

RNC v. Wetzel

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Abstract

A recent federal court decision upholding a state's rejection of timely cast absentee ballots received after Election Day illustrates a growing threat to voting rights. By making the right to vote contingent on postal speed over voter compliance, such a ruling risks widespread disenfranchisement, particularly of military voters, overseas citizens, students, disabled voters, and the elderly, threatening a system in which lawful votes are routinely discarded. This Article argues that such interpretations misread historical practice, distort Supreme Court precedent, and undermine election integrity, since federal law permits states to count ballots cast by Election Day even if received afterward. Legal scholarship has largely converged on the view that uniform Election Day statutes regulate when voting ends, not when ballot receipt must occur, a position supported by historical practice, federal legislation, and Supreme Court precedent. Recent judicial redefinitions of “casting,” “finality,” and “consummation” invert voter-centric election law and actively erode public confidence by transforming routine election administration into routine disenfranchisement.

I. Introduction

In *Republican National Committee v. Wetzel* (2024), the U.S. Court of Appeals for the Fifth Circuit addressed whether MS Code § 23-15-637, a law permitting state election officials to count absentee ballots cast before or on election day but received up to five business days after election day, was preempted by federal law.¹ The Mississippi provision ensures that timely cast ballots are still counted despite mail-processing delays.² This prevents the disenfranchisement of voters who submitted their absentee ballots in time, but whose ballots arrived after Election day due to circumstances beyond their control. For decades, states have adopted similar provisions to safeguard the voting rights of military members serving abroad, travelling workers, the disabled, and others.

Mississippi's provision was challenged by the Republican National Committee, alleging that the

¹ *Republican Nat'l Comm. v. Wetzel*, 120 F.4th 200 (5th Cir. 2024).

² MS Code § 23-15-637 (1) (a) (2024)

five-day receipt window was preempted by the federal statute establishing a uniform national Election Day for Members of Congress. The district court rejected that challenge, finding no preemption.³ On appeal, the Fifth Circuit rejected Mississippi’s approach, holding that it was preempted by the federal statute requiring a uniform national election day for Members of Congress.⁴ In the Fifth Circuit’s view, receipt of a ballot after Election Day prevents the election’s completion on the federally prescribed day, and therefore renders Mississippi’s five-day window an unlawful extension of the election itself, even when the voter met every deadline within their control.⁵

Although the Fifth Circuit frames its decision as necessary to protect electoral integrity, *Wetzel* threatens to unsettle more than a century of absentee-ballot practice. By discarding valid ballots, the decision risks disenfranchising broad swaths of the electorate, especially military voters, rural voters, transient workers, and students, without any evidence that such ballots pose a meaningful risk of fraud. More fundamentally, the reasoning departs from the historical understanding of Election Day statutes and misreads precedent from both the Supreme Court and circuit courts.

This article argues that *Wetzel* is mistaken on history, doctrine, and policy. Part I situates Mississippi’s ballot deadline within the broader history of absentee voting and federal Election statutes. Part II explains the Fifth Circuit’s holding. Part III explains why precedent does not support the Fifth Circuit’s sweeping conception of “holding an election” on a single day. Part IV explains why the Fifth Circuit’s reasoning does little to prevent fraud and instead may erode public confidence by discarding legitimate ballots. Finally, Part V explores how the Supreme Court is likely to rule on the current version of this case *Watson v. RNC* (2025) given both historical practice and the Court’s recent federalism jurisprudence.

II. The History of the Absentee Ballot

Absentee ballots are as old as the United States. In 1775, as the Revolutionary War began, soldiers from Hollis, New Hampshire petitioned their town for permission to vote in an upcoming local election, despite being deployed. The town allowed their votes to count “as if the men were present themselves.”⁶ Indeed, the driving force behind absentee voting provisions were designed to ensure soldiers the franchise.

The Antebellum era saw minimal growth in the absentee ballot. However, there were limited experiments with absentee ballots tied to military service. Pennsylvania was the first state to

³ *Republican Nat’l Comm*, 120 F.4th at 5

⁴ *Id.* At 2-3.

⁵ *Republican Nat’l Comm*, 120 F.4th at 12

⁶ Hon. Samuel T. Worcester, *Town of Hollis, N.H., in the War of the Revolution*, 30 *New England Historical & Genealogical Register* 288, 293 (1876)

legalize absentee balloting in 1813, permitting members of the military serving in the War of 1812 to vote by mail if they were stationed more than two miles from their homes.⁷ Shortly thereafter, New Jersey enacted a similar law in 1815, although it repealed that provision in 1820.⁸ These early statutes were exceptions to the dominant practice of in-person voting and were rarely expanded to broader electorates before the Civil War.

