New

[4] The Founding generation understood that whether choosing the electors was done by voting by the people or by voting in the legislature, each constituted an "election." *See infra,,* at 6-7, 10 (discussing and quoting Article II, Section 1, the 1788 Resolution, and the 1792 Election Time Statute); *see also, e.g.*, 4 *The Debates in the Several State Conventions* 404-06 (J. Elliot ed., 2d ed. 1836) (North Carolina ratification debates refer interchangeably to the "choosing of the electors" and "the election" of the electors); Article I, Sections 2- 4 (describing both when Representatives are "chosen … by the People" and when Senators are "chosen by the Legislature" as "Elections"); Article I, Section 6, Clause 2 (describing both Senators and Representatives as "elected").

York." (Emphasis added; available at www.avalon.yale.edu.) (the "1788 Resolution"). The 1788 Resolution set January 7, 1789, as "the day for appointing Electors in the several states."

2. *The 1792 Statute Used "the time of choosing electors."*

In 1792, Congress enacted "An Act Relative to the *Election* of a President and Vice President of the United States . . . ." 1 Stat. 239 (emphasis added). This 1792 Election Time Statute opted not to have a single day for choosing the Electors. Instead, its Section 1 provided that "electors shall be appointed in each state for the election of a President and Vice President of the United States, within thirty-four days preceding the first Wednesday in December." *Id.*

Most important, Section 1 described the time when "the electors shall be appointed in each state" as "the *time of choosing* electors." *Id.* (emphasis added). Specifically, in addressing how many electoral votes each state had, Section 1 added a provision: "That where no apportionment of Representatives shall have been made after any enumeration [census], *at the time of choosing electors*, then the number of electors shall be according to the existing apportionment of Senators and Representatives." *Id.* (emphasis added).

After the Twelfth Amendment was proposed by Congress, Congress in 1804 enacted a supplementary act to the 1792 Election Time Statute. Under the 1804 statute, the "shall be appointed" and "the time of choosing electors" provisions in Section 1 of the 1792 Statute would continue to "extend and apply to every *election* of a President and Vice President of the United States." 2 Stat. 294 ("1804 Statute") (emphasis added). Indeed, the words "shall be appointed" and "the time of choosing electors" are still in in 3 U.S.C. §§ 1 and 3.

3. The 1845 Statute Enacted A Single Day For "choosing electors."

The 34-day period remained the federal time for elections of presidential electors until 1845. By 1845, every one of the 24 states except South Carolina used popular voting for

presidential elections. *McPherson* 146 U.S. at 32. It also had become clear that news of the announced results from the popular voting in some states was settling who would be the next President before the people of other states had even voted. *See Foster*, 522 U.S. at 74.

In 1845, Congress enacted a statute entitled "An Act to establish a uniform time for holding *elections* for electors of President and Vice President in all the states of the Union." 5 Stat. 721 (emphasis added). That 1845 Election Day Statute enacted what has remained the rule in presidential election years that "the Electors of the President shall be appointed in each State on the Tuesday next after the first Monday in the month of November." *Id; see* 62 Stat. 672 (1948) (codifying 3 U.S.C § 1). As of 1845, for the states with popular election of the electors, "appointed" was understood to mean "chosen … by the people." 3 J. Story, *Commentaries on the Constitution*, § 1466 (1833) ("At present, in nearly all the states, the electors are chosen either by the people by a general ticket, or by the legislature.").

The 1845 Election Day Statute thus used "shall be appointed" on election day to mean shall be chosen on election day. Indeed, the 1845 Election Day Statute added an exception that confirmed that the touchstone of election day was voters "choosing electors": "when any state shall have held an *election* for the purpose of *choosing* electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the state by law may provide." 5 Stat. 721 (emphasis added). As explained by a New Hampshire Representative, the trigger for adding this exception was that a New Hampshire statute required a run-off election if, on the day for "the choice of electors," no electors were chosen by "a majority of all the votes cast." Cong. Globe, 28th Cong., 2d Sess. 14 (Dec. 9, 1844) (Rep. Hale).

Moreover, the 1845 Election Day Statute did not repeal but rather left in place "the time of choosing electors" language from the 1792 Election Time Statute. Thus, when Congress, on June 22, 1874, codified the Revised Statutes, the "appointed" provision from the 1845 Election Day Statute and "the "time of choosing electors" provision from the 1792 Election Time Statute were back-to-back as Sections 131 and 132 of Title III. In 1948, these were recodified as 3 U.S.C. §§ 1 and 3. *See* 62 Stat. 672.

