

No. 20-3139

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAMES CARSON, *et al.*,
PLAINTIFFS-APPELLANTS,

v.

STEVE SIMON, in his official capacity as Minnesota Secretary of State,
DEFENDANT-APPELLEE,

AND

ROBERT LAROSE, *et al.*,
INTERVENOR DEFENDANTS-APPELLEES.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

**BRIEF FOR THE DISTRICT OF COLUMBIA AND THE STATES OF
CALIFORNIA, CONNECTICUT, ILLINOIS, MARYLAND,
MASSACHUSETTS, NEVADA, NEW JERSEY, NEW MEXICO, OREGON,
PENNSYLVANIA, VIRGINIA, AND WASHINGTON AS AMICI CURIAE
IN SUPPORT OF APPELLEES AND IN OPPOSITION TO APPELLANTS'
EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL**

KARL A. RACINE
Attorney General for the
District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Principal Deputy Solicitor General

CARL J. SCHIFFERLE
Deputy Solicitor General

ANDREW J. DELAPLANE
SAMSON J. SCHATZ
Assistant Attorneys General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 727-6287
(202) 730-1864 (fax)
Loren.AliKhan@dc.gov

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The District of Columbia and the States of California, Connecticut, Illinois, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Virginia, and Washington (collectively, the “Amici States”) submit this brief as amici curiae in support of the appellee and in opposition to appellants’ emergency motion for an injunction pending appeal. In our federalist system, states play “a major role . . . in structuring and monitoring the election process.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000); *see* U.S. Const. art. I, § 4, cl. 1. But states also have an ongoing obligation to “protect[] the health, safety, and welfare of [their] citizens.” *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007).

Due to the COVID-19 pandemic and significant issues with the United States Postal Service (“USPS”), several states—including Minnesota, by consent decree—have extended their receipt deadline for mail-in ballots that are properly cast on or before Election Day. By extending receipt deadlines, states are protecting public health by avoiding crowded, in-person voting on Election Day, while also accounting for USPS’s delays in mail delivery—a factor over which voters have no control. And extended receipt deadlines are not a new phenomenon. More than a third of the states and the District of Columbia had such deadlines before this election, consistent with the notion that all ballots cast on or before Election Day

should be counted. Prohibiting Minnesota from accepting ballots cast by Election Day would thus be a dramatic departure from common state election practices, and it is especially unwarranted given the twin exigencies of the global pandemic and USPS's mail delays.

ARGUMENT

I. States Have Flexibility To Accommodate Voters In Light Of COVID-19 And The Uncertainties With The Postal Service.

The Supreme Court has recognized that “States retain the power to regulate their own elections.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). That role, however, comes with the attendant responsibility to administer elections in ways that both safeguard residents’ health and facilitate citizens’ voting rights. The consent decree exemplifies Minnesota’s thoughtful embrace of both responsibilities. Through the consent decree, Minnesota has reasonably adapted its approach to voting in response to the pandemic and USPS’s issues by setting a clear deadline for voters to mail their ballots; allowing a reasonable time for ballots to travel through the mail; and giving voters the benefit of the doubt when—due to USPS error—their ballots are not postmarked.

Despite the ongoing public health emergency, election experts project that voter turnout this November will be “exceptional, perhaps the highest in over a century.” Galston, *Election 2020: A Once-in-a-Century, Massive Turnout?*,

Brookings (Aug. 14, 2020) (internal quotation marks omitted).¹ Election officials thus face the unique challenge of overseeing the democratic process while preventing transmission of the novel coronavirus. Given the disruption caused by the pandemic, 49 percent of registered voters expect to face difficulties casting a ballot this fall. Pew Rsch. Ctr., *Election 2020: Voters Are Highly Engaged, but Nearly Half Expect to Have Difficulties Voting* 4 (Aug. 13, 2020).² This is likely because the traditional practice of voting in-person, on the same day, and in designated locations is hard to reconcile with public health directives to practice social distancing and limit person-to-person contact to minimize the transmission of COVID-19. See CDC, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others* (Sept. 11, 2020).³

Given the risks associated with person-to-person contact, the number of voters interested in absentee voting has, unsurprisingly, “skyrocket[ed] around the country.” Levy et al., *Surge of Ballot Requests Already Setting Records in the US*, CNN (Sept. 25, 2020).⁴ No less so in Minnesota, where over 1.5 million registered voters have requested absentee ballots for the November election, up from 676,000

¹ Available at <https://brook.gs/3jAGF6a>.

² Available at <https://pewrsr.ch/2H4HvKx>.