However, absentee voting reemerged in the Civil War. Both the Union and Confederacy adopted widespread absentee voting systems to ensure that soldiers in active combat could participate in elections.⁹ During the war, nineteen out of twenty-five states in the Union and seven out of eleven states in the Confederacy allowed for some form of absentee voting.¹⁰ In the Union, there was a clear divide between supporters and opponents of absentee voting. Republicans supported legislation to provide voting to soldiers, whereas Democrats opposed them. The main reason for this is that Republicans believed the soldiers would support Lincoln's war efforts, and the Democrats feared that they would vote Democrats out of the government. This echoes modern divides between Republicans and Democrats on absentee ballots, but in the opposite direction: Democrats tend to favor absentee ballots,¹¹ whereas Republicans are more likely to oppose those measures, for the exact reason that Democrats opposed absentee ballots during the Civil War: those measures would create an influx of Democrat votes that might replace Republicans come the next election.

After the Civil War, absentee voting stagnated. By 1915, only Michigan, Kansas, Maine, New York, Nevada, Rhode Island, and Kansas kept military voting statutes.¹² Many other states had deactivated absentee voting provisions in their Constitutions.

World War I accelerated the adoption and expansion of absentee ballot legislation across the states. Confronted with the mobility of large numbers of workers, states moved to formalize mechanisms that allowed qualified voters to cast ballots outside their home precincts.¹³

States responded with a patchwork of new absentee voting systems. Two models emerged: the Kansas/Missouri Model and the North Dakota Model.¹⁴ The Kansas/Missouri Model allowed

⁷ Act of March 29, 1813, ch. 3769, 1812-1813 Pa. Laws 70.

⁸ "Voting Resources: Voting: A History." Pence Law Library, 16 Sept. 2024, wcl.american.libguides.com/voting/history.

⁹ John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 483, 492 (2003).

¹⁰ *Id.* at 493

¹¹ Daniller, A. (2024, July 9). Republicans, Democrats continue to differ sharply on voting access. Pew Research Center.

<https://www.pewresearch.org/short-reads/2024/07/09/republicans-democrats-continue-to-differ-sharply-on-voting-access/>

¹² *Supra* note 7 at 501.

¹³ *Id.* at 504

¹⁴ *Id.* at 505

any voter temporarily away from home to appear at any polling place in the state, cast a ballot, and have that ballot mailed back to the voter's home precinct for counting. This system prioritized intrastate accessibility: if a worker lived in Kansas City but was assigned to a factory in Wichita on Election Day, they could still vote without returning home.

The North Dakota Model required voters to apply for an absentee ballot ahead of time. Election officials mailed the ballot to the voter, who then completed it in the presence of a notary or other designated official before mailing it back.¹⁵

Neither model was perfect. The North Dakota statute sought to balance absentee voting with ballot secrecy by imposing witnessed procedures that mimicked the privacy of the polling place, though it could not fully eliminate the risk of coercion or dishonest officials.¹⁶ The Kansas/Missouri model compromised ballot secrecy by placing the voter's name on the ballot itself, allowing not just election officials but also anyone who opened the ballot to identify the voter.¹⁷

Nevertheless, both reflected the same principle that drove absentee voting since 1775: the mechanics of employment, military service, or travel should not limit participation in democratic life.

World War II accelerated these developments. With sixteen million Americans serving in the armed forces, the federal and state governments faced enormous pressure to protect the franchise. Congress passed the Soldier Voting Act of 1942, later amended in 1944, to facilitate absentee voting for soldiers.¹⁸ By the end of the war, more than 3.2 million absentee ballots had been cast.¹⁹ This administrative success demonstrated the feasibility of large-scale absentee voting and also its necessity in a modern, mobilized society.

Absentee voting did not recede when the emergency of war did. Rather, the postwar decades saw further developments in voter accessibility. In efforts to increase voter turnout, states lowered the burden for a valid absentee ballot request.²⁰ California, for instance, adopted a no-excuse absentee law, allowing any voter to request an absentee ballot without providing a reason.²¹

¹⁵ *Id.*

¹⁶ *Id. at 503*

¹⁷ *Id. at 504*

¹⁸ Soldier Voting Act of 1942, Pub. L. No. 77-712, 56 Stat. 753 (1942) (originally titled "An Act to provide for a method of voting, in time of war, by members of the land and naval forces absent from the place of their residence"), amended by Act of Dec. 7, 1944, Pub. L. No. 78-712, 58 Stat. 795.

¹⁹ Molly Guptill Manning, Fighting to Lose the Vote: How the Soldier Voting Acts of 1942 and 1944 Disenfranchised America's Armed Forces, 19 N.Y.U. J. Legislation & Public Policy 345, 370 (2016).

²⁰ Lee, Sal, Judicial Review of Absentee Voting Laws: How Courts Should Balance State Interests Against the Fundamental Right to Vote Going Forward, 105 Iowa Law Review 803 (2020).