It was the case that when the 1792 Election Time Statute and the 1845 Election Day Statute were enacted, popular voting for President was in person, so that the voter's choice and the official receipt occurred on the same day. But that does not modify the import of "the time of choosing electors" language for two reasons. First, as was well known in 1792 and 1845, and remains true, the history of popular elections has been one of innovation and change. Advance voter registration, secret ballots, printed ballots, punch card ballots, voting machines, identification of voters by photo or social security number, and more were once innovations. *See, e.g.,* A. Keysar, *Voter Registration: A Very Short History* 1, available at www. responsivegov.org ("Voter registration laws initially appeared in a handful of states (mostly in the Northeast) during the first half of the nineteenth century.").

As *Classic* held in interpreting "Elections" in the Elections Clause:

> Long before the adoption of the Constitution the form and mode of that expression [of voters' choice of candidates] had changed from time to time. There is no historical warrant for supposing that the framers were under the illusion that the method of effecting the choice of the electors [voters] would never change ….

313 U.S. at 318.

That does not mean anything goes. But what it does mean is that a judge cannot evaluate a legal issue concerning an election innovation based on the judge's policy views that the

innovation is unwise or risky. Those policy issues are for legislatures. Instead, a court must apply the concept of "Elections" to a post-enactment innovation based on the purpose revealed by the pertinent texts. *Id.* Here, the texts of the Constitution, the 1792 Election Time Statute, and the 1845 Election Day Statute reveal that presidential election day is "the time of choosing electors" by the voters.

Second, as explored in the next subsection, before 1845, there already was an established form of presidential voting where the election occurs when votes were cast on a day set by Congress, even though those votes were not first received by any election official until many days later. This system was for the votes of electors for President. Nothing in the 1845 Election Day Statute intimated that Congress was forever banning states from adopting a similar system for the votes of citizens for the electors.

a. *The Election Of The President Occurs Before Electoral Votes Are Received.*

Section 1 of Article II provides that the President and Vice President "be elected" every four years. As our presidential "elect[ion]" process has developed, every presidential election has two elections. (a) In each of the 50 states (and D.C.), citizens choose the presidential electors. (b) On the single day specified by federal statute, in each State (and D.C.), the presidential electors meet and vote by ballot for the President and Vice President.

Article II, Section 1, Clause 4 empowers Congress to determine "the Day on which they [the Electors] shall give their Votes, which day shall be the same throughout the United States." Here, "give their Votes" is a synonym for "cast their ballots." *See Chiafalo*, 591 U.S. at 592 (electors "meet and cast ballots to send to the Capitol"); *id.* at 593 ("Electors have only rarely exercised discretion in casting their ballots for President.").

When the electors "'vote' by 'ballot'" on the day set by Congress, "they do indeed elect a President." *Id.* at 592 (internal quotes in original). That day is when the election of the President and Vice President occurs. What occurs every four years in Washington, D.C., *after* that day – receipt of the electoral votes by the President of the Senate, opening those votes, and counting them by Congress – is not the election itself. Indeed, the 1788 Election Resolution had no procedures for the "Election" of the President after specifying that on February 4, 1789, the electors in each state "assemble . . . and vote for a president." Accordingly, the election of the President by the electors occurs when they cast their votes on the date specified by Congress, *not* on the later days when the votes of the electors are first received by an election official in a different place.

Article II, Section 1, Clause 3, repeated in the Twelfth Amendment, states that the first election official who receives electoral votes is the President of the Senate: "The Electors shall meet in their respective states and *vote by ballot* . . . and they shall make distinct lists" of the "number of votes" for each candidate, "which lists they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, *directed to the President of the Senate*." (Emphasis added.) Thus, no state official acts as an election official who receives electoral votes.

The presidential electors are *not* themselves officials who receive their own electoral votes on the day they cast them. The Supreme Court has twice rejected that presidential electors are officials or act in any other capacity other than as voters. *See Ray v. Blair*, 343 U.S. 214, 224 (1952) ("presidential electors . . . are not federal officers or agents any more than the state elector [voter] who votes for congressmen"); *In re Green*, 134 U.S. 377, 379-80 (1890) ("The sole function of the presidential electors is to cast, certify and transmit the vote of the State for

President and Vice President of the nation . . . . [T]he electors . . . are no more officers or agents of the United States than are . . . the people of the States when acting as electors of representatives in Congress").

