

No. 24-1260

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## In the Supreme Court of the United States

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MICHAEL WATSON, MISSISSIPPI SECRETARY OF STATE,  
PETITIONER,

*v.*

REPUBLICAN NATIONAL COMMITTEE, ET AL.

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

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### **BRIEF OF AMICUS CURIAE NATIONAL DEFENSE COMMITTEE SUPPORTING PETITIONER**

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JOHN N. MAHER  
*Counsel of Record*  
KEVIN J. MIKOLASHEK  
MAHER LEGAL SERVICES PC  
*122 North Wheaton Ave.,*  
*P.O. Box 1386*  
*Wheaton, IL 60187*  
*(708) 468-8155*  
*john@maherlegalservices.com*

SAMUEL F. WRIGHT  
*1202 Elmwood Dr.*  
*Marlin, TX 76661*  
*(254) 743-9547*  
*samwright50@yahoo.com*

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## **INTERESTS OF *AMICUS CURIAE*<sup>1</sup>**

The National Defense Committee, *Amicus Curiae* here, is a U.S. military veteran-serving nonprofit advocacy and services organization organized under Section 501(c)(4) of the Internal Revenue Code. It advocates on behalf of servicemembers in the following areas: military voting rights; military and veteran health care; veteran education benefits; and due process/veterans' gun rights.

## **SUMMARY OF ARGUMENT**

For more than a century and a half, Congress and the States have confronted a recurring and unavoidable problem: citizens serving the Nation in uniform are often unable to return their ballots by Election Day even when they vote on time. From the Civil War through the modern era of global military deployments, the Nation's experience has demonstrated that rigid election rules—particularly rigid timing rules—operate not as neutral administrative measures, but as mechanisms of disenfranchisement for service members stationed far from home.

The historical record confirms this point. During the Civil War, States adopted absentee and field-voting mechanisms so that Union soldiers could vote despite distance and delay, and those ballots were counted as part of the election even when logistical realities required flexibility. By contrast, during World War I, the absence of a comprehensive federal framework left military voting almost entirely to the States, resulting in the effective disenfranchisement of millions of service members in the

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<sup>1</sup> No counsel for a party authored this brief in whole or in part. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties were given timely notice of *amicus*'s intent to file this brief.

1918 federal elections. That failure was widely acknowledged in later decades and became a driving force behind subsequent congressional action. During World War II and the Korean War, Congress again confronted the same problem and experimented with federal absentee ballots, recognizing that military service made ordinary election timelines unworkable.

Those lessons culminated in the enactment of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (“UOCAVA”), as strengthened by the Military and Overseas Voter Empowerment Act of 2009 (“MOVE Act”). UOCAVA reflects Congress’s settled judgment that the right to vote must not depend on whether a service member’s ballot can traverse oceans, war zones, and military postal systems in time to satisfy rigid receipt deadlines. Instead, Congress designed a comprehensive federal framework to ensure that military and overseas voters can cast ballots that actually get counted.

The decision of the United States Court of Appeals for the Fifth Circuit disregards that judgment. By interpreting the federal election-day statutes—2 U.S.C. §§ 1 and 7 and 3 U.S.C. § 1—to impose a rigid receipt-by-Election-Day rule, the court below adopted a construction that predictably disenfranchises overseas service members and other UOCAVA-protected voters. Those statutes establish a uniform national day for federal elections; they do not impose a ballot-receipt deadline or prohibit States from counting absentee ballots that are timely cast by Election Day but received shortly thereafter.

This Court’s decision in *Foster v. Love*, 522 U.S. 67 (1997), does not compel the Fifth Circuit’s result. *Foster* addressed a state scheme that effectively completed the election and selected federal officers before the federally prescribed Election Day. *Id.* at 71–73. The constitutional defect in *Foster* was not that votes were counted after

Election Day, but that the election itself was concluded beforehand. Counting absentee ballots that are lawfully cast by Election Day but received after that date due to ordinary administrative or mail delays does not extend the election beyond the federal day; it merely completes the tabulation of votes cast as part of that election.

Congress directly addressed the realities underlying that distinction in UOCAVA. Recognizing that military and overseas voters face delays inherent in service abroad, Congress required States to transmit absentee ballots to UOCAVA-protected voters at least forty-five days before federal elections, authorized electronic transmission of ballots, created a federal write-in absentee ballot as a fail-safe, and empowered the Attorney General to bring civil actions to enforce these guarantees. 52 U.S.C. §§ 20302–20307. Congress understood that even these protections might not always suffice, and it therefore authorized federal enforcement mechanisms designed to prevent disenfranchisement when ballots are transmitted late or delayed in transit.