²¹ Cal. Elec Code § 3000.5 (2024)

Oregon shifted to an all vote-by-mail system and has used this method since 2000.²² Washington created a system of permanent absentee status, automatically sending ballots to voters who requested vote-by-mail, eliminating the need to reapply each cycle.²³ Texas took absentee voting beyond planetary boundaries, adopting Rule 81.35, which enables astronauts on the International Space Station to cast ballots electronically. As of now, 14 states require an excuse to cast absentee ballots, and 36 states and the District of Columbia do not require an excuse to vote by absentee ballot.²⁴

The onset of COVID-19 accelerated this trajectory.²⁵ During the 2018 midterm elections, over 58% of voters cast their ballots in person on Election Day.²⁶ The pandemic radically reshaped that statistic. To minimize public health risks associated with polling places, states almost universally adopted mailed ballot applications to all registered voters. During the 2020 presidential election, the most common method of voting nationwide was voting by mail, with approximately 45% of all voters casting a ballot by mail.²⁷

III. The Decision in *RNC v. Wetzel*

The constitutional issue in *RNC v. Wetzel* began during the COVID-19 pandemic. In 2020, Mississippi amended its constitution 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.”²⁸ Since then, Mississippi has retained that deadline.

On January 26, 2024, the Republican National Committee, the Mississippi Republican Party, and two individuals filed a suit in the Southern District of Mississippi alleging that the Act was unconstitutional. A week later, the Libertarian Party of Mississippi filed an identical suit alleging the same. The plaintiffs claimed that federal Election Day statutes established a single, uniform day for choosing members of Congress and appointing presidential electors. As such, any ballots received after Election Day were considered invalid.²⁹

In overturning Mississippi’s receipt-deadline law, the Fifth Circuit first examined the Constitution. The Elections Clause of the United States Constitution allows states to determine

²² Oregon Ballot Measure 60 (1998)

²³ Rev. Code of Wash. 29A.40.010 (2024)

²⁴ Movement Advancement Project. "Availability of No-Excuse Absentee Voting."

https://www.mapresearch.org/democracy-maps/absentee_requirements. Accessed 12 April 2026

²⁵ Tex. Admin. Code § 81.35 (2000)

²⁶ Lopez, Ashley. "Mail Voting Is Still Pretty Popular, Even without the Pressure of the Pandemic." NPR, 2023, www.npr.org/2023/07/03/1185843074/mail-voting-is-still-pretty-popular-even-without-the-pressure-of-the-pandemic.

²⁷ Hannah Hartig et al. *Voter Turnout, 2018-2022*. Pew Research Center, 12 July 2023, www.pewresearch.org/politics/2023/07/12/voter-turnout-2018-2022/.

²⁸ Act of July 8, 2020, ch. 472 § 1, 2020 Miss. Laws 1411; MISS. CODE § 23- 15-637(1)(a).

²⁹ *Republican Nat'l Comm*, 120

the “Times, Places, and Manner” of choosing Senators and Representatives, but grants Congress the authority to override those regulations.³⁰ States can regulate many elements of Federal Elections, but Congress can establish “uniform rules for federal elections” that override the regulations of the State.³¹ Applying that understanding, the Fifth Circuit read Congress’s uniform Election Day statutes as exercises of its Elections Clause authority that fix not only when voting must occur, but also when the election itself must be completed. On that view, Mississippi’s acceptance of absentee ballots received after Election Day constituted an impermissible extension of the federal election beyond the single day mandated by Congress, and therefore fell outside the State’s power under the Elections Clause.³²

The Fifth Circuit relied heavily on *Foster v. Love* (1997). In *Foster*, Louisiana conducted congressional elections under an “open primary” system in which the candidate receiving a majority in the primary, which was held before the federally assigned Election Day, would win the office outright.³³ The Supreme Court, in a unanimous decision, struck down Louisiana’s open primary system, holding that both 2 U.S.C. Section 1 and 7 preempt their law. The *Foster* court defined three key concepts: official action, finality, and consummation.

Official action requires that an election involve some degree of governmental action. In other words, the election of a Representative or Senator involves the “combined actions of voters and officials” required for a “final selection of an officeholder.”³⁴ The Fifth Circuit holds that a ballot is only “cast” when the “State takes custody of it.”³⁵

Finality refers to the point at which the state has completed the legally operative steps necessary to select the officeholder, requiring not only the electorate’s ballots but also the electors’ final selection. Distinguishing a voter’s selection of a candidate from the public’s selection of that candidate, the Fifth Circuit defined an election as concluded when the “final ballots are received” and the electorate, not the individual selector, has chosen.”

The Fifth Circuit points to Mississippi’s own regulations to reject the state’s argument that a ballot becomes “final” when the voter mails it. Under Mississippi law, an absentee ballot does not become a “final vote” until the Resolution Board receives, accepts, and processes it. Since state rules tie finality to post-receipt official action, the court concluded that Mississippi’s statutory scheme contradicts its claim that the election is finalized at the moment of mailing.