³ Available at <https://bit.ly/34NCJJa>.

⁴ Available at <https://cnn.it/3iMhDQf>.

in the 2016 general election. *See* Montgomery, *Minnesota Absentee Voting on Record-Setting Pace*, MPR News (Oct. 9, 2020).⁵ Given the influx of expected eligible absentee voters, ensuring that all valid ballots cast on or before Election Day will count—even if they are received after the polls close—would be prudent under any pandemic scenario. But offering voters this extra boost of confidence that their vote will count is especially critical given the recent issues affecting USPS.

Even during an ordinary election cycle, USPS service constraints are a common consideration when it comes to setting deadlines for absentee ballots. *See, e.g.,* 52 U.S.C. § 20304(b)(2) (requiring “cooperation and coordination with [USPS]”). But this year, the issues facing USPS are legion and well-documented. Dist. Ct. Dkt. No. 14, Ex. C at 5-7. USPS is in the grip of an unprecedented budget crisis, where it “cannot fund its current level of services and financial obligations.” U.S. GAO, *U.S. Postal Service’s Financial Viability - High Risk Issue*.⁶ It has faced staffing shortages, with “[m]ore than 50,000 workers [taking] time off for virus-related reasons.” Jameel & McCarthy, *Poorly Protected Postal Workers Are Catching COVID-19 by the Thousands. It’s One More Threat to Voting by Mail*, ProPublica (Sept. 18, 2020).⁷ And it continues to struggle with the fallout from

⁵ Available at <https://bit.ly/2T1ryqy>.

⁶ Available at <https://bit.ly/33PaEly> (last visited Oct. 19, 2020).

⁷ Available at <https://bit.ly/2SKDuNp>.

recent high-profile operational changes imposed—and then partially rescinded—by the Postmaster General. *See, e.g., Pflum, Despite DeJoy’s Vows to Halt Changes, Serious Problems Persist, Postal Workers Say*, NBC News (Aug. 28, 2020).⁸ At a time when more Americans than ever are relying on USPS to exercise their fundamental right to vote, these delays have a significant impact on the franchise. *See Badger et al., Our Tracker Says the Mail Is Still Slow*, N.Y. Times (Oct. 14, 2020).⁹

Numerous courts have addressed the impact of USPS delays on the election. A district court in Missouri recently allowed voters to return their mail-in ballots in person if they feared that USPS’s delays would prevent their timely arrival. *Organization for Black Struggle v. Ashcroft*, No. 2:20-CV-4184, slip op. at 19-20 (W.D. Mo. Oct. 9, 2020). And several other courts have enjoined USPS from making further process changes that could cause delays leading up to the election. *See, e.g., New York v. Trump*, No. 20-CV-2340, 2020 WL 5763775, at *1 (D.D.C. Sept. 27, 2020). Nevertheless, widespread and legitimate concerns persist about USPS’s ability to deliver election mail within the timeframes historically dictated by state law.

⁸ Available at <https://nbcnews.to/2GF3ibw>.

⁹ Available at <https://nyti.ms/33PPnYW>.

As the record reflects, these delays pose acute risks for Minnesota voters. Dist. Ct. Dkt. No. 59, at 14. In July, USPS officials wrote to Secretary Simon, warning that “certain state-law requirements and deadlines appear to be incompatible with the Postal Service’s delivery standards.” Letter from Thomas J. Marshall, Gen. Counsel & Exec. Vice President, to Steve Simon, Minn. Sec’y of State 2 (July 29, 2020).¹⁰ Specifically, because Minnesota law provides that “a completed ballot must be received by Election Day to be counted,” but also “permits voters to request a[n absentee] ballot as late as the day before the election,” “there is a significant risk” that voters’ ballots will not arrive in time to be counted. *Id.* The consent decree appropriately addressed these concerns by extending the receipt deadline for mail-in ballots.¹¹

Other states’ experiences in the primaries highlight the issues that Minnesota could face in the upcoming general election. More than “50,000 absentee or mail-in

¹⁰ Available at <https://wapo.st/2GUtE9z>, at 111.