Consistent with that design, when States fail to meet UOCAVA’s timing requirements or when overseas mail delays threaten to invalidate timely-cast ballots, the federal government has repeatedly sought—and federal courts have ordered—extensions of ballot-receipt deadlines beyond Election Day so that those ballots may be counted. That remedial practice is not incidental; it is the only means by which UOCAVA’s guarantees can be made effective. The Fifth Circuit’s interpretation would render Congress’s chosen remedy unlawful, converting UOCAVA from a protective statute into an empty promise.

The Fifth Circuit’s decision also conflicts with this Court’s long-standing instruction that statutes affecting those who serve in the Armed Forces must be construed liberally in their favor. *See Fishgold v. Sullivan Drydock*

*& Repair Corp.*, 328 U.S. 275, 285 (1946) (“[L]egislation is to be liberally construed for the benefit of those who left private life to serve their country.”); *Boone v. Lightner*, 319 U.S. 561, 575 (1943). That canon reflects the recognition that service members operate under constraints that civilians do not. Resolving statutory ambiguity against military voters—and invalidating their ballots because of mail delays inherent in overseas service—reverses that settled principle and converts unavoidable service-related obstacles into forfeiture of the franchise.

Finally, the Fifth Circuit’s rigid receipt rule destabilizes the balance Congress struck between federal authority and state election administration. States have long counted absentee ballots that are timely cast but received after Election Day, and Congress legislated against that backdrop when it enacted UOCAVA. Nothing in the federal election-day statutes suggests an intent to prohibit that widespread and longstanding practice, particularly where doing so would disenfranchise the very voters Congress sought most urgently to protect.

For these reasons, the Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit and hold that States may count absentee ballots that are timely cast by Election Day, including ballots cast by UOCAVA-protected voters, even when those ballots are received shortly after Election Day.

## ARGUMENT

### I. HISTORICAL BACKGROUND

#### A. Absentee Voting By Union Army and Navy Soldiers and Sailors In The Civil War

With regard to soldier voting in the Civil War, the American Battlefield Trust has reported:

For the first time since 1812, a presidential election occurred during a war. As voting rights

had expanded for male voters in the mid-19th Century, the challenge of letting volunteer soldiers vote in the election became a much-discussed topic. Voting qualifications were still controlled by states; women were not allowed to vote, and only a handful of northern states allowed African American men to vote. Absentee voting came under discussion and was allowed for the first time in United States history. Plans were also put in place for soldiers to vote in their military camps. For northern states that did not allow absentee voting, provisions were often made for soldiers to be sent home for furloughs to vote in their hometowns during the autumn months. Nineteenth Century-style conspiracy theories ran wild that voting fraud would be rampant through the methods of allowing soldiers to vote. Election officials made extra efforts to ensure the honesty of the election, and most voting soldiers also took their vote and method of casting a ballot seriously.

Voting in the 1860s did not include secret ballots, so whether voters cast their ballots in their hometowns or in a military camp, their votes were not secret. Voting was seen as a community and civic event, and the “community” of soldiers in military camps during the Civil War became a key voting bloc in the 1864 Election.

The outcome of campaigns and battles where soldiers literally fought impacted the election and the soldiers’ vote was also recognized as an important voice for the outcome of the conflict. Both militarily and politically, Union soldiers showed their preference for a victory outcome and national unity—even though that meant they would stay, serve, and fight through the end of the military conflict.

Throughout the summer of 1864, Confederate victories and high Union casualties filled the newspapers. Battles like Mansfield, Cold Harbor, Brice's Crossroads, Kennesaw Mountain, and The Crater put Confederate triumphs into the headlines. However, overall campaign success swung in the Union's favor as United States Armies continued to advance and captured key strategic Confederate strongholds despite heavy losses. The Overland Campaign in Virginia eventually pinned the Confederate Army of Northern Virginia at Petersburg and put pressure on the Confederate capital at Richmond. The United States Navy and Army captured Mobile Bay in Alabama during August 1864. Then, Union troops under General William T. Sherman captured Atlanta.

Politics and the election filled letters between soldiers and their correspondents on the home front. Though women could not vote, they often participated in local political gatherings and had strong opinions on state and national candidates. Women sometimes encouraged soldiers to vote in certain ways or took an interest in hearing how the men planned to vote.

Uncertainty hung over the soldiers' vote. McClellan had been a popular Union general, still beloved by many of the soldiers who had marched under his command. However, Lincoln and the National Union Party stood for a victory that would reunite the country and give meaning to the sacrifices and losses the soldiers had witnessed or suffered. For soldiers who also wanted to see the abolition of slavery, victory and voting with the National Union Party offered a better chance of success for that goal and a constitutional amendment. Many soldiers influenced their home-voters and their comrades to vote—usually for Lincoln's re-election and with harsh words toward "Copperheads" and peace without victory. Aware of the recent battlefield victories—some of which they had fought to win—soldiers understood the folksy slogan of

the Lincoln campaign: “Don’t change horses in the middle of the stream.” Military victories were adding up, and the end of the Confederacy and the war was in sight through victory.