The Fifth Circuit further claims that mail-in ballots are less final than in-person ballots because

³⁰ U.S. Const. art. I, § 4

³¹ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–33 (1995)

³² *Republican Nat’l Comm*, 120 at 3-4.

³³ *Foster v. Love*, 522 U.S. 67 (1997) <https://supreme.justia.com/cases/federal/us/522/67/>

³⁴ *Id.* at 71

³⁵ *Republican Nat’l Comm*, 120 F.4th at 9

mailers can recall their votes. The postal service allows senders to recall mail, thereby reducing the finality of a mail-in ballot.³⁶

Consummation addresses the moment when the electorate's decision becomes fixed and cannot be changed under state law. In *Foster*, Louisiana's system violated consummation because a candidate could secure victory *before* the federal Election Day simply by winning a majority in the primary. It rendered the election result as effectively final prior to the uniform election date Congress established. This, according to *Foster*, conflicted with the original purpose of uniform Election Days, since non-uniform elections would allow the results of a state with an earlier election day to come out before later states, possibly influencing voters. Where *Foster* treated consummation as a limit on elections concluding too early, the Fifth Circuit in *Wetzel* transformed it into a requirement that all ballots be received by Election Day.

The Fifth Circuit concluded that receiving the last ballot constitutes "consummation of the election," which must happen on Election Day because "officials know there are X ballots to count" when the ballot box is closed.

Applying the analysis of the three concepts from *Foster*, the Fifth Circuit found Mississippi's absentee recipient law unconstitutional.

IV. The Court Misuses *Foster*

The Fifth Circuit used a faulty interpretation of *Foster v. Love* to reach its decision.

Foster makes clear that its holding is narrow and should not be read to unsettle the finer doctrinal distinctions that structure state authority in this area. The Court repeatedly emphasized that it was not attempting to define every act that must occur on Election Day, nor to specify how states must structure voting, counting, or receipt. Rather, the decision addressed only the constitutionality of concluding a federal election before Election Day.

Justice Souter underscored this limited scope:

"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."³⁷

³⁶ See U.S. Postal Service, *Package Intercept Service*, USPS.com (describing circumstances under which senders may request interception or recall of mailed items). See *infra* 36 (explaining why this reasoning is flawed).

³⁷ *Foster v. Love*, 522 U.S. 67 at 72

The Supreme Court emphasized that it is *not* deciding when ballots must be received, how counting must proceed, or what administrative acts must occur on Election day. All it held was that States may not finish elections before Congress’s designated day. Yet, the Fifth Circuit’s holding uses the decision to turn on such niceties: the minute details that govern Election Law, dissecting it into three characteristics of an election to determine whether ballot receipt must occur before the end of Election Day. In short, *Foster* advises against using its decision to decide critical sections of the Fifth Circuit’s reasoning.

Secondly, the definitions that the Fifth Circuit outlines go against its conclusion that ballot receipt must happen by the end of Election Day. The first factor, “official action,” is defined as “the combined actions of voters and officials meant to make a final selection of an officeholder.”³⁸ Instead of asserting that all administrative processing actions—ballot receipt, verification, and tabulation—must occur by the end of Election Day, the Fifth Circuit acknowledges that such a situation would be extremely difficult. Rather, the Fifth Circuit isolates just one component of the administrative process—ballot receipt—and elevates it into the sole act that must occur before Election Day ends. This internal inconsistency exposes the fragility of the Fifth Circuit’s reasoning. If official action truly encompasses the “combined actions” of voters and state officials, then no coherent principle distinguishes ballot receipt from all other official actions performed by election administrators come the closing of the polls. Verification and tabulation undoubtedly qualify as “official action.” The only reason why such processes can occur after the election is because it is independent of the selection process, as the votes are locked and unchangeable. Why, then, must receipt be treated differently?

The Fifth Circuit turns to the definition of “casting” a ballot to defend why ballot receipt must occur before Election day ends. The Fifth Circuit defines a ballot as “cast” only when the state takes custody of it, meaning receipt, not voter action, controls the legal status of the vote.³⁹ Under that view, a voter who completes every step required of them in a timely fashion still has not voted if the ballot has not yet entered state possession.

Their definition of a cast ballot is flawed.

A cast ballot does not require that it be received by its intended recipients. In ordinary usage, a voter *casts* a ballot when they mark it and transmit it in the manner the law mandates, whether by depositing it into a voting machine, ballot box, or by placing it into the mail. Everyday language reflects this understanding: we say that a voter “cast her absentee ballot last week,” not that she cast it *only once the registrar opened the envelope*. Federal statutes like the Help America Vote Act (HAVA) support this definition.