Article II did not mention a delivery or receipt day for the votes of the electors. Nor did the 1788 Resolution. Section 2 of the 1792 Election Time Statute was the first provision to address a receipt day.

Section 2 of the 1792 statute starts by requiring the electors to "meet and give their votes on the said first Wednesday in December." 1 Stat. 239. Section 2 added requirements for the electors to make and sign three sealed certificates of "all the votes by them given" and thereafter cause "deliver[y]" of a sealed certificate of their votes to the President of the Senate in at least two ways. *Id.* at 239-40. The first way was that the electors had to appoint a person to "*deliver* [one certificate] to the President of the Senate, at the seat of government, before the first Wednesday in January then next ensuing." *Id.* at 240 (emphasis added). The voting electors thus had *27 to 34 days* after the day on which the election happened to effectuate receipt of their votes by the pertinent government official. The second way was that Section 2 also required the electors to "forthwith forward by the post-office to the President of the Senate, at the seat of government, one other of the said certificates." *Id.* at 240.

Section 4 provided that if both the by-hand delivery and mailed certificates "shall not have been *received* at the seat of government on the said first Wednesday in January" – *28 days or 35 after* the presidential election had occurred – the U.S. Secretary of State was commanded to send a special messenger to the district judge in the pertinent state who had the third sealed certificate, "who shall forthwith transmit the same to the seat of government." *Id.* (emphasis added).

Necessarily, this third sealed certificate would not be received by the President of the Senate until *28 days* or more after the day set by statute for casting the electoral votes.

The 1804 Statute provided that the 1792 Election Day Statute's provisions both for one electoral voting day and for the subsequent delivery and receipt of electoral votes would continue in effect under the Twelfth Amendment. 2 Stat. 295 (1804). These provisions of the 1792 and 1804 Acts remained in effect when and after the 1845 Election Day Statute was enacted. *See* Revised Statutes, Title III, §§ 140-41 (1874).

This is relevant because the Congress that enacted the 1845 Election Day Statute was well aware of the 1792 Election Time Statute and changed only some of its provisions. The 1845 statute changed from the 1792 statute's 34-day period for voters to choose the electors to choosing by a single day, and added a provision for filling vacancies in the electors: "Provided, That each State may by law provide for the filling of any vacancy or vacancies which may occur in its college of electors when such college meets to give its electoral vote." 5 Stat. 721.

But the 1845 Election Day Statute left in the place the provisions in Sections 2 and 4 of the 1792 Election Time Statute under which the presidential election occurs when the electors cast their ballots on the day set by Congress, even though their votes are not delivered to or received by any election official until up to 27 or more days later. Most important, nothing in the 1845 Election Days Statute hinted that it was banning a state from choosing a procedure for the voting *for* electors that resembled the decades-old federal statutory procedure for the voting *by* electors. Put another way, nothing in the 1845 Election Days Statute hinted that it was silently adding a deadline for delivery to or receipt by an election official in the "election for the purpose of *choosing* the electors." 5 Stat. 721 (emphasis added).

4. *The ECRA Did Not Silently Add A Mail-In Ballot Receipt Deadline.*

By election day in 2020, statutes in 19 states and the District of Columbia counted mail-in ballots that were postmarked by election day and were received by election officials by a subsequent specified day. *The Evolution of Absentee/Mail Voting Laws 2020-22, Table 6: Absentee/Mail Ballot Received-By Deadlines*, Nat'l Conf. of State Legislatures ("NCSL") (updated Oct. 26, 2023). Undoubtedly, as is the case now, *see* above at 2, additional states had statutes that counted military and sometimes all overseas votes mailed by election day and received by a later specified day.