Throughout Union army camps in the autumn of 1864, soldiers lined up to cast their ballots or election tickets into the box for their preferred party and candidate. These votes would be counted with the others of their state and help determine the political fate of the country. The recent victories at Mobile Bay and Atlanta and the near immobility of Lee’s army at Petersburg kept the chances of Union victory strong, influencing both the home front and soldier vote.

Confederates knew a political victory for the Democratic Party would give them their best chance in 1864 for separation and a quick end to the war through the efforts of the Peace Democrats who split and influenced that party in this election cycle.

When the votes were tallied across the northern states—including the votes of soldiers in distant camps—President Lincoln had won a second term with 55% of the popular vote and 212 electoral votes. McClellan won the electoral votes of just three states: Kentucky, Delaware, and New Jersey. Of the 40,247 Union soldiers who voted, 30,503 voted for Lincoln—75.8% of the Union citizen-soldiers.

A few months after the election, President Lincoln took the oath of office for the second time in March 1865. In his second inaugural address, he shared his hopes for reuniting the country after the end of the Civil War:

*With malice toward none; with charity for all;  
with firmness in the right, as God gives us to see  
the right, let us strive on to finish the work we are  
in; to bind up the nations wounds; to care for  
him who shall have borne the battle, and for his*

*widow, and his orphan to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations.*

While all Union soldiers did not agree with Lincoln's ideals, they had voted and continued to fight for victory. These citizen-soldiers would be part of the path beyond the war, finding peace and redefining their victories in the decades ahead. The experiences of soldiers in the Civil War influenced their votes for years to come, and the usage of absentee ballots during 1864 also added new voting precedents to the American quest for democracy and voting rights.<sup>2</sup>

#### **B. Absentee Voting By United States Service Members In World War I**

World War I exposed the consequences of failing to provide a comprehensive federal framework for military absentee voting. Unlike the Civil War—when States adopted a variety of absentee and field-voting mechanisms to accommodate soldiers in the field—Congress enacted no uniform federal system to protect the voting rights of service members during World War I. Military voting was left almost entirely to disparate state laws, many of which made no provision for absentee voting at all or imposed registration and voting requirements impossible to satisfy for citizens serving overseas.

As Congress later acknowledged, this state-by-state approach resulted in the practical disenfranchisement of large numbers of service members during the 1918 federal elections. In reviewing the Nation's wartime voting experience, the House Committee on House Administration concluded that “large numbers of men in the Armed Forces were unable to vote” during World War

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<sup>2</sup> <https://www.battlefields.org/learn/articles/election-1864-and-soldiers-vote>.

I because existing state laws failed to provide absentee voting mechanisms for soldiers serving away from home. H.R. Rep. No. 77-181, at 2-4 (1941).

The Senate reached the same conclusion. In considering legislation to address military voting during World War II, the Senate Committee on Privileges and Elections observed that during World War I “the absence of uniform absentee voting procedures resulted in the practical disfranchisement of many soldiers.” S. Rep. No. 77-481, at 1-3 (1942). The Committee emphasized that reliance on state law alone had proven inadequate to protect the franchise of citizens serving in uniform during wartime.

This congressional recognition of World War I as a failure of military voting policy is significant. It demonstrates that disenfranchisement of service members was not hypothetical or incidental, but a foreseeable consequence of rigid election rules and the absence of federal safeguards.

The lessons of World War I directly informed Congress’s subsequent efforts during World War II and beyond to ensure that military service would not again operate as a barrier to participation in federal elections.

### **C. Absentee Voting By United States Service Members in World War II**

With regard to voting by United States military personnel during World War II, the National World War II Museum has reported:

During World War II, more than 16 million Americans served in uniform. Approximately 11.5 million men and women served overseas, and the remainder often served thousands of miles away from their homes even when stationed within the United States. To ensure that these service members continued to be represented in their government, Congress passed bills in 1942 and 1944

intended to guarantee that American soldiers could vote in wartime elections for federal offices. Although the bills fell short of their ambitious goal, the 1944 bill permitted millions of soldiers to cast absentee ballots in the federal election that year.

The idea of allowing soldiers to cast absentee ballots had a precedent in an earlier American war. During the Civil War, some states within the Union passed laws enabling soldiers to vote using mail-in ballots in the election of 1864. Other states sent commissioners into the field to record soldiers' votes. Many politicians during the Civil War, however, feared that soldiers would blindly vote for their commander-in-chief, President Abraham Lincoln. As a result, some states did not make any provision for soldiers to vote. The state officials who willfully disenfranchised soldiers may have felt their actions were justified when Lincoln captured 78 percent of soldiers' votes and 55 percent of the popular vote. After the war, most of the laws enabling soldiers to vote expired, and no provisions were made at the national level for soldiers to cast absentee ballots in the 1918 congressional elections during World War I.