³⁸ *Republican Nat’l Comm*, 120 at 8 (quoting *Foster*)

³⁹ See *supra* note 26

Section 21082 of Title 52 in HAVA, governs the use of provisional ballots and makes clear distinctions between casting, receiving, and counting a vote.⁴⁰ Under the statute, when an individual appears to vote but their eligibility is questioned, the individual must nonetheless be permitted to cast a provisional ballot after delivering a written affirmation that they are registered and eligible. The statute repeatedly refers to this act as the voter having “cast” a ballot at the moment of submission, even though the ballot’s validity has not yet been determined. For example, “the individual shall be permitted to cast a provisional ballot at that polling place...before an election official” and the official must “transmit the ballot cast by the individual” to an appropriate tabulation area. Only if the voter is later found eligible is the ballot counted. Importantly, the statute requires that voters be given information about how to learn their ballot was counted at the time they cast it, further emphasizing the legislative intent that casting and counting are distinct stages. Nowhere does Section 21082 define “cast” to mean receipt, verification, or tabulation by the state, which demonstrates the many requirements surrounding an official’s handling of a *cast ballot*. Instead, the statute’s wording reflects Congress’s ordinary understanding of the term: a ballot is cast when the voter completes the legally required steps to submit it through the authorized process, even though subsequent administrative actions determine whether that ballot will ultimately be counted. The same legislation allows for individuals to vote after an election as the result of a court order extending the deadline, which contradicts the Fifth Circuit’s theory of consummation. If casting truly required receipt by Election Day, then ballots submitted after Election Day under court order could not be cast at all. Yet Congress explicitly authorizes those ballots and treats them as votes that are cast and later counted if valid. Federal law therefore recognizes casting as a voter action that can occur after Election Day when legally authorized. It is not a state-controlled event fixed to receipt deadlines.

Another concern of the Fifth Circuit is that voters might write ballots and stuff it into drawers, never to be found, yet this completely mischaracterizes what constitutes casting a ballot. Casting a ballot only necessitates selecting a candidate and turning the ballot in. Our legal system routinely recognizes this distinction in other contexts. A mailed tax return may be filed when deposited in the mailbox, even though it is not yet received by the IRS; a contract sent by mail may be accepted upon dispatch (the “mailbox rule”), even though the offeree has not yet received notice.⁴¹ The law does not make the exercise of a legal right contingent on the speed or efficiency of an intermediary. The Fifth Circuit’s insistence that a ballot is not “cast” until the state physically takes custody subordinates the voter’s constitutional act to the mechanics of mail delivery, an inversion of the very right the system exists to protect.

⁴⁰ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (Oct. 29, 2002), reprinted in *Guide to Federal Election Statutes*, Sec. 302 (“Provisional voting and voting information requirements”).

⁴¹ *Houston v. Lack*, 487 U.S. 266, 270–72 (1988) (treating a prisoner’s court filing as complete upon delivery to a government-designated intermediary rather than upon receipt by officials).

Even under the Fifth Circuit’s premise that ballots must fall under state custody before the end of Election Day, Mississippi law satisfies this. Absentee ballots must be placed in the custody of the USPS or other common carriers and must also be “postmarked on or before the date of the election.”⁴² At that point, the ballot is meaningfully in the stream of the election process and subject to the State’s procedures for delivery and processing.

Treating the State’s designated carrier as part of the voting chain is consistent with basic principles of agency and election administration. When a voter inserts a ballot into a precinct ballot box, no one disputes that the ballot has been cast. A postmarked absentee ballot is the functional equivalent: the ballot has been legally transmitted into the State’s custody system, even though it has not yet been physically handled by an election official.⁴³ The Fifth Circuit’s claim that such ballots remain outside State custody, and thus outside the election, until they arrive at an elections office artificially disregards the structure Mississippi itself created for securely receiving absentee ballots. The State authorized USPS and other common carriers as its intermediary; a voter who follows that law has done everything required to cast a valid vote.⁴⁴

Thus, even under the Fifth Circuit’s own theory, Mississippi’s deadline requiring deposit and postmark by Election Day ensures that ballots are within the State’s designated custodial chain before the close of polls. The only thing occurring after Election Day is administrative processing, which *Foster* explicitly permits and no election system can avoid. The Fifth Circuit’s attempt to declare those ballots uncaptured by state authority ignores both the statutory design and the practical reality of mail-based voting.

Furthermore, the Supreme Court has already weighed in on casting versus receipt. In *Republican National Committee v. Democratic National Committee* (2020), the Court stayed a United States District Court for the Western District of Wisconsin ruling that commanded election officials to count ballots postmarked after Election Day. Noting that extending the ballot deadline fundamentally alters the essence of the election, the Court clearly distinguished the *time that casting a ballot is valid* from *allowing timely cast ballots to be received*.⁴⁵ Holding that extending the casting time is invalid, the Court’s phrasing presupposes that a ballot may be “cast” even though it has not yet been “received by the municipal clerks.”⁴⁶ That directly contradicts the Fifth Circuit’s claim that a ballot cannot be “cast” until the State physically possesses it.