¹¹ By law, USPS is required to postmark election mail, *see* 39 C.F.R. § 211.2(a); USPS, *Postal Operations Manual* § 443.3 (2020), available at <https://bit.ly/3m0Rtez>; so postmarks are typically useful evidence in determining whether a mail-in ballot was cast on or before Election Day. However, USPS’s Office of the Inspector General recently reported that—through no fault of voters’ own—not all mail-in ballots will receive a postmark. USPS, Off. of the Inspector General, *Election Readiness Report 3* (Aug. 31, 2020), available at <https://bit.ly/3j6z7a6>. By counting all ballots received by a date certain, Minnesota is ensuring that USPS’s inability to comply with its own regulations does not result in the disenfranchisement of Minnesotans. And Minnesota is not alone in this. *See, e.g.*, Nev. Rev. Stat. § 293.317(2).

ballots [were] rejected” in 2020 “because they arrived past the deadline, often through no fault of the voter.” Fessler & Moore, *Signed, Sealed, Undelivered: Thousands Of Mail-In Ballots Rejected For Tardiness*, NPR (July 13, 2020).¹² And the risks of rejection are higher now, where some states are expecting ten times the normal volume of election mail. Cox et al., *Postal Service Warns 46 States Their Voters Could be Disenfranchised by Delayed Mail-in Ballots*, Wash. Post (Aug. 14, 2020).¹³

II. The Secretary’s Plan Of Accepting Ballots Received After Election Day Is Consistent With Longstanding Practice.

Tellingly, appellants cite no case holding that federal law prohibits states from counting votes cast on or before, but received after, Election Day. That is because it is a common state and federal practice. *See* Addendum. In addition to the states that historically accepted these ballots, several others, including Minnesota, have extended their receipt deadlines for mail-in ballots in response to the pandemic and the delays plaguing USPS. But none of these states are “chang[ing] Election Day.” Mot. 7. Extended receipt deadlines, whether implemented by legislative, executive, or judicial action, are consistent with the congressional mandate that the election must be held on one day.

¹² Available at <https://n.pr/3dDBznD>.

¹³ Available at <https://wapo.st/3kdW38V>.

To begin, numerous states accept absentee or mail-in ballots received after Election Day when the ballot was shown—via postmark or otherwise—to have been cast on or before Election Day. As the district court noted, the District of Columbia’s law is illustrative. In the District, absentee ballots that are “postmarked or otherwise proven to have been sent on or before the day of the election, and received . . . no later than the 7th day after the election” shall be accepted. D.C. Code § 1-1001.05(a)(10A). And California has long deemed a mail-in ballot timely as long as it is “postmarked[,] . . . time stamped[,] or date stamped . . . on or before election day” and election officials receive it within a specified time period—which has been increased from three days to 17 for the upcoming election due to the COVID-19 pandemic. Cal. Elec. Code § 3020(b)(1), (d).

In total, at least 22 states other than Minnesota accept ballots mailed on or before, but received after, Election Day. These include Alaska, California, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Mississippi, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Texas, Utah, Virginia, Washington, West Virginia, and the District of Columbia. *See* Addendum. Yet others accept overseas and military absentee ballots received after Election Day under their statutes effectuating the Federal Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 52 U.S.C. § 20301, *et seq.* *See* Mont. Code Ann. § 13-21-206(1); 25 Pa. Cons. Stat. § 3511.

This practice has only expanded during the COVID-19 pandemic, during which many states have extended their receipt deadlines to reduce the public health risks of voting in-person and accommodate the issues facing USPS. As examples, Massachusetts and Mississippi have enacted legislation to accept ballots mailed on or before Election Day, but received later. *See, e.g.*, 2020 Mass. Acts Ch. 115, § 6(h)(3); Miss. Code. Ann. § 23-15-637(1)(a) (effective July 8, 2020). And states that previously had generous receipt deadlines have further extended them in light of this year’s exigencies. *See, e.g.*, D.C. Code § 1-1001.05(a)(10A) (extending seven-day receipt deadline to ten days); Cal. Elec. Code § 3020(d) (effective June 18, 2020) (extending three-day receipt deadline 17 days); N.J. Stat. § 19:63-22 (effective Aug. 28, 2020) (extending 48-hour receipt deadline to 144 hours).

Next, Minnesota is not alone in extending its receipt deadline through non-legislative means. To “ensure that Kentuckians c[ould] exercise their right to vote while protecting themselves and their families from COVID-19,” Governor Andy Beshear issued an executive order permitting the acceptance of ballots mailed by November 3 and received by November 6. Ky. Exec. Order No. 2020-688 at 7 (Aug. 14, 2020).¹⁴ Similarly, Pennsylvania’s Secretary of State sought, and its Supreme Court granted, an order permitting ballots mailed by Election Day but

¹⁴ Available at <https://bit.ly/35b4BXK>.