After election day in 2020, when election results indicated that the Democratic nominee had won the Presidency, many Republicans publicly argued that the "failed" choice exception from the 1845 Election Day Statute – by 2020 codified as 3 U.S.C. § 2 – enabled state legislatures to award their states' electoral votes to the Republican nominee even *after* the electors had voted. *E.g.,* Motion For Preliminary Injunction And Temporary Restraining Order, at 4-5, 8, 19, 26, 32, 36, filed Dec. 7, 2020, in *Texas v. Pennsylvania,* No. 22O155 ("*Texas*"); Bill Of Complaint In Intervention, at 17-18, filed Dec. 9, 2020, in *Texas*; D. Paul, *Trump Campaign Wants States to Override Electoral Votes for Biden,* WALL ST. J. (Nov. 21, 2020). Congress responded when it enacted the federal Electoral Count Reform Act of 2022 ("ECRA"). In pertinent part, the ECRA (a) defined the term "election day" as continuing to mean the "Tuesday next after the first Monday in November" and (b) replaced the fail-to-make-a-choice exception from the 1845 Election Day Statute with an exception limited to when "prior to such day" a state has enacted a law that extends "the period of voting" when "necessitated by force majeure events that are extraordinary and catastrophic" and such events had occurred. 3 U.S.C. § 21(1). Thus, federal law remained unchanged that, except for the narrower "force majeure"

exception, "[t]he electors of President and Vice President shall be appointed, in each State, on" "the Tuesday next after the first Monday in November." 3 U.S.C. §§ 1, 21(1).

The ECRA's use of the word "election" in 3 U.S.C. § 1 was not new. "Election" or "elections" had been in the title and text of the 1845 Election Day Statute, 5 Stat. 721, the title of the 1792 Election Time Statute, 1 Stat. 239, the text of the 1804 statute that made Section 1 of the 1792 statute continue to "extend and apply to every election of a President and Vice President," 5 Stat. 295, and the 1788 Resolution. *See* above at 6-8, 10. Nothing suggested that in 2022, the reference to "election" in 3 U.S.C. § 1 somehow secretly changed the meaning of "appointed," which had been used as a synonym for "chosen" since the 1792 Election Time Statute and the 1845 Election Days Statute. *See* above at 7-9. This silence was despite the fact that the Republican party and others had objected in 2020 that Pennsylvania (pursuant to a state supreme court decision) and Nevada (pursuant to an express state statute) had violated 3 U.S.C. § 1 by requiring election officials to count mail-in ballots received after election day. *See* Petition for Certiorari, at 32, in *Republican Party of Pennsylvania v. Boockvar,* No. 20-542, filed Oct. 23, 2020; Petition for Certiorari, at 2-3, in *Scarnatti v. Pennsylvania Democratic Party,* No. 20-574, filed Oct. 27, 2020; *Donald J. Trump for President, Inc. v. Cegavske,* 488 F. Supp. 3d 993, 996-97 & n.5 (D. Nev. 2000).

Most telling, the ECRA did not repeal or amend the language dating back to the 1792 Election Time Statute that described when electors were appointed as "the time of choosing electors." That language remains codified in 3 U.S.C. § 3.

5. Summary: To Elect Is To Choose.

Text and history show two things. First, as the Constitution makes plain in Clauses 2 through 4 of Section 1 of Article II, when Congress sets a day as the time for appointing

presidential electors, including by popular vote, that day refers to "the Time of chusing the Electors" by the voters. Second, when statutes in 1792, 1845, and 2022 used "appointed" in the express context of the time of election of the presidential electors, each also meant "the time of choosing electors" by the voters.

Voters choose. In our republic, election officials do not choose the winner. Election officials receive and count votes and announce results. A mail-in voter's choice ends when he or she submits the ballot. A voter cannot choose how fast the mail moves. Because a voter's choice is complete before an election official's receipt of a mail-in ballot, the time of the official's receipt is not part of the time of choosing, appointment, and election of electors.

B. Election Day Means The Same For Congressional Elections.

In 1872, Congress enacted the first federal statute that established a time for congressional elections. The 1872 Election Day Statute stated: "the Tuesday next after the first Monday in November . . . is hereby fixed and established as the day for the election … of Representatives and Delegates to the Congress." 17 Stat. 28. This provision is codified in 2 U.S.C. § 7. And in 1914, what is now 2 U.S.C. § 1 adopted this same day for when "a United States Senator . . . shall be elected by the people." 38 Stat. 384.

From every perspective, "election" day under 2 U.S.C. §§ 1 and 7 is by when the people choose Representatives and Senators. It is not a federal deadline by when an election official must receive a mail-in ballot.

First, *Foster* v. *Love* holds that all three election day statutes "mandate[] holding all elections for Congress and the Presidency on a single day throughout the Union." 522 U.S. at 70. Indeed, the purpose of the later 1872 Election Day Statute was to align its date with the election

date set by the 1845 Election Day Statute. *Id.* at 73-74. Thus, because the 1845 Election Day Statute sets a date by when voters exercise their choice, so must the 1872 Election Day Statute.