⁴² MS Code § 23-15-637 (2024)

⁴³ *Id.* see section 3, which directs the Secretary of State to safely store all absentee ballots for counting.

⁴⁴ Restatement (Third) of Agency § 1.01 (2006) (defining agency as acting through an authorized intermediary)

⁴⁵ *Republican National Committee v. Democratic National Committee*, 589 U.S. ____ (2020)

⁴⁶ *Id.* at 2

On finality, the Fifth Circuit again departs from *Foster*'s logic. In *Foster*, finality referred to the moment when the voters' choice becomes fixed since no additional voting could affect the outcome and a candidate had secured the office. The problem in *Foster* was that Louisiana's law allowed that moment of finality to occur before the federal Election Day, eliminating any role for the uniform national day in determining the winner. The Court's concern was that the election would be over too soon.

Under that definition, Mississippi's absentee ballot system fully complies: voting ends on Election Day, and no additional ballots may be cast thereafter. The people's choice is therefore final at poll closing, regardless of ballot receipt.

The Fifth Circuit's argument that domestic absentee ballots are "less final" because USPS theoretically permits certain mail pieces to be recalled mischaracterizes both the regulations and the nature of finality in election law.⁴⁷ The Postal Service's mail-recall procedures exist to allow the retrieval of misaddressed mail or mail sent in error, but they do not grant voters a lawful opportunity to alter or withdraw a ballot after submission.⁴⁸ Nor would such a situation allow a recalled ballot to be counted, since any recalled and recast ballot would have to receive a postmark on a post-Election Day date, which Mississippi law rejects.⁴⁹

Thus, the Fifth Circuit's mail recall theory transforms a rare administrative safeguard into a constitutional rule of disenfranchisement. Finality is determined by lawful voter action, not by the availability of a postal correction procedure that becomes unlawful the instant it is used on a submitted ballot.

The Fifth Circuit's treatment of consummation also conflicts with both precedent and its own logic. It held that an election is not "consummated" until the last ballot is received and the "ballot box is closed."⁵⁰ Under this framing, so long as ballots are still arriving, the election remains "ongoing." But this approach misunderstands what consummation means in election law. As *Foster* applies the concept, consummation refers to the completion of the act of selecting an officeholder, not the moment when all ballots physically reach election officials. That act is complete when voting ends, not when mail delivery ends. Once the polls close, whether physically or through timely casting by mail, the electorate's decision is fixed. The number of outstanding ballots may be unknown until arrival, but the opportunity to change the result no longer exists. The Fifth Circuit claims that counting received ballots after Election Day does not extend the election because officials "know there are X ballots to count," meaning the box is

⁴⁷ *Republican Nat'l Comm*, 120 at 10

⁴⁸ See *supra* note 27

⁴⁹ See *supra* note 36

⁵⁰ *Republican Nat'l Comm*, 120 at 11

effectively closed.⁵¹

Yet this conflates knowing how many ballots exist with determining when voting is over. In reality, counting and receiving delayed ballots are indistinguishable in their effect on consummation. Both occur after the voters have finished voting and neither allows additional voting opportunities. The Fifth Circuit's definition of consummation drifts from *Foster's* concern about elections concluding too early, and instead treats routine post-Election Day election administration as an improper extension of the election itself. Under a correct understanding of consummation, Mississippi's system fully complies: voting ends on Election Day, and no candidate may be chosen before that date. What occurs afterward is not the continuation of the election. Rather, it is the implementation of the voters' final choice.

Taken together, the Fifth Circuit's applications of *official action*, *finality*, and *consummation* misread the Supreme Court's framework in *Foster* and stretch a narrow holding into a sweeping restriction with no historical or doctrinal basis. *Foster* prohibits states from ending federal elections before the uniform day, but it expressly declined to prescribe the precise administrative actions that must occur on that day. The Fifth Circuit flips this logic upside down: instead of preventing elections from concluding too early, it invalidates ballots merely because they arrive too late, even though voters cast them on time. Under any faithful reading of precedent, Mississippi's law complies with federal requirements because the electorate's decision becomes fixed, and the election is complete in the constitutional sense, when the opportunity to vote ends on Election Day. The decision in *Wetzel* is therefore not an application of controlling precedent, but a departure from it.

V. Preventing Election Integrity

The Fifth Circuit frames its decision as necessary to protect election integrity and public confidence. However, the approach adopted in *Wetzel* does very little to prevent fraud. Worse, it threatens to undermine confidence in the legitimacy of elections.

Available evidence does not demonstrate increased risk of fraud from post-election receipt deadlines. Election security reports across the country consistently demonstrate that mail-in voting is secure and that ballots arriving after Election Day are subject to multiple layers of verification, including signature matching and serial number checks.⁵² The purported risk the Fifth Circuit seeks to address simply has not been shown to exist.

