Transmission of Electoral-College Certificates by "Registered Mail"

Sections 6, 11, and 12 of the electoral-college provisions in title 3 of the U.S. Code require state officials to transmit their selection and vote certificates to the Archivist of the United States by United States Postal Service registered mail.

The electoral-college provisions do not require the Archivist to reject certificates that he receives even if state officials have transmitted them by some other means.

February 27, 2020

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION[*]

In the Constitution's system for selecting the President and Vice President of the United States, each State must appoint electors, who cast votes to determine who fills the offices. *See* U.S. Const. art. II, § 1, cl. 2; *id.* amend. XII. Every State currently provides that the electors are to be appointed based upon the results of the State's presidential election. Upon the electors' appointment, each state governor is "to communicate by registered mail" a selection certificate identifying the electors to the Archivist of the United States. 3 U.S.C. § 6. After the electors within each State meet and cast their votes on the appointed day, the electors, and in some instances the State's secretary of state, must send sealed certificates reflecting those votes to the Archivist, again "by registered mail." *Id.* §§ 11–12.

You have asked whether those statutory references to "registered mail" mean that the state officials must send their certificates through the United States Postal Service's ("USPS") registered-mail service, or whether they may use equivalent commercial carriers or other USPS mail services, such as certified mail. If the state officials are required to use registered mail, but instead use some other service, you have asked whether the Archivist must refuse to accept the certificates because they have been sent by an unauthorized means.

[*] Editor's note: The Electoral Count Reform Act of 2022, Pub. L. No. 117-328, div. P, title I, 136 Stat. 4459, 5233–41, made a number of changes to chapter 1 of title 3 of the U.S. Code, including by eliminating references to "registered mail."

We conclude that federal law does require state officials to send their electoral certificates by USPS's registered-mail service. The plain language of the statute requires the use of registered mail, and this interpretation is supported by the history of the statute, Congress's decision to amend other statutory provisions, and the relevant judicial precedent. But the statute places no restrictions on the Archivist's acceptance of the States' certificates. Instead, it calls for him to request duplicate copies only if he does not "receive[]" a State's vote certificates. 3 U.S.C. §§ 12, 13. The statute therefore does not require the Archivist to reject certificates sent by an unauthorized means. By refusing receipt, the Archivist would thwart the statutory scheme, which seeks to ensure that the States reliably transmit the certificates to the Archivist for the purpose of keeping the official records and, in the case of the certificates of the electors' votes, as duplicates of the vote certificates sent to the President of the Senate.

I.

Article II, Section 1 of the Constitution, as amended by the Twelfth Amendment, establishes the process for selecting the President and Vice President. *See* U.S. Const. art. II, § 1, cls. 2–4; *id.* amend. XII. Each State appoints, in the manner its legislature sees fit, a number of "Electors" equal to the number of Senators and Representatives it has in Congress. *Id.* art. II, § 1, cl. 2. (In addition, under the Twenty-Third Amendment, the District of Columbia appoints three electors.) The electors in each State meet and vote for the President and Vice President. *Id.* amend. XII. The electors then transmit their votes to the President of the Senate, who counts the votes in a meeting of both Houses of Congress. *Id.* The candidates who receive the most electoral votes for President and Vice President, respectively, win those offices, so long as the votes constitute a majority of the appointed electors. *Id.*

Congress has further prescribed the timing and manner of these elections in chapter 1 of title 3 of the U.S. Code, which is entitled "Presidential Elections and Vacancies" and governs the activities of the electoral college and the selection of the President and Vice President. *See* 3 U.S.C. §§ 1–21. Absent an electoral dispute, a State must appoint its electors on the Tuesday after the first Monday in November of a presidential election year. *Id.* §§ 1–2. After a State appoints its electors, the State's governor

must "communicate by registered mail under the seal of the State to the Archivist" a certificate listing the names of the electors and the number of votes cast for each person on the ballot. *Id.* § 6.