The Soldier Voting Act of 1942 once again attempted to give soldiers the ability to vote, but it was not without controversy. Some legislators feared that the federal government's attempt to create a uniform absentee ballot and dictate election procedures trespassed on states' sovereignty. Yet many states' election laws made no provision whatsoever for soldiers to vote using absentee ballots, and half a dozen states made no provision for absentee ballots at all. While nearly all congressmen agreed in principle that soldiers should be able to vote, some resisted having the federal government create a uniform procedure for enabling it.

Debate over the bill divided legislators along both partisan and regional lines. Initial drafts of the bill

mandated that no soldier would be required to pay a poll tax or make any other type of payment in order to vote. This provision infuriated representatives of the eight southern states (all former members of the Confederacy) that continued to use poll taxes in order to disenfranchise African American voters. Some congressmen accused their southern colleagues of blocking the Soldier Voting Act's passage just because it might benefit African Americans in uniform.

Representative John Jennings of Tennessee vehemently declared that African Americans "are citizens of this country, they are its defenders, and they have the right to vote." With less than two months to go before the election of 1942, Jennings and his allies finally secured the votes necessary to override supporters of the poll tax. The final bill was signed into law on September 16, 1942. Among the bill's provisions, it guaranteed that "every individual absent from the place of his residence and serving in the land or naval forces of the United States" was entitled to vote in elections for federal offices." It also contained a provision which stated that "No person in military service in time of war shall be required, as a condition of voting in any election... to pay any poll tax."

In the wake of this improbable victory, the bill still failed to live up to its sponsors' hopes. A mere 28,000 service members, out of nearly four million men and women in uniform in 1942, voted in the election. While the late passage of the bill gave states little time to prepare ballots and send them to soldiers, the bill also failed to make any provisions for soldiers serving overseas to vote. This omission stemmed from the opinion of War Department representatives, who informed Congress that the demands of wartime shipping and slow mail service overseas would preclude the return of overseas soldiers' ballots by the election.

In response to the Soldier Voting Act's abject failure, Congress sought to revise it in time for the November 1944 election. The War and Navy Departments supported the adoption of a universal ballot that would allow soldiers to write in the candidates they wished to vote for in federal elections. Although such a ballot required soldiers to know the names of the candidates they wished to support and did not allow them to vote in local elections, it enabled ballots to be printed and distributed before the final nominating conventions were held by each political party. A uniform ballot had the additional benefit of reducing weight and eliminating the need for soldiers to individually request a ballot.

Despite the advantages of a universal federal ballot, some congressmen again took issue with the proposal. President Franklin D. Roosevelt was seeking an unprecedented fourth term as president and his margin of victory in 1940, 5 million votes out of nearly 50 million votes cast, indicated that the estimated 9,225,000 Americans in the armed forces who were of voting age (at least 21 years old) could easily determine the 1944 presidential race. As polls suggested that a majority of American soldiers planned to return President Franklin D. Roosevelt to the White House, Republicans and conservative Democrats resisted measures that would make it easier for soldiers to vote.

Republican Senator Robert Taft of Ohio, the leading opponent of the bill, insisted that the ballots should bear the names of candidates for office. Taft and his colleagues believed that, given a blank ballot, many soldiers would vote for the only president they had known for the past 11 years. Taft also expressed his doubts that officials in Roosevelt's government would facilitate a fair election, and he once again raised the issues of poll taxes and state voter registrations. Even though these obstacles had been overcome in the 1942 bill, Taft sought to reignite the

debate in order to prevent the new bill's passage. As Taft expected, southern senators joined him in opposing the bill and defending poll taxes. Louisiana Senator John Overton declared to his colleagues that "we have got to retain our constitutional rights to prescribe qualifications of electors, and for what reason? Because we are bound to maintain white supremacy in those States." The debate dragged on into the spring of 1944 with both parties accusing the other of trying to manipulate the outcome of the presidential election through the bill.

The bill that finally passed in April 1944 appeased both sides by encouraging states to amend their own absentee ballot procedures to enable soldiers to vote. Alternatively, state governors could choose to adopt the "Official Federal War Ballot."

Ultimately, 20 states authorized the use of the ballot, which required soldiers to write the names of the candidates they wished to vote for. Incredibly, the bill stated that no ballot could be declared invalid even if a soldier made a mistake in writing a candidate's name, provided that "the candidate intended by the voter is plainly identifiable." This victory was marred by the fact that, unlike the Soldier Voting Act of 1942, the 1944 bill enabled states to collect poll taxes from soldiers.