Empirical evidence likewise offers no support for the Fifth Circuit's fear that accepting ballots received after Election Day opens the door to fraud. Multiple analyses confirm that mail-voting

⁵¹ *Id.* at 12

⁵² Mail Voting Accuracy. (2024, March). Brennan Center for Justice. <https://www.brennancenter.org/our-work/research-reports/mail-voting-accuracy>

fraud is extraordinarily rare. One study drawing from twenty years of reported cases concluded that such instances represent “only 0.00006% of individual votes nationally.”⁵³ The implementation of multi-layered security checks, as well as stringent and harsh penalties for committing voter fraud, strongly contributes to these low instances of fraud.⁵⁴

Oregon, which has conducted universal vote-by-mail elections since 2000, has “documented only about a dozen cases of proven fraud out of more than 100 million mail-in ballots.”⁵⁵ Likewise, a technical report issued by the American Statistical Association found “no evidence that voting by mail increases the risk of voter fraud overall,” estimating that Washington State would have experienced only a negligible increase in fraud cases had it not adopted universal vote-by-mail.⁵⁶ Comparable data from non-universal mail states reflects similarly negligible rates. In Pennsylvania, for example, election data spanning roughly three decades and more than 100 million ballots revealed only thirty-nine proven instances of voter fraud.⁵⁷

Prohibiting the counting of ballots cast on time but received later does not meaningfully reduce fraud. It merely disenfranchises lawful voters in the millions based on postal timing rather than any risk to electoral integrity in the name of preventing a handful of fraudulent ballots. Implementing this might lead to a cycle of disenfranchisement, where those who were stripped of their political power are further disenfranchised through stricter voting laws on the next election. This would create policies that further neglect their needs, reducing their political power, and deepening their alienation from democracy, creating a feedback loop of exclusion and disadvantage.

More importantly, the court’s rule does not actually prevent any unlawful votes from being counted. The only ballots it excludes are those cast by eligible voters who followed every legal requirement within their control. It prevents what Mississippi policymakers sought to guarantee: that the act of voting is completed when the voter performs the duties assigned to them. By shifting the consequences of delivery timing onto the voter rather than the state or postal system, the court’s ruling ensures that administrative timing failures, not voter behavior, will cast votes. Election integrity is not strengthened when citizens who comply with the law lose their ability to participate because the mail ran slowly.

⁵³ Amber McReynolds and Charles Stewart III. “Let’s Put the Vote-By-Mail “Fraud” Myth to Rest.” The Hill, 28 Apr. 2020, thehill.com/opinion/campaign/494189-lets-put-the-vote-by-mail-fraud-myth-to-rest/.

⁵⁴ See Brennan Center for Justice, *Mail Voting Accuracy* (noting multilayered security checks including signature verification, bipartisan review, and unique tracking systems to ensure mail ballots are secure and legitimate).

⁵⁵ NYT Editorial Board, “Opinion | The 2020 Election Won’t Look like Any We’ve Seen Before.” The New York Times, 21 Mar. 2020, www.nytimes.com/2020/03/21/opinion/sunday/coronavirus-vote-mail.html.

⁵⁶ Auerbach, J; Pierson, S. Does voting by mail increase fraud? Estimating the change in reported voter fraud when states switch to elections by mail. *American Statistical Association, Office of Science Policy*. (26 Oct. 2020)

⁵⁷ Kamarck, E. (2024, October 28). How widespread is election fraud in the United States? Not very. Brookings. www.brookings.edu/articles/how-widespread-is-election-fraud-in-the-united-states-not-very

The decision also destabilizes public confidence in the electoral system by undermining longstanding voting practices relied upon across the nation. For more than a century, states have routinely received and counted absentee ballots after Election Day, particularly those cast by members of the armed forces and voters living or working away from home. Congress has repeatedly enacted legislation requiring states to accept late-arriving ballots from military and overseas voters. Most notably, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986 guarantees that ballots cast by service members abroad must be counted if cast by Election Day, even if they arrive later.⁵⁸ Congress strengthened that mandate through the Military and Overseas Voter Empowerment (MOVE) Act of 2009, requiring states to provide sufficient transmission time to ensure overseas ballots can be returned and received after Election Day.⁵⁹

These federal statutes reflect the consistent legislative intent of counting timely ballots cast that arrive late. As demonstrated by historical expansion of absentee ballots, national policy has long favored flexibility in receipt deadlines to protect the franchise, not rigid cutoffs that discard valid votes. By calling into question the legitimacy of ballots that voters lawfully mailed on time, the Fifth Circuit’s decision disrupts an established framework that millions of Americans view as essential to participating in the democratic process. Abruptly eliminating those protections does not reassure voters that elections are fair and accurate. Instead, it makes them question whether their valid votes will count at all.