The electors meet in their respective States to vote "on the first Monday after the second Wednesday in December." *Id.* § 7. The electors from each State execute six vote certificates, listing their votes for the President and the Vice President, which they then seal and certify. *Id.* §§ 9–10. The electors must "forthwith forward" one certificate "by registered mail" to the President of the Senate. *Id.* § 11. They must "forward" two certificates "by registered mail" to the Archivist, one to "be held subject to the order of the President of the Senate" and the other to be retained as a record "open to public inspection." *Id.* Two certificates also go to the State's secretary of state, again for purposes of providing a duplicate copy and a public record. *Id.* The sixth certificate goes to the district judge in the district where the electors have met, also to be preserved in case of need. *Id.*

If none of a State's vote certificates reach the President of the Senate or the Archivist by the fourth Wednesday in December, the President of the Senate (or the Archivist if the President of the Senate is absent) requests, "by the most expeditious method available," that the secretary of state of that State "immediately" send one of his certificates to the President of the Senate "by registered mail." *Id.* § 12. If neither the President of the Senate nor the Archivist has received a State's vote certificate by the fourth Wednesday in December, the President of the Senate (or the Archivist if the President of the Senate is absent) must send a messenger to retrieve by hand the sixth vote certificate from the district judge in the district where the electors met. *Id.* § 13. Finally, the President of the Senate opens the certificates and counts the votes in the House of Representatives, with all the Members of Congress present, on January 6. *Id.* § 15.

II.

You have asked whether references to "registered mail" in 3 U.S.C. §§ 6, 11, and 12 mean that state officials must, in fact, transmit certain certificates "by registered mail." We conclude that these statutory requirements mean what they say—both the selection certificates and the vote certificates must be sent through USPS's registered-mail service. Not

only does the plain language of the statute require this result, but all of the other relevant principles of statutory interpretation confirm that the text reflects a deliberate choice by Congress to require the use of registered mail.

A.

We begin with the text of the statute. "When the words of a statute are unambiguous, . . . this first canon is also the last[.]" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Congress first required the States in 1928 to send their electoral certificates "by registered mail" to the President of the Senate and to the U.S. Secretary of State, who then performed the record-keeping duties now performed by the Archivist.[1] *See* Pub. L. No. 70-569, §§ 2, 4–5, 45 Stat. 945, 946–47 (1928). When Congress introduced these requirements, it specifically and repeatedly used the phrase "registered mail." *See id.*[2]

There is no ambiguity here. At the time the statute was adopted, "registered mail" referred to a specific service offered by USPS (then called the Post Office Department) that provided special safety measures to assure delivery. *See Webster's New International Dictionary of the English Language* 1796–97 (1917) (defining "registered . . . mail" as "mail the addresses of the sender and consignee of which are, on payment of a special fee, registered in the post office and the transmission and delivery of which are attended to with certain formalities for the sake of security"); *see also Funk & Wagnalls New Standard Dictionary of the English Language* 2077 (1925) (defining "registered letter" as "a letter . . . of which the addresses of the consignor and consignee are entered in a register at the transmitting office, and which upon payment of a special fee obtains the benefit of extra safeguards to insure the safe transmission and delivery of its contents"); 5 *The Century Dictionary and Cyclopedia* 3421 (1911)

[1] In 1951, Congress substituted the Administrator of General Services for the Secretary of State. *See* Pub. L. No. 82-248, §§ 5–9, 65 Stat. 710, 711–12 (1951). In 1984, Congress created the National Archives and Records Administration and transferred the electoral-college duties from the Administrator to the Archivist. National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(e)(1)–(3), 98 Stat. 2280, 2291–92.

[2] These provisions were included without any relevant substantive changes when Congress enacted title 3 of the U.S. Code as positive law in 1948. Pub. L. No. 80-771, 62 Stat. 672, 673–74 (1948).

(defining "[r]egistered letter" as "a letter the address of which is registered at a post-office for a special fee, in order to secure its safe transmission, a receipt being given to the sender and by each postmaster and employee through whose hands it passes").

We have found no indication that there was any other general use of the term "registered mail."[3] To the contrary, at the time, federal law criminalized the establishment of "any private express for the conveyance of letters or packets," except by special messenger. *See* 18 U.S.C. §§ 304–309 (1925). No entity other than USPS offered a service by the name "registered mail" in 1928 or provided the mail delivery required by the electoral-college provisions. Congress's reference to "registered mail" therefore would have plainly been understood at the time to refer to a particular service offered by USPS.