received by November 6 to be counted. *Pa. Democratic Party v. Boockvar*, No. 133-MM-2020, 2020 WL 5554644, at *18 (Pa. Sept. 17, 2020), *stay pending appeal denied*, Order List, Nos. 20A53, 20A54 (U.S. Oct. 19, 2020). The Secretary expressly acknowledged that, while she had previously opposed such extensions, she had reassessed her stance in light of information from USPS. *Id.* at *13. The Pennsylvania Supreme Court held that, “in light of the[] unprecedented numbers [of mail-in ballots] and the near-certain delays,” it “c[ould] and should act to extend the received-by deadline . . . to prevent the disenfranchisement of voters.” *Id.* at *18. Other courts have done the same in past elections. *See, e.g., United States v. Cunningham*, No. 3:08-CV-709, 2009 WL 3350028, at *10 n.3 (E.D. Va. Oct. 15, 2009) (listing examples from federal courts in New York, Michigan, Idaho, Oklahoma, New Jersey, and Colorado); *In re Holmes*, 788 A.2d 291, 295 (N.J. App. Div. 2002); *Curtis v. Bindeman*, 261 A.2d 515, 519 (D.C. 1970).

Indeed—and quite tellingly—the United States Supreme Court issued an order earlier this year directing that Wisconsin ballots mailed by Election Day and received within six days must be counted, *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1208 (2020), and it just yesterday declined to stay Pennsylvania’s extended receipt deadline, *Boockvar, supra*. The Minnesota Secretary’s actions are thus consistent with both longstanding practice and recent

efforts to ensure that voters’ mail-in ballots are counted despite the influx of election mail caused by the pandemic and the problems affecting USPS.

Finally, Congress has afforded states a significant amount of flexibility in administering elections—states select polling locations, set polling hours, and determine the methods by which votes are cast. *See, e.g., Storer v. Brown*, 415 U.S. 724, 729-30 (1974). Consistent with this, Congress also granted states the ability to determine that a ballot cast on or before Election Day is timely even if it is later received. States that accept ballots mailed by, but arriving after, Election Day thus do so consistently with the congressional mandate that the election take place on a “single day throughout the Union.” *Foster v. Love*, 522 U.S. 67, 69-70 (1997).

Congress could certainly regulate the procedure for determining whether a ballot was validly cast by Election Day. Indeed, in the UOCAVA, it carefully set out how military families and others living abroad may vote. *See* 52 U.S.C. § 20301 *et seq.* But even there, Congress allowed states to set the date by which ballots cast before Election Day would be counted. 52 U.S.C. § 20303(b).¹⁵ This is only further confirmation of the basic principle that the Constitution leaves to the states “the

¹⁵ To the extent that appellants are arguing that a unitary Election Day means that all voting *and* counting must occur on one single day, Mot. 7, that argument is belied by both UOCAVA and the well-settled practice of states setting their own deadlines to certify their election results. *Election Results Certification Dates, 2020*, Ballotpedia, <https://bit.ly/3k7Lp3t> (last visited Oct. 19, 2020).

initial task” of prescribing the time, place, and manner of elections. *Storer*, 415 U.S. at 729-30. And given this once-in-century pandemic, coupled with USPS issues that are unprecedented in the modern era, states are in the best position to decide how to administer the upcoming general election.

CONCLUSION

This Court should deny appellants’ motion for an injunction pending appeal.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

/s/ Loren L. AliKhan
LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Principal Deputy Solicitor General

CARL J. SCHIFFERLE
Deputy Solicitor General

ANDREW J. DELAPLANE
SAMSON J. SCHATZ
Assistant Attorneys General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 727-6287
(202) 730-1864 (fax)
Loren.AliKhan@dc.gov

October 2020

On behalf of:

XAVIER BECERRA
Attorney General
State of California
1300 I Street
Sacramento, CA 95814

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph Street, 12th Floor
Chicago, IL 60601

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

GURBIR S. GREWAL
Attorney General
State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North 9th Street
Richmond, VA 23219

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

AARON D. FORD
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

HECTOR BALDERAS
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
1600 Arch Street Suite 300
Philadelphia, PA 19103

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504

CERTIFICATE OF SERVICE

I certify that on October 20, 2020, this brief was filed with this Court and served on all parties via the Court's CM/ECF filing system.

/s/ Loren L. AliKhan
LOREN L. ALIKHAN

CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitations in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because the brief contains 2595 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point. Additionally, this brief and addendum comply with Eighth Circuit Rule 28A(h)(2) because the document was scanned for viruses using the most recent version of McAfee Endpoint Security and is free of viruses.