Another practical concern raised by amici for Mississippi is the problem of multiple elections operating simultaneously under different timing rules. The Fifth Circuit’s rigid receipt-by-Election-Day rule applies only to federal contests because it is derived from federal statutes. States remain free to allow later-arriving ballots for state and local offices. Under the decision in *Wetzel*, the same absentee ballot could therefore be validly counted for a governor, state representative, or county commissioner, but discarded for U.S. House or Senate.

Local election officials would be required to separate ballots based solely on which contests appear on the page and whether they arrived in a particular mail delivery window after Election Day. Election administrators cautioned in the Multistate Amicus Brief filed in support for Watson that such a bifurcated system would entail “double the printing and counting of ballots, additional voter education to avoid confusion, increased risk of error, and other significant costs on the states.”⁶⁰ This dramatically increases administrative burden, error risk, and voter confusion. While the Fifth Circuit suggested that this complexity is constitutionally irrelevant, meaning it is not the Constitution’s job to reduce such burdens, amici correctly warns that such

⁵⁸ 52 U.S.C. §§ 20301–20311

⁵⁹ Pub. L. No. 111-84, §§ 577-83(a)

⁶⁰ Multistate Amicus Brief in Support of Respondents, *Watson v. Republican National Committee* (U.S. 2025). At 13

inconsistency will be obvious to voters. If their ballot is good enough to choose a mayor but not a member of Congress, the choice is not integrity but arbitrariness. When different parts of the same ballot are treated as simultaneously valid and invalid, it can only increase skepticism that elections reflect the will of the people rather than the technicalities of mail delivery.

Finally, the harm that the Fifth Circuit purports to protect against precisely damages confidence in democracy. When results hinge not on voter intent but on the speed of mail processing or when election offices complete their intake work, the public is more likely to view elections as arbitrary rather than reflective of the will of the people.

If valid ballots cast by these citizens are discarded solely because the mail arrived slowly, the outcome will not be restored confidence but rather deepen distrust in the system. Voters are already weary of delayed election results. Research from the Yankelovich Center for Social Science Research at the University of California San Diego shows that delays in reporting election results can erode voter trust in the integrity of the electoral process, but early communication from Election officials can mitigate that erosion.⁶¹ This suggests that voter skepticism about slow election outcomes is real, and a system that discards those legitimately cast votes would not help mitigate that skepticism.

When voters who are already anxious about fraud are told afterward that their timely ballots did not count, it serves as confirmation of their skepticism. A rule purporting to protect integrity by throwing out lawful votes therefore risks accelerating the very crisis of legitimacy that currently threatens American democracy.

Voters may lose faith in elections because lawful ballots are counted a day or two late.⁶² Yet, they will likely lose even more faith when they are told their lawful ballots never mattered. The Fifth Circuit's theory of election integrity is backward. It preserves no meaningful protection against fraud and instead creates a real and widespread threat to public confidence by discarding legitimate voter participation that the democratic system should protect.

VI. Conclusion

The Fifth Circuit's decision in *RNC v. Wetzel* rests on a misreading of precedent and a misplaced conception of election integrity. For nearly 250 years, American election systems have been designed to ensure that citizens who cast their ballots on time are not disenfranchised by circumstances beyond their control. *Foster v. Love* prohibits states from concluding elections before the uniform Election Day; it does not require that every ballot be received by the end of

⁶¹ Kiderra, I, *Election Officials Can Boost Voter Trust in Delayed Results with Early Communication*, UC San Diego Today (Oct. 15, 2024).

⁶² *Id.*

that day. Federal legislation, including UOCAVA and the MOVE Act, confirms this understanding by mandating ample time for absentee ballots for certain groups of people to be transmitted and returned after Election Day. The Fifth Circuit's analysis reverses this longstanding practice and transforms administrative timing into a constitutional barrier to counting legitimate votes.

Nor does the court's rule serve the purpose it invokes. There is no empirical link between post-Election Day ballot receipt and fraud. Instead, the decision threatens to discard only lawful votes cast by eligible Americans who did exactly what the state told them to do. Disqualifying their ballots not only strips them of their rights, but also reinforces the very distrust that currently undermines public confidence in the electoral system. A vision of integrity that guarantees the rejection of valid votes is not a safeguard of democracy but a threat to it.

The Supreme Court has now taken up this question, and its answer will shape whether absentee voting remains a meaningful guarantee of the franchise. The Constitution mandates a single day when the Election ends. Mississippi's system honors that mandate by closing the voting window at the end of Election Day and counting only ballots cast in time. That is all that federal law requires, and it is what democratic legitimacy depends on. Upholding the Fifth Circuit's rule would abandon centuries of election practice and deprive countless Americans of their right to participate in the democratic process. The Supreme Court must reaffirm what history, doctrine, and common sense already make clear: Election Day marks the close of voting, not the closure of democratic participation.

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