Second, "election" in 2 U.S.C. § 7 is literally transplanted from "Elections" in Article I, Section 4, Clause 1 of the Constitution. The established meaning of "Elections" in this Elections Clause is that congressional elections occur when Representatives and Senators are chosen by the people.

Article I, Section 2 stated that "[t]he House of Representatives shall be composed of Members *chosen* every second Year *by the People* of the several states." (Emphasis added.) As Madison stated in Federalist No. 57, "the great body of the people" do the "electing," and "the restraint of frequent elections" render the Representatives "dependen[t] on the people." Clause 1 of Section 3 of Article I likewise focused on who chooses Senators, stating that "[t]he Senate … shall be composed of two Senators from each State, *chosen* by the Legislature." (Emphasis added). (The Seventeenth Amendment transferred that choosing to "the people."). So when Section 4 of Article I refers to "[t]he Times of . . . of holding Elections for Senators and Representatives," it refers to when members of Congress are chosen by voters.

This follows from the decision in *United States v. Classic* that "the authority of Congress, given by § 4 [of Article I]," over congressional "elections" extended to primaries. 313 U.S. at 317. To ascertain "the meaning of § 4 of Article I," *Classic* said, "we turn to the words of the Constitution read in their historical setting." *Id. Classic* interpreted "elections" to embody the "chosen . . . by the People" language that governed congressional elections under Section 2 of Article I and the Seventeenth Amendment's revision to Section 3. *Id.* at 318. *Classic* concluded that "an *election* to public office has been in point of substance *no more and no less than the expression by qualified electors [voters] of their choice* of candidates." *Id.* (emphases added).

For voters who use mail-in ballots, "the expression by [voters] of their choice" occurs when they mail their ballots. Accordingly, under the constitutional definition of "elections" in the Elections Clause –and transplanted into 2 U.S.C. § 7 – an election official's post-choice receipt of a mail-in ballot need not occur within the time set by Congress for a federal "election."

Supporters of the argument that an "election" requires official receipt of mail-in ballots by election day contend that a congressional "election" should be viewed as the "State's process." RNC Opp. at 20. That is completely rebutted by *Classic*'s holding that "Elections" in the Elections Clause embodies the meaning that "[f]rom time immemorial an *election* to public office has been *no more* and no less *than* the expression *by qualified electors [voters] of their choice* of candidates." 313 U.S. at 318 (emphases added). In our Nation, when it comes to choosing the winner of a federal election, election officials have no "choice" in the matter because "here, We the People rule." *Chiafalo*, 591 U.S. at 597.

Third, in construing the 1872 Election Day Statute, *Foster* v. *Love* quoted an 1869 dictionary – and no others – as "defining 'election' as '[t]he act of choosing a person to fill an office.'" 522 U.S at 71 (internal quotations from N. Webster, *An American Dictionary Of The English Language* 433 (C. Goodrich & N. Porter, eds.) (1869)). Given this "choosing" definition, Congress would hardly have used the word "election" in the 1872 Election Day Statute to depart for congressional elections from the voter choice meaning mandated for presidential elections by the words "the Time for chusing the Electors" in Clause 4 of Section 1 of Article II and the similar "choosing" language in the subsequent 1792 and 1845 statutes.

Fourth, as of the 1872 Election Day Statute and after, the "election" of the President and Vice President by the electors was still occurring 27 to 34 days *before* the votes of the electors were due to be delivered to the first election official to receive them, the President of the Senate.

See Revised Statutes, Title III, §§ 135, 140-41 (1874); above at 11-13. Similarly, during the Civil War, three states – Pennsylvania, Nevada, and Rhode Island – had allowed popular voting in the field by soldiers on election day, even though only military officers, but not election officials, were present to receive the votes. *See* Josiah Henry Benton, *Voting in the Field: A Forgotten Chapter Of The Civil War,* 171-73, 186-190, 318 (1915).[5] Those votes were counted even though not received by an election official until after election day. *See id.*

Fifth, substituting the time of receipt by an election official for the exercise of voter choice would enable states to enact procedures that make a mockery of both the "choosing" and "chosen" language in Articles I and II, and the common sense and contextual purpose of all the federal election statutes discussed above that require a single election day. To start, if an "election" does not occur until the deadline for an election official's receipt of mail-in ballots, the federal statutes would enable states to require all voters to stop voting weeks *before* election day. Specifically, a state could (a) adopt all mail-in voting, (b) require voters to postmark their ballots by a given date in October (or earlier), and (c) require that the ballots be received by election day. Indeed, that state could have *different* deadlines for congressional and presidential elections for voters to cast their postmarked mail-in ballots, so long as the state had one ballot-receipt deadline of election day that applied to both elections. Even without that wrinkle, voters would be deprived of any ability to wait until the federal election day in November to make their choices.