/s/ Loren L. AliKhan
LOREN L. ALIKHAN

Addendum

Addendum: States Ballot Acceptance Processes

Number Of States That Count Mail-In Ballots Received After Election Day: 23

State	Counts mail-in ballots received after Election Day?	Changes related to COVID-19	Details	Source(s)
Alabama	No	—	"No absentee ballot shall be opened or counted if received by ... mail, unless postmarked as of the date prior to the day of the election and received by mail no later than noon on the day of election, or, if received ... by hand delivery, unless so delivered by the voter or medical emergency designee ... not later than the close of the last business day next preceding the election or, if delivered by the medical emergency designee, by noon on the day of the election."	Ala. Code § 17-11-18(a)
Alaska	Yes	—	"An absentee ballot must be marked on or before the date of the election.... [A] voter who returns the absentee ballot by mail, ... shall use a mail service at least equal to first class and mail the ballot not later than the day of the election Except as provided [elsewhere], the ballot may not be counted unless it is received by the close of business on the 10th day after the election. If the ballot is postmarked, it must be postmarked on or before election day. After the day of the election, ballots may not be accepted unless received by mail."	Alaska Stat. § 15.20.081(e)
Arizona	No	—	"In order to be counted and valid, the ballot must be received by the county recorder ... or deposited at any polling place in the county no later than 7:00 p.m. on election day."	Ariz. Rev. Stat. Ann. § 16-548(A)
Arkansas	No	—	"Absentee voting may be accomplished ... [b]y delivery of the ballot by mail that must be received in the office of the county clerk of the county of residence of the voter not later than 7:30 p.m. on election day."	Ark. Code Ann. § 7-5-411(a)(1)(A)
California	Yes	Yes	"[F]or the statewide general election to be held on November 3, 2020, any vote by mail ballot ... shall be timely cast if it is received ... by the 17th day after election day and either ... (1) The ballot is postmarked ... or is time stamped or date stamped ... on or before election day. [Or] (2) [i]f the ballot has no postmark, a postmark with no date, or an illegible postmark, the vote by mail ballot identification envelope is date stamped by the elections official upon receipt of the vote by mail ballot ..., and is signed and dated ... on or before election day."	Cal. Elec. Code § 3020(d)
Colorado	No	—	"The ballot must be received ... [by] 7 p.m. on election day. All envelopes containing mail ballots must be in the hands of the county clerk and recorder or designated election official no later than 7 p.m. on the day of the election. Mail ballot envelopes received after 7 p.m. on the day of the election but postmarked on or before the day of the election will remain sealed and uncounted, but the elector's registration record shall not be canceled for failure to vote in a general election."	Colo. Rev. Stat. § 1-7.5-107(4)(b)(II)
Connecticut	No	—	"An absentee ballot shall be cast ... only if [i]t is mailed ... so that it is received ... not later than the close of the polls."	Conn. Gen. Stat. § 9-140b(a)(1)
Delaware	No	—	"For a mail ballot to be counted under this chapter, an elector voting by mail ballot shall return the elector marked ballot ... before the polls close on the day of the election."	Del. Code Ann. tit. 15, § 5608(b)
District of Columbia	Yes	Yes	"[F]or elections held in calendar year 2020, the Board shall accept absentee ballots postmarked or otherwise proven to have been sent on or before the day of the election, and received by the Board no later than the 10th day after the election."	D.C. Code § 1-1001.05(a)(10A)