It is difficult to accurately assess the full impact of the soldier vote in the 1944 election. Approximately 3.4 million absentee votes were cast in the 1944 election, with President Franklin D. Roosevelt winning reelection to a fourth term by a margin of slightly more than 3.5 million votes. Although the Soldier Voting Act of 1944 was a success compared to its earlier iteration, only 25 percent of service members voted in 1944 compared to more than 55 percent of the population as a whole. Nevertheless, the bill gave millions of men and women in uniform a voice in their government during a global war in which few soldiers of other nations enjoyed the same privilege.

#### **D. Absentee Military Voting In The Korean War**

In a 1952 letter to Congress, during the 1950-53 Korean War, President Harry S. Truman wrote:

About 2,500,000 men and women in the Armed Forces are of voting age at the present time.<sup>3</sup> Many of those in uniform are serving overseas, or in parts of the country distant from their homes. They are unable to return to their States either to register or to vote. Yet these men and women, who are serving their country and in many cases risking their lives, deserve above all others to exercise the right to vote in this election year. At a time when these young people are defending our country and its free institutions, the least we at home can do is to make sure that they are able to enjoy the rights they are being asked to fight to preserve.<sup>4</sup>

President Truman's letter is included in a 1952 report of the Subcommittee on Elections, Committee on House Administration, United States House of Representatives, concerning voting rights for military personnel fighting the Korean War.<sup>5</sup>

The 1952 congressional report also includes the testimony of the Honorable C.G. Hall, the Secretary of State of Arkansas, and President of the National Association of Secretaries of State. He testified that military personnel in Korea and elsewhere were likely to

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<sup>3</sup> At the time, and until the 26<sup>th</sup> Amendment was ratified on July 1, 1971, the minimum age for voting was 21.

<sup>4</sup> President Harry S. Truman, Message to Congress, Special Committee on Service Voting of the American Political Science Association, Mar. 28, 1952 (avail. at <https://www.trumanlibrary.gov/library/public-papers/96/letter-secretary-defense-voting-servicemen>).

<sup>5</sup> 82 Cong. Rec. 4376-78 (1952)

be disenfranchised because late primaries, ballot access lawsuits, and other problems made it impossible for local election officials (LEOs) to print and mail absentee ballots until a few days before Election Day.<sup>6</sup>

In his 1952 letter, President Truman called upon the States to fix this problem, and he called upon Congress to enact *temporary* federal legislation for the 1952 presidential election. He wrote: “Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954.”<sup>7</sup>

Well, it did not work out that way. Congress did not enact temporary military voting legislation for the 1952 presidential election, and there was no concerted effort in the State legislatures to fix this problem before the congressional elections of 1954. The Korean War grounded to an inconclusive halt in 1953 and this issue dropped off the national radar screen.

#### **E. The Federal Voting Assistance Act of 1955**

On August 9, 1955, President Dwight D. Eisenhower signed into law the Federal Voting Assistance Act of 1955 (FVAA).<sup>8</sup> This law created the Federal Voting Assistance Program in the Department of Defense (DOD). The FVAA was intended to assist military service members, civilian Federal Government employees, and their families in casting absentee ballots. The FVAP’s responsibilities include:

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<sup>6</sup> 82 Cong. Rec. 4376-78 (1952).

<sup>7</sup> President Harry S. Truman, Message to Congress, Special Committee on Service Voting of the American Political Science Association, Mar. 28, 1952 (avail. at <https://www.trumanlibrary.gov/library/public-papers/96/letter-secretary-defense-voting-servicemen>).

<sup>8</sup> 69 Stat. 584.

- (A) Provide military voters with nonpartisan information about voter registration and assistance with the absentee voting process.
- (B) Produce and distribute voting resources to election officials, Voting Assistance Officers, and voters to help them utilize the absentee voting process.
- (C) Inform States of their responsibilities and the particular challenges that military personnel face in the absentee voting process.

The FVAP did not have the authority to require the States to adjust their election calendars, such as moving primaries back to earlier in the year, to enable LEOs to print and mail absentee ballots sufficiently early so that overseas military personnel will have the opportunity to cast ballots that really do get counted, no matter where the service of our country has taken them.

#### **F. Overseas Citizens Voting Rights Act of 1975**

On January 2, 1976, President Gerald R. Ford signed into law the Overseas Citizens Voting Rights Act (OCVRA).<sup>9</sup> The provisions of this law included the following:

Affords each citizen residing outside the United States the right to register absentee for, and to vote by, an absentee ballot in any Federal election in the State, or district of such State, in which he was last domiciled immediately prior to his departure from the United States and in which he would have met all qualifications to vote in Federal elections, if he has complied with all applicable State or district qualifications and requirements that are consistent with this Act.

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<sup>9</sup> Public Law 94-203, 89 Stat. 1142.