Moreover, any other state could adopt a similar scheme but with a required postmarking day in October (or earlier) that was *different* from the first state. Thus, voting could end in different states on different days. None of the federal election day statutes could sensibly be read

[5] *See, e.g.,* 1866 Nev. Stat. 215.

in a way that enables state statutes to require that all votes be submitted long before election day *and* that voting end on different days in different states.

Of course, nothing in *Foster* v. *Love* supports a statutory reading that would allow a state to mandate that all voting *cease before* election day, and different states to have different days when voting stops. *Foster* v. *Love* was entirely about whether federal election day statutes allow *all* aspects of a state's federal election to be completed *before* election day, not which activities involving an election official if they occur *after* election day violate the federal election day statute. In *Foster* v. *Love*, Louisiana held an open primary for congressional offices. For each office, if one candidate received a majority, that candidate was elected to Congress without any voting in November. *See* 522 U.S. at 70. *Foster* stated that "election" in 2 U.S.C. § 7, refers "to the combined actions of voters and officials meant to make a final selection of an officeholder." *Id.* at 71. Because winning a majority in the October open primary meant that neither Louisiana voters nor officials were doing *any act* on election day, 2 U.S.C. § 7 was violated. *Id.* at 72. ("no act in law or in fact [was] to take place on the date chosen by Congress"). *Foster* expressly disclaimed that it was providing any guidance on "what acts a state must cause to be done on federal election day (and not before it) in order to satisfy the statute." *Id.* at 72.

Unlike in *Foster v. Love,* in the 30 states and D.C. that allow the receipt of mail-in ballots from all or some voters after election day, *see* above at 2, their election officials do *not* sit on their hands on election day. To start, they are receiving and processing some mail-in ballots on election day. Indeed, 26 of these states – including Mississippi – and D.C. require election officials to notify voters and alert them that they may cure errors in their ballots. *Table 15: States With Signature Cure Procedures,* NCSL (updated July 17, 2025). Thus, on election day,

election officials in most of the 30 states and D.C. at issue are involved in notice-and-cure procedures for mail-in ballots received on or before that day.

Moreover, all 30 states and D.C. offer an option through election day for some form of in-person voting or dropping off a mail-in ballot at an open election office. Mississippi, for example, offers polling stations manned by election officials on election day in each of its 82 counties. In 2024, in Mississippi, 1,010,752 votes were cast in person on election day. U.S. Election Assistance Commission, *Election Administration and Voting Survey Comprehensive Report*, Overview Table 2: In-Person and Other Modes of Voting 41 (June 2025). In California, 1,836,518 votes were cast in person on election day. *Id.*

Most important, nothing in *Foster* suggests that when a voter submits his or her vote by election day, an election official's receipt of that submission on a later day means that the voter exercised his or her choice on the date of the official's receipt, rather than the date of the voter's submission. Any such suggestion contradicts the touchstone of voter choice that underlies all election day provisions in the Constitution and federal statutes. Suppose, for example, that Soldier Able and Soldier Baker are friends from Mississippi stationed in California. Both soldiers mail their ballots in the same California mail box at the same time, and each envelope is postmarked three days before the election. Able's ballot is received on election day, while Baker's vote is received the next day. How fast the mail moves is not a matter of a voter's choice. If Able's vote is counted while Baker's vote is rejected, voter choice cannot be the reason.

C. A Mail-In Ballot Deadline Regulates The "Manner" Of An Election, Not Its Time.

The reason for setting election day as the mail-in ballot receipt deadline is to enable election officials to be able to count votes earlier and announce election results sooner.