State	Counts mail-in ballots received after Election Day?	Changes related to COVID-19	Details	Source(s)
Florida	No	—	"[A]ll marked absent electors' ballots to be counted must be received by the supervisor by 7 p.m. the day of the election."	Fla. Stat. § 101.67(2)
Georgia	No	—	"All absentee ballots returned ... after the closing of the polls on the day of the ... election shall be safely kept unopened The board of registrars or absentee ballot clerk shall promptly notify the elector by first-class mail that the elector's ballot was returned too late to be counted" A district court enjoined the deadline, but the Eleventh Circuit stayed that ruling pending appeal. See <i>New Ga. Project v. Raffensperger</i> , No. 20-13360-D, 2020 WL 5877588, at *4 (11th Cir. Oct. 2, 2020).	Ga. Code Ann. § 21-2-386(a)(1)(F)
Hawaii	No	—	"The return envelope shall be ... Mailed" or "Delivered other than by mail" "no later than the closing hour on election day."	Haw. Rev. Stat. § 15-9(a)(1)-(2)
Idaho	No	—	"[A]n absentee ballot must be received by the issuing officer by 8:00 p.m. on the day of election before such ballot may be counted."	Idaho Code § 34-1005
Illinois	Yes	—	Each vote by mail voter's ballot that is mailed to an election authority and postmarked no later than election day, but that is received by the election authority after the polls close on election day and before the close of the period for counting provisional ballots cast at that election, ... shall be counted ... during the period for counting provisional ballots.	10 Ill. Comp. Stat. 5/19-8(c)
Indiana	No	—	"[A]bsentee ballots received by mail ... after noon on election day are considered as arriving too late and may not be counted." A district court enjoined Indiana to count all ballots received by 10 days after Election Day, but the Seventh Circuit stayed the injunction pending appeal. See <i>Common Cause Ind. v. Lawson</i> , No. 20-2911, slip op. at 2, 5 (7th Cir. Oct. 13, 2020).	Ind. Code § 3-11.5-4-10
Iowa	Yes	—	"In order for the ballot to be counted, the return envelope must be received ... before the polls close on election day or be clearly postmarked by an officially authorized postal service ... not later than the day before the election, ... and received ... not later than noon on the Monday following the election."	Iowa Code § 53.17(2)
Kansas	Yes	—	"[A]ll advance voting ballots received by mail by the office of the county election officer after the closing of the polls ... and which are postmarked or are otherwise indicated by the United States postal service to have been mailed on or before the close of the polls on the date of the election, shall be ... canvass[ed] in a manner consistent, as nearly as may be, with other advance voting ballots. The deadline for the receipt by mail of the advance voting ballots ... shall be the last delivery of mail by the United States postal service on the third day following the date of the election, unless additional time is permitted by the secretary."	Kan. Stat. Ann. § 25-1132(b)
Kentucky	Yes	Yes	"[A]ny absentee ballot postmarked on or before November 3, 2020 shall be accepted upon receipt ... until 6:00 p.m., local time, November 6, 2020. A ballot delivered by 6:00 p.m., local time, on November 3, 2020 shall not be required to bear a postmark."	31 Ky. Admin. Regs. 4:193E § 13

State	Counts mail-in ballots received after Election Day?	Changes related to COVID-19	Details	Source(s)
Louisiana	No	—	"[A]ll ballots received by the registrar by 4:30 p.m. on the day before election day shall be counted."	La. Stat. Ann. § 18:1308(C)
Maine	No	—	"In order to be valid, an absentee ballot must be delivered to the municipal clerk at any time before the polls are closed."	Me. Stat. tit. 21-A § 755
Maryland	Yes	Yes	"An absentee ballot is considered to have been timely received [] if ... [t]he ballot[] (a) is received by the local board office from the United States Postal Service or a private mail carrier on or before 10 a.m. on the second Friday after an election; and (b) Was mailed on or before election day, as verified[] (i) By a postmark ...; or (ii) By the voter's affidavit that the ballot was completed and mailed on or before election day, if the return envelope does not contain a postmark or the postmark is illegible."	Md. Code Regs. 33.11.03.08(B)(3) (2020)
Massachusetts	Yes	Yes	"[A]n early voting ballot cast for the general election that is received not later than 5 P.M. on November 6, 2020 and mailed on or before November 3, 2020 shall be [counted].... A postmark, if legible, shall be evidence of the time of mailing."	H.B. 4820, 2020 Act Ch. 115 § 6(h)(3) (Mass. 2020)
Michigan	No	—	"The ballot must reach the clerk ... before the close of the polls on election day. An absent voter ballot received ... after the close of the polls on election day will not be counted." A lower court ruling that that ballots postmarked by November 2 must be counted, as long as they are received by election officials on November 17, was reversed by the Michigan Court of Appeals. See Mich. All. For Retired Ams. v. Secretary of State, No. 354993, slip op. 12 (Mich. Ct. App. Oct. 16, 2020).	Mich. Comp. Laws § 168.764a
Minnesota	Yes	Yes	"Defendant shall issue guidance instructing all relevant local election officials to count all mail-in ballots in the November General Election that are otherwise validly cast and postmarked on or before Election Day but received by 8 p.m. within 5 business days of Election Day (i.e., seven calendar days, or one week)." "Where a ballot does not bear a postmark date, the election official reviewing the ballot should presume that it was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day."	Consent Decree at 11 LaRose v. Simon, No. 62-CV-20-3149 (Minn. Cir. Ct. July. 17, 2020)
Mississippi	Yes	Yes	"Absentee ballots and applications received by mail ... must be postmarked on or before the date of the election and received by the registrar no more than five (5) business days after the election."	Miss. Code Ann. § 23-15-637(1)(a) (effective July 8, 2020).
Missouri	No	—	"All proper votes on each absentee ballot received by an election authority at or before the time fixed by law for the closing of the polls on election day shall be counted."	Mo. Rev. Stat. § 115.293
Montana	No	—	"Except as provided in [UOCAVA provisions], in order for the ballot to be counted, each elector shall return it in a manner that ensures the ballot is received prior to 8 p.m. on election day."	Mont. Code Ann. § 13-13-201(3).