Requires States to provide for the absentee registration and the casting of absentee ballots in Federal elections by citizens residing outside the United States.

Empowers the Attorney General to bring actions to enforce this Act. G. Uniformed and Overseas Citizens Absentee Voting Act

On August 28, 1986, President Ronald Reagan signed into law the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).<sup>10</sup> This law consolidated the FVAA and the OCVRA and enacted important new provisions.

On its website, the Civil Rights Division of the United States Department of Justice (DOJ) states the following about UOCAVA:

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) was enacted by Congress in 1986. UOCAVA requires that the states and territories allow certain groups of citizens to register and vote absentee in elections for Federal offices. In addition, most states and territories have their own laws allowing citizens covered by UOCAVA to register and vote absentee in state and local elections as well.

The Civil Rights Division's website also informs that: United States citizens covered by UOCAVA include:

- members of the United States Uniformed Services and merchant marine;
- their family members; and
- United States citizens residing outside the United States.

Among its key provisions, UOCAVA provides for an application called the Federal Post Card Application

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<sup>10</sup> Public Law 99-410, title I, § 101, Aug. 28, 1986; 100 Stat. 924.

(FPCA) that qualified servicemembers and overseas citizens can use to register to vote and request an absentee ballot simultaneously. The law also allows for the use of a "back-up" ballot for federal offices, called the Federal Write-in Absentee Ballot (FWAB). This ballot may be cast by voters covered by the Act who have made timely application for, but have not received, their regular ballot from their state or territory, subject to certain conditions.

In 2009, a subtitle of the National Defense Authorization Act for Fiscal Year 2010, titled the Military and Overseas Voter Empowerment Act (MOVE Act) amended UOCAVA to establish new voter registration and absentee ballot procedures which states must follow in all federal elections. The amended UOCAVA is available [here](#).

Most of these new procedures were implemented by the November 2010 general election. As amended by the MOVE Act, UOCAVA now requires state officials to:

- provide UOCAVA voters with an option to request and receive voter registration and absentee ballot applications by electronic transmission and establish electronic transmission options for delivery of blank absentee ballots to UOCAVA voters;
- *transmit validly requested absentee ballots to UOCAVA voters no later than 45 days before an election for a federal office, when the request has been received by that date, except where an undue hardship waiver is approved by the Department of Defense for that election;*
- take steps to ensure that electronic transmission procedures protect the security of the balloting process and the privacy of the identity and

personal data of UOCAVA voters using the procedures;

- expand the acceptance of the Federal Write-in Absentee Ballot (FWAB) to all elections for federal office beginning December 31, 2010;
- accept otherwise valid voter registration applications, absentee ballot applications, voted ballots, or Federal Write-in Absentee Ballots (FWABs) without regard to state notarization requirements, or restrictions on paper type, or envelope type; and
- allow UOCAVA voters to track the receipt of their absentee ballots through a free access system.

The Secretary of Defense has administrative responsibilities for UOCAVA. Within the Department of Defense, the Secretary has assigned these responsibilities to the Federal Voting Assistance Program (FVAP). The FVAP actively monitors the voter registration and absentee voting opportunities provided to members of the Armed Forces, their family members, and U.S. citizens residing overseas. It works closely with the States to assure that citizens covered by UOCAVA have a full opportunity to participate in Federal elections.

A qualified voter protected by UOCAVA, in elections for federal office, the state in which the absentee military member is qualified to vote must (1) permit voters to register to vote and request an absentee ballot if a request is received by the 30th day before the election; (2) send voters an absentee ballot early enough to receive it, vote it, and send it back, specifically by the 45th day before the election, if a request is received by that date; (3) permit voters to request and receive your voter registration form, absentee ballot request, and blank absentee ballot electronically; (4) permit voters to cast a Federal Write-In Absentee Ballot under certain conditions; (5) provide

voters with free access to a tracking system that tells you whether your ballot has been received by the appropriate state election official; and (6) accept otherwise-valid voted ballots even if they are not notarized, and even if they are printed on a nonstandard paper size or sent in a nonstandard type envelope.

The Federal Write-In Absentee Ballot (FWAB) is an official blank write-in ballot that all UOCAVA voters can use as an emergency “back-up” ballot if they have made a timely request for an absentee ballot from the state or county but do not receive it in time to send it back by their state's deadline. UOCAVA requires states to accept FWABs in all elections for federal office. If a UOCAVA voter receives a state-issued ballot after having already sent in a FWAB, the FVAP recommends that the voter vote that ballot and send it in. A state will only count one of the ballots.