USPS introduced registered-mail service in 1855.[4] The service had well-understood attributes by 1928, as shown by the detailed Postal Laws and Regulations then in effect. *See* Post Office Dep't, *Postal Laws and Regulations of the United States of America* §§ 859–1076 (1924). USPS kept registered mail "separate from ordinary matter" and "properly protected from accident or theft," using special envelopes, jackets, and pouches. *Id.* §§ 894–95, 1058. At each step of the transmission process, postal workers created receipts, establishing a chain of custody so that employees would be "prepared at any time to make affidavit stating that any particular registered piece was properly dispatched, delivered as a hand piece, or received, and its condition." *Id.* § 932; *see id.* §§ 882, 900, 922, 934, 1062.

Registered mail remains much the same today. USPS describes registered-mail service as "the most secure service" that it offers. United States

[3] Although the legislative history discussing these provisions is sparse, at no time did any member of Congress mention any entity other than the "post office" or any specific service other than "registered mail," with the other references being simply to the "mail." *See Providing for the Meeting of Electors of President and Vice President and for the Issuance and Transmission of the Certificates of Their Selection and of the Result of Their Determination, and for Other Purposes: Hearing on H.R. 7373 Before the H. Comm. on Election of President, Vice President, and Representatives in Congress*, 70th Cong. 1, 2, 4, 5 (1928) ("1928 House Hearing"); 69 Cong. Rec. 8827 (1928) (statement of Sen. Samuel Bratton).

[4] *See Significant Years in U.S. Postal History*, https://about.usps.com/publications/pub100/pub100_076.htm (last visited Jan. 6, 2020).

Postal Service, *Mailing Standards of the United States Postal Service, Domestic Mail Manual* § 503.2.1.1 (Jan. 26, 2020) ("DMM"). USPS requires that registered mail be kept in "a locked drawer, cabinet, safe, or registry section" until dispatched for transport or delivery in a special pouch, container, or envelope. United States Postal Service, *Registered Mail*, Handbook DM-901 §§ 3-3.3.2, 5-2.1 (Apr. 2010) ("Handbook DM-901"). USPS still keeps registered mail "separate from ordinary mail," *id.* § 7-3.1.1, and continues to utilize "a system of receipts to monitor the movement of the mail from the point of acceptance to delivery," DMM § 503.2.1.1. And USPS instructs employees to "[h]andle" registered mail "so that individual responsibility can be assigned at all times." Handbook DM-901 § 7-3.2.2. USPS warns customers that because "[r]egistered [m]ail is kept highly secured and is processed manually," it does not travel as quickly as mail sent by other services. *What is Registered Mail®?* (May 19, 2019), https://faq.usps.com/s/article/What-is-Registered-Mail. And USPS recently trademarked "registered mail," which precludes any other carrier from offering a service under that same name. REGISTERED MAIL, Registration No. 5,306,691.

The phrase "registered mail" had a specific and well-understood meaning in 1928, and, even if private companies now offer similar services, the term—which remains in 3 U.S.C. §§ 6, 11, and 12—retains the same meaning and the same association with USPS today.

B.

The history of the electoral-college statute indicates that, consistent with the plain meaning of the term, Congress deliberately chose "registered mail" in order to refer to the specific means of delivery offered by USPS. Before the 1928 statute, Congress had required the States to "communicate"—with no means specified—their selection certificates to the U.S. Secretary of State. *See* Act of Feb. 3, 1887, ch. 90, § 3, 24 Stat. 373, 373. And, after the electors in each State had voted, they were required to "appoint" a person to "deliver" one of their vote certificates to the President of the Senate and to send another vote certificate to him "by the post-office." Rev. Stat. § 140 (2d ed. 1878), 18 Stat., pt. 1, at 23 (repl. vol.); *see* 1928 House Hearing, *supra* note 3, at 1 (statement of Rep. Hatton Sumners) (describing how, under the old method, "one [vote certificate] is delivered to a messenger who brings it to Washington");

69 Cong. Rec. 8827 (statement of Sen. Samuel Bratton) ("[The new bill] dispenses with the necessity of presidential electors coming to the Capital in person to bring the returns.").