Precedent shows, however, that state rules relating to when to count votes and announce results – including post-election day deadlines after which even properly and timely-cast votes will not be counted – are regulations of the "manner" of holding federal elections, not the time of those elections. Different states are free under current federal law to set different "manner" deadlines. Indeed, the "manner" power truly makes each state what Brandeis called, in another context, "a laboratory" of democracy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

In *Smiley* v. *Holm*, 285 U.S. 355 (1932), the court delineated which are powers over the "manner" of congressional elections, rather than powers "only as to times and places." *Id* at 366. In particular, laws "*in relation to* . . . counting of votes . . . and making and publication of election results" are laws regulating the "manner" of elections. *Id.* at 366 (emphasis added).

In *Bush v. Gore*, 531 U.S. 98 (2000), the three-Justice concurrence written by Chief Justice Rehnquist addressed solely whether the Florida Supreme Court had usurped the Florida legislature's power to prescribe the "manner" of counting and certifying the popular votes in a presidential election. *Id* at 112-14. The concurrence concluded that the Florida Supreme Court had usurped the legislature's "manner" authority by badly misinterpreting statutes relating to, among other things, how and when election officials "count the votes," "provide results," and "certify the results," including "the certification deadline." *Id.* at 116-18. Despite the sharp differences in *Bush v. Gore*, none of the other six Justices suggested that state statutes relating to the counting of votes and certification of results in presidential elections were anything other than laws regulating the "manner" of those elections.

Most important, *Bush v. Gore* treated two post-election deadlines from the Florida legislature that cut off the counting of some properly and timely-cast votes as binding

regulations of the "manner" of the election. First, the concurrence read Florida statutes to give its Secretary of State discretion, once the certification deadline occurred, to reject votes subsequently found by a recount to be cast timely and properly. *Id.* at 117-18. Second, the *per curiam* majority opinion said that the Florida "legislature intended" the counting of ballots to stop in time to meet the optional federal December 12 date in 3 U.S.C. § 5, which in 2000 made conclusive a state's determination in a controversy or contest of which electors won. *Id.* at 110. The *per curiam* opinion therefore stopped the recount in Florida on December 12, without regard to whether some timely and properly-cast votes remained to be counted. *Id.*

A post-election day deadline for receiving mail-in ballots is like the other "manner" deadlines discussed in *Bush v. Gore.* A mail-in receipt deadline for ballots mailed by election day embodies the state legislature's policy judgment, in its exercise of its "manner" power, as to what is the day on which reaching finality in the *counting* by officials of votes justifies a deadline that cuts off their counting of some properly and timely-cast mail-in votes.

This is confirmed by the opinions of three Justices in 2021 who dissented from the denial of certiorari in *Republican Party of Pennsylvania v. Degraffenreid,* 141 S. Ct. 732 (2021) ("*RPP*"). In *RPP,* petitioners had challenged the Pennsylvania Supreme Court's extension of Pennsylvania's mail-in ballot receipt deadlines for both presidential and congressional elections from election day, as a Pennsylvania statute required, to three days later. *Id.* at 733 (Thomas, J., dissenting). Justice Thomas stated there was a "strong argument" that the Pennsylvania Supreme Court had violated the Elections and Electors Clauses by usurping the "state legislature['s] authority to determine the '*Manner*' of federal elections." *Id.* at 733-34 (emphasis added). Justice Alito, joined by Justice Gorsuch, agreed with Justice Thomas that the Court should have granted certiorari over whether the Elections and Electors Clauses had been violated. *Id.* at 738.

None of the Justices even mentioned the other question presented by the petitioners, *see* above at 15, namely, whether the federal election day statutes had been violated.

D. Neither The Executive Branch Nor The Federal Courts Should Arrogate The Unexercised Power Of Congress To Set A Federal Mail-In Ballot Deadline.

Some who assert that post-election mail-in ballot receipt deadlines are preempted argue that otherwise a state could enact a deadline 100 days after election day, or the like. Pet. App. in *Watson*, at 26a. That line of argument should be rejected because it amounts to "fear mongering on the basis of extreme hypotheticals," *Trump v. United States*, 603 U.S. 593, 640 (2024). In the decades of mail-in ballots in popular federal elections, there is no reported instance of the post-election day receipt of a mail-in ballot causing a state to miss any of its own post-election deadlines for counts, recounts, protests, contests, certification, or anything else. Much less that any mail-in ballot receipt deadline caused a congressional seat to be empty on January 3 of the following year, or the casting of a presidential electoral vote to be late. States want more representation in Congress and more electoral votes, not less.