Under Section 105 of UOCAVA, the Attorney General is authorized to bring civil actions to enforce UOCAVA requirements. *When states have failed to make sure that ballots are sent to qualified UOCAVA protected voters in a timely manner, the Department of Justice has successfully obtained court orders and consent decrees. Many of these have required states to extend their deadlines for receiving these ballots and to count such ballots, even when they arrived after Election Day.* In some cases, the states were required to make permanent changes to their laws or procedures to make sure the problems are not repeated in future elections. Through these cases brought to enforce the federal law, the Department of Justice has ensured that qualified servicemembers and overseas voters were able to cast their ballots, and know that they were counted.

Under Section 105 of UOCAVA, the Attorney General is authorized to bring civil actions to enforce its

requirements. The Attorney General has assigned this enforcement responsibility to the Civil Rights Division.

Since UOCAVA was enacted in 1986, the Civil Rights Division has brought numerous enforcement lawsuits.

In addition, between 1976 and 1986, the Division brought 12 enforcement lawsuits under predecessor legislation, the Overseas Citizens Voting Rights Act of 1975, and the Federal Voting Assistance Act of 1955, both of which have been repealed.<sup>11</sup>

## II. CURRENT CONDUCT OF ABSENTEE VOTING

Absentee voting necessarily involves multiple sequential steps, each of which consumes time. First, the voter’s request for an absentee ballot must travel—typically by mail—from the voter to the appropriate local election official (“LEO”) in the voter’s State or locality. Second, the unmarked absentee ballot must be transmitted from the LEO to the voter. Third, the voter’s completed ballot must travel from the voter back to the LEO for receipt and tabulation.

For a civilian voter casting an absentee ballot from a hospital, nursing home, or other location within the voter’s home county, each of these steps can ordinarily be completed expeditiously. For members of the Armed Forces serving aboard a Navy or Coast Guard vessel at sea, or for service members assigned to remote or isolated overseas duty stations, however, each step may take many weeks. International military mail routes, security restrictions, operational tempo, and the realities of deployment make ordinary domestic election timelines unworkable for overseas military voters.

Recognizing these structural delays, Congress enacted UOCAVA to ensure that service members and

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<sup>11</sup> <https://www.justice.gov/crt/uniformed-and-overseas-citizens-absentee-voting-act> (emphasis by italics supplied).

overseas citizens have a meaningful opportunity to participate in federal elections. UOCAVA requires each State to transmit absentee ballots to covered voters at least forty-five days before any primary, general, special, or runoff election for federal office. 52 U.S.C. § 20302(a)(8)(A). That statutory requirement reflects Congress's judgment that extended transmission time is essential if overseas military ballots are to be cast and returned in time to be counted. The fact that federal law requires transmission at least forty-five days before Election Day, however, does not mean that all LEOs consistently meet that standard in practice.

Administration of absentee voting in the United States is highly decentralized. There are approximately 7,600 local election officials nationwide. Absentee voting is conducted centrally at the State level only in Alaska, Maine, and the District of Columbia. In most States, absentee voting is administered by counties (or parishes in Louisiana). In the New England States, as well as Michigan and Wisconsin, absentee voting is conducted by cities, towns, and townships, which are generally smaller and more numerous than counties.<sup>1</sup>

This decentralization increases the likelihood of variation in compliance with federal timing requirements and magnifies the risk that overseas ballots will be transmitted late.

In addition, the printing and mailing of absentee ballots may be delayed by factors beyond the control of local election officials. Such factors include ballot-access litigation, redistricting disputes, and other pre-election legal challenges that can postpone finalization of ballots until shortly before an election. When such delays occur, the effects fall most heavily on military and overseas voters, whose ballots must travel the farthest and through the most constrained delivery channels.

**III. THE FIFTH CIRCUIT'S INTERPRETATION OF 2 U.S.C. § 7 IS INCONSISTENT WITH BOTH THIS COURT'S GUIDANCE AND UOCAVA**

The decision of the United States Court of Appeals for the Fifth Circuit rests on a fundamental misreading of the federal election-day statutes. By interpreting 2 U.S.C. § 7 to prohibit States from counting absentee ballots that are timely cast by Election Day but received shortly thereafter, the court below adopted a rigid receipt-by-Election-Day rule that conflicts with this Court's precedent, disregards Congress's later-enacted military voting protections, and predictably disenfranchises service members and other UOCAVA-protected voters.

**A. Interpreting 2 U.S.C. § 7 as a Rigid Receipt Deadline Conflicts With This Court's Instruction to Construe Statutes Liberally for the Benefit of Those Who Serve in the Armed Forces**

This Court has repeatedly instructed that statutes affecting those who serve or have served in the Armed Forces must be construed liberally in their favor, not narrowly to create forfeitures based on technicalities. See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("[L]egislation is to be liberally construed for the benefit of those who left private life to serve their country."); *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

That interpretive principle applies with particular force here. As demonstrated above, overseas military voting is subject to unavoidable delays inherent in service abroad, including extended mail routes, operational constraints, and security restrictions. Construing 2 U.S.C. § 7 to invalidate ballots that are timely cast by service members but received after Election Day transforms those unavoidable delays into a basis for disenfranchisement. Such a construction places the risk of governmental delay squarely on the voter least able to control it—the deployed service member—and is

precisely the sort of result this Court’s pro-service-member canon forbids.