State	Counts mail-in ballots received after Election Day?	Changes related to COVID-19	Details	Source(s)
Nebraska	No	—	"[Mail-in b]allots ... which are returned not later than the hour established for the closing of the polls shall be accepted for review by the counting board for early voting. Such ballots received by the election commissioner or county clerk after the close of the polls on election day shall remain sealed in the envelope on which the election commissioner or county clerk shall write Rejected"	Neb. Rev. Stat. § 32-950
Nevada	Yes	—	Mail In ballots must be either "[d]elivered by hand to the county clerk before the time set for closing of the polls" or "[m]ailed ... and [p]ostmarked on or before the day of election[]" and [r]eceived ... not later than 5 p.m. on the seventh day following the election." When "an absent ballot is received by mail not later than 5 p.m. on the third day following the election and the date of the postmark cannot be determined, the absent ballot shall be deemed to have been postmarked on or before the day of the election."	Nev. Rev. Stat. § 293.317
New Hampshire	No	—	"[A] town or city clerk shall not accept any completed absentee ballots delivered to the clerk after 5:00 p.m. on election day except as provided in [provisions applicable to disabled voters and emergency services workers]."	N.H. Rev. Stat. Ann. § 657:22
New Jersey	Yes	Yes	Ballots must be postmarked by Election Day and received within 144 hours of the polls closing. Additionally, every ballot without a postmark or mismarked by the post office (and confirmed by the post office that those ballots were received by the post office on or before November 3) and received within 48 hours of polls closing on Election Day will be considered valid.	N.J. Stat. Ann. § 19:63-22 (effective Aug. 28, 2020)
New Mexico	No	—	"Completed official mailing envelopes shall be accepted until 7:00 p.m. on election day."	N.M. Stat. Ann. § 1-6-10(c).
New York	Yes	Yes	"The board of elections shall cause all absentee ballots received by it before the close of the polls on election day and all ballots contained in envelopes showing a cancellation mark of the United States postal service ... with a date which is ascertained to be not later than the day of the election and received ... not later than seven days following the day of election to be cast and counted. For purposes of this section, any absentee ballot received by the board of elections by mail that does not bear or display a dated postmark shall be presumed to have been timely mailed or delivered if such ballot bears a time stamp of the receiving board of elections indicating receipt by such board on the day after the election."	N.Y. Elec. Law § 8-412 (effective Aug. 20, 2020)
North Carolina	Yes	—	Ballots received after election day will be accepted if they "are postmarked and that postmark is dated on or before the day of the statewide primary or general election or county bond election and are received by the county board of elections not later than three days after the election by 5:00 p.m." or UOCAVA provisions apply.	N.C. Gen. Stat. § 163-231(b)(2)
North Dakota	Yes	—	Mail in ballots may be counted if they arrive "in an envelope postmarked or otherwise officially marked by the United States postal service or other mail delivery system before the date of election."	N.D. Cent. Code § 16.1-07-09
Ohio	Yes	—	"[A]ny return envelope that is postmarked prior to the day of the election shall be delivered to the director prior to the eleventh day after the election. Ballots delivered in envelopes postmarked prior to the day of the election that are received after the close of the polls on election day through the tenth day thereafter shall be counted.... Any such ballots that are received by the director later than the tenth day following the election shall not be counted."	Ohio Rev. Code Ann. § 3509.05