The 1928 statute altered those existing procedures by, among other things, eliminating the requirement that one vote certificate be hand-delivered to the President of the Senate. At the same time, the statute imposed more specific requirements about how to send the selection certificates (to the U.S. Secretary of State) and mail the vote certificates (now to the President of the Senate and, for the first time, the U.S. Secretary of State), now requiring both kinds of certificates to be sent by registered mail. These changes updated the process for collecting the electors' votes, while maintaining the security of that process. *See* 1928 House Hearing, *supra* note 3, at 1 (statement of Rep. Hatton Sumners) ("The purpose of this bill is to provide for the use of the mail in order to bring these certificates to Washington[.]"); S. Rep. No. 70-986, at 1–2 (1928) ("The purpose of [the bill] is to modernize, to make more safe and less expensive the method of assembling the certificates[.]"); H.R. Rep. No. 70-750, at 1 (1928) (same); 69 Cong. Rec. 8827 (statement of Sen. Samuel Bratton) ("[The change] is in the interest of economy and is perfectly safe as an administrative measure."). The 1928 amendments thus reflected a deliberate decision to require the use of registered mail in transmitting the certificates.

C.

Congress's deliberate choice to require the use of registered mail is confirmed by other statutory provisions, both within the electoral-college statute and in the broader body of federal law. Numerous other provisions of federal law distinguish between "registered mail" and other delivery services. The most natural interpretation of these laws is that, where Congress has required the use of registered mail, the law does not permit the use of another service.

The electoral-college statute itself confirms the distinction between registered mail and other forms of communication. For instance, 3 U.S.C. § 6 requires the state governors to send the selection certificates to the Archivist "by registered mail," but the very same provision allows the governors to inform the Archivist about the resolution of disputes over electors' appointments by "communicat[ing] . . . a certificate of such determination

in form and manner as the same shall have been made." To take another example, 3 U.S.C. § 12 provides that, if the President of the Senate and the Archivist do not receive the vote certificates by the fourth Wednesday in December, then the relevant federal officials must notify the State's secretary of state "by the most expeditious method available," and the secretary of state must respond by sending the vote certificate "by registered mail." Congress thus plainly knew and marked the difference between registered mail and other forms of communication in the electoral-college statute. *See Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353–54 (2013) (similar).

In addition, Congress has repeatedly amended federal law to permit the use of mail services other than registered mail for certain communications required by statute. Congress previously required the use of registered mail in a number of different statutes.[5] After USPS introduced certified-mail service in 1955, Congress considered a bill that would have "authorize[d] the use of certified mail for the transmission or service of anything required by Federal law to be transmitted or served by registered mail." Letter for E. Robert Seaver, Assistant to the Deputy Attorney General, from Frederick W. Ford, Acting Assistant Attorney General, Office of Legal Counsel at 1 (Oct. 26, 1956). As the Director of the Postal Services testified not long thereafter, such legislation was necessary, if Congress wanted to allow the use of certified mail, because "the old statutes . . . bound" people "to use [registered-mail] service whether they need it or not." *Optional Use of Certified Mail by Government Agencies: Hearing on H.R. 8542, H.R. 8543, and H.R. 10996 Before the H. Comm. on Post Office and Civil Serv.*, 86th Cong. 5, 15 (1960) ("Certified Mail Hearing").

Such legislation, however, was never enacted. As the Postmaster General explained in a letter to the Speaker of the House:

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[5] *See, e.g.*, Grain Futures Act, Pub. L. No. 67-331, § 6(b), 42 Stat. 998, 1002 (1922); Pub. L. No. 69-740, § 3, 44 Stat. 1372, 1373 (1927); Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 69-803, § 19(b), (c), (e), 44 Stat. 1424, 1435 (1927); Pub. L. No. 70-573, 45 Stat. 953, 954 (1928); Pub. L. No. 71-325, § 6(c), 46 Stat. 531, 534 (1930); Pub. L. No. 73-1, §§ 208, 301, 48 Stat. 1, 4, 5 (1933).

> The view has been expressed that it would be unwise to enact a general authorization for the use of certified mail in addition to registered mail for the transmission or service of documents and other matter. Accordingly, each department and agency has examined the laws under its administration and has advised with respect to the specific laws which should be amended to include authorization for the service or transmission of documents and other matter, by certified mail, in addition to registered mail.

Letter for Sam Rayburn, Speaker of the House of Representatives, from Arthur E. Summerfield, Postmaster General, Post Office