Nothing in the text of § 7 compels that outcome. Section 7 establishes a uniform national day for federal elections; it does not prescribe ballot-receipt deadlines or require that all lawful votes be received by Election Day in order to be counted. Where Congress has intended to impose precise timing rules on election administration, it has done so expressly. Absent such language, § 7 should not be read to silently strip military voters of the protections Congress has repeatedly sought to provide.

**B. The Fifth Circuit’s Interpretation of 2 U.S.C. § 7 Conflicts With UOCAVA, Enacted 111 Years Later to Address the Same Problem**

Even if 2 U.S.C. § 7 were ambiguous on the question of ballot receipt, that ambiguity must be resolved in light of Congress’s later and more specific enactments. UOCAVA was enacted in 1986—111 years after § 7—to address the precise problem at issue here: the inability of military and overseas voters to participate meaningfully in federal elections under ordinary state voting timelines.

UOCAVA requires States to transmit absentee ballots to covered voters at least forty-five days before federal elections, authorizes electronic transmission of ballots, provides a federal write-in absentee ballot as a backup, and empowers the Attorney General to bring civil actions to enforce these requirements. 52 U.S.C. §§ 20302–20307. These provisions reflect Congress’s recognition that overseas ballots may not return by Election Day even when voters act diligently and in good faith.

Consistent with that statutory design, when States fail to meet UOCAVA’s transmission deadlines or when overseas mail delays threaten disenfranchisement, the federal government has repeatedly sought—and federal

courts have granted—extensions of ballot-receipt deadlines beyond Election Day so that timely cast ballots may be counted. That remedial practice is not incidental; it is the only means by which UOCAVA’s guarantees can be made effective. Interpreting § 7 to prohibit counting ballots received after Election Day would render Congress’s chosen remedy unlawful and nullify the enforcement mechanism Congress expressly authorized.

Under settled principles of statutory interpretation, later-enacted statutes addressing the same subject matter must be read *in pari materia* with earlier ones, and the later enactment informs the meaning of the earlier provision. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Even if § 7 could be read to suggest a rigid timing rule in isolation, that reading cannot survive Congress’s subsequent enactment of UOCAVA, which squarely rejects disenfranchisement of military voters based on receipt delays.

### C. The Fifth Circuit’s Reliance on *Foster v. Love* Is Misplaced

The Fifth Circuit’s interpretation is not compelled by this Court’s decision in *Foster v. Love*, 522 U.S. 67 (1997). *Foster* addressed a Louisiana election scheme that effectively completed the election and selected federal officers before the federally prescribed Election Day. *Id.* at 71–73. The constitutional defect identified in *Foster* was that the election itself occurred before Election Day, not that votes were counted after that date.

Counting absentee ballots that are lawfully cast by Election Day but received shortly thereafter does not extend the election beyond the federal day or select federal officers on a different date. It merely completes the administrative process of tabulating votes cast as part of the Election Day election. Extending *Foster* to prohibit post-Election-Day receipt and counting of timely cast ballots would dramatically expand that decision beyond

its holding and place it in direct conflict with Congress's military voting statutes.

### **CONCLUSION**

For more than a century, Congress has acted to ensure that military service does not operate as a barrier to participation in federal elections. Through UOCAVA and its subsequent amendments, Congress made a deliberate judgment that ballots timely cast by service members and overseas voters must be afforded a meaningful opportunity to be counted, notwithstanding the unavoidable delays inherent in service abroad.

The Fifth Circuit's interpretation of 2 U.S.C. § 7 disregards that judgment. By construing the federal election-day statutes to impose a rigid receipt-by-Election-Day rule, the court below revived a form of military disenfranchisement Congress has repeatedly sought to eliminate, nullified Congress's chosen remedial framework, and conflicted with this Court's instruction that statutes affecting those who serve in the Armed Forces be construed liberally in their favor.

The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted.

JOHN N. MAHER  
*Counsel of Record*  
KEVIN J. MIKOLASHEK  
MAHER LEGAL SERVICES PC  
*122 North Wheaton Ave.,*  
*P.O. Box 1386*  
*Wheaton, IL 60187*  
*(708) 468-8155*  
*john@maherlegalservices.com*

SAMUEL F. WRIGHT  
*1202 Elmwood Dr.*  
*Marlin, TX 76661*  
*(254) 743-9547*  
*samwright50@yahoo.com*

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