State	Counts mail-in ballots received after Election Day?	Changes related to COVID-19	Details	Source(s)
Oklahoma	No	—	"Absentee ballots shall be returned ... no later than 7:00 p.m. the day of the election; provided, absentee ballots that are hand delivered ... shall be delivered no later than the end of regular business hours on the day prior to the date of the election."	Okl. Stat. Ann. tit. 26, § 14-104.
Oregon	No	—	"A ballot from an absent elector must be received by a county clerk not later than 8 p.m. of the day of the election."	Or. Rev. Stat. § 253.070
Pennsylvania	Yes	Yes	The Pennsylvania Supreme Court granted a "three-day extension of the absentee and mail-in ballot received-by deadline ... such that ballots ... postmarked by 8:00 p.m. on Election Day, November 3, 2020, shall be counted if they are otherwise valid and received by the county boards of election on or before 5:00 p.m. on November 6, 2020." "[B]allots received within this period that lack a postmark ... or for which the postmark ... is illegible, will be presumed to have been mailed by Election Day."	Pa. Democratic Party v. Boockvar, No. 133-MM-2020, 2020 WL 5554644 (Pa. Sept. 17, 2020).
Rhode Island	No	—	"Mail ballots may be cast in the manner provided by law on or before election day; provided, that no mail ballot shall be counted unless it is received by ... [the time] for the closing of polling places on election day, except ballots cast under the provisions of [Rhode Island's UOCAVA provision], which shall be counted if received by the state board by four o'clock p.m. (4:00) on the third day following a primary or four o'clock p.m. (4:00) on the seventh day following an election."	17 R.I. Gen. Laws § 20-16
South Carolina	No	—	"No [absentee] ballot shall be counted ... which is received ... after [the] time for closing of the polls, and the printed instructions ... to be sent each absentee ballot applicant shall notify him that his vote will not be counted in either of these events."	S.C. Code Ann. § 7-15-230
South Dakota	No	—	"If an absentee ballot is delivered to a polling place after the polls are closed, the absentee ballot may not be counted or opened."	S.D. Codified Laws § 12-19-12
Tennessee	No	—	"Any absentee ballot received by mail by the county election commission before the closing of the polls shall be processed as were absentee ballots received before election day."	Tenn. Code Ann. § 2-6-303(b)
Texas	Yes	—	Unless the Texas provisions of the UOCAVA apply, a marked ballot must arrive "before the time the polls are required to close on election day; or not later than 5 p.m. on the day after election day, if the carrier envelope was placed for delivery by mail or common or contract carrier before election day and bears a cancellation mark of a common or contract carrier or a courier indicating a time not later than 7 p.m. at the location of the election on election day."	Tex. Elec. Code Ann. § 86.007
Utah	Yes	—	A mailed ballot must be "clearly postmarked before election day, or otherwise clearly marked by the post office as received by the post office before election day; and received in the office of the election officer before noon on the day of the official canvass following the election."	Utah Code Ann. § 20A-3-204,

State	Counts mail-in ballots received after Election Day?	Changes related to COVID-19	Details	Source(s)
Vermont	No	—	"All early voter absentee ballots returned as follows shall be counted: (A) by any means, ... on the day preceding the election; (B) by mail, ... on the day of the election; and (C) by hand delivery to the presiding officer at the voter's polling place."	Vt. Stat. Ann. tit. 17, § 2543(d)(1)
Virginia	Yes	Yes	"[A]ny absentee ballot (i) returned to the general registrar after the closing of the polls on election day but before noon on the third day after the election and (ii) postmarked on or before the date of the election shall be counted pursuant to the procedures set forth in this chapter if the voter is found entitled to vote."	Va. Code Ann. 24.2-709 (effective July 1, 2020)
Washington	Yes	—	"The voter must be instructed to either return the ballot to the county auditor no later than 8:00 p.m. the day of the election or primary, or mail the ballot to the county auditor with a postmark no later than the day of the election or primary."	Wash. Rev. Code Ann. § 29A.40.091(4)
West Virginia	Yes	—	An absentee ballot is to be accepted if the ballot "bears a postmark of the United States Postal Service dated no later than election day and the ballot is received by the official designated to supervise and conduct absentee voting no later than the hour at which the board of canvassers convenes to begin the canvass."	W. Va. Code § 3-3-5(g)(2)
Wisconsin	No	—	"The ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day." A District Court judge enjoined the deadline, but the Seventh Circuit stayed this ruling pending appeal. That stay is currently pending before the United States Supreme Court. See Democratic National Committee, et al. v. Bostelmann, No. 20-2835, 2020 WL 5951359 (7th Cir. Oct. 8, 2020), application for a stay filed sub nom. Swenson v. Bostelmann, No. 20A64 (U.S. Oct. 13, 2020).	Wis. Stat. § 6.87(6)
Wyoming	No	—	"An absentee ballot received by the clerk after the polls close shall not be voted. The clerk shall write on the inner envelope of such late absentee ballot "Rejected--received after the polls closed". These late ballots shall be kept by the clerk for at least two (2) years after the election or longer if required by federal law and then destroyed."	Wyo. Stat. Ann. § 22-9-119