In all events, Congress has the power to fix any hypothetical problem that a state's mail-in ballot receipt deadline may pose to federal elections. First, because mail-in ballot receipt deadlines are an issue of the "manner" of congressional elections, *see* above at 22-23, Article I's Elections Clause gives Congress the power to set those deadlines and preempt state law. 2 U.S.C. §§ 7 and 1, however, do not even address the manner of congressional elections, only their time. Indeed, their codified titles are "Time for election of Senators," 2 U.S.C. § 1, and "Time of Election." 2 U.S.C. § 7.

Congress also has the power to set a mail-in ballot receipt deadline in presidential elections, even though Article II gives only the states power over the "manner" of choosing electors. This is because a state's exercise of its "manner" power under Article II is constrained

by the other provisions "in the Constitution." *Chiafalo,* 591 U.S. at 588-89 & n.4. A proper federal statute enacted under the Necessary and Proper Clause in Article I, Section 8, Clause 18 is one such constraint. That Clause gives Congress the power to make laws "necessary and proper for carrying into Execution . . . all . . . powers vested by this Constitution in the Government of the Unified States, or in any Department or Officer thereof."

The Necessary and Proper Clause gives Congress the power to set deadlines in presidential elections relating to counting the popular votes and announcing the results. One such deadline would be a mail-in ballot receipt deadline, if it was the view of Congress that such a deadline helps ensure the timeline for vesting the powers of the Presidency and Vice Presidency in the elected winners – including the timely meeting and voting of presidential electors in mid-December of every presidential election year, the timely counting of electoral votes by Congress in early January of the following year, and the timely start of the exercise of power by the elected President and Vice President by noon on January 20 of that following year. *See Burroughs v. United States,* 290 U.S. 534, 545 (1934) (Congress has power over presidential elections derived from its power to enact laws "essential to preserve the departments and institutions of the general government from impairment and destruction").

In the ECRA in 2022, Congress used its power under the Necessary and Proper Clause to set a deadline of six days before the meeting of the electors for the "executive of each state" to "issue a certificate of ascertainment of appointment of electors." 3 U.S.C. § 5(a)(1). In stark contrast, however, even though the Republican Party and others in 2020 had complained that the mail-in ballot receipt deadlines of Pennsylvania and Nevada extended after election day, *see* above at 15, Congress set no deadline with respect to a state's receipt of mail-in ballots.

Because setting a federal deadline for receipt of mail-in ballots in presidential elections would have to rely on the Necessary and Proper Clause, one would expect Congress to make any such mail-in ballot receipt deadline reasonably clear in the statutory text. *See Bond* v. *United States*, 572 U.S. 844, 857-60 (2014) (requiring clearer expression for a Necessary-and-Proper statute to displace state law in an area usually allocated to state law); *United States* v. *Gladwell*, 243 U.S. 476, 485 (1917) ("whenever Congress has regulated federal elections, it has done so by positive and clear statutes").[6] For example, Congress was clear in Sections 2 and 4 of the 1792 Election Time Statute that it was specifying a day for when electoral votes were to be "deliver[ed]" to and "received" by the President of the Senate. 1 Stat. 230-40; *see* above at 12.

3 U.S.C. § 1 certainly does not expressly nor reasonably clearly set a day for receipt of mail-in ballots in a popular presidential election by a state election official. *See* RNC Opp. at 20 (conceding that one meaning of "election" is "the 'voter's choice'"). Instead, the textual and historical focus on voter choice in the pertinent constitutional and statutory provisions clearly shows that the federal election day statutes have never set any such deadline. *See* above, 7-9, 13-18.

Neither the federal executive branch nor federal courts should arrogate to themselves the policy judgment whether, to enable state officials to announce final results sooner, voters who cast their ballots by mail must send their choices sufficiently *before* election day so that their ballots are received by election day by an election official. The Constitution and the federal election day statutes have left that policy judgment to each state legislature. Thus, it is for each state, not the federal executive branch or federal courts, to make the policy judgment on whether

[6] Beyond the scope of this article are the strong arguments for applying the major questions doctrine to the statutory meaning of election day because of the critical political significance of elections, as well as the impossibility of separation of powers without congressional control of federal election issues.

a state's election officials must receive mail-in votes by election day or may receive by a later deadline ballots postmarked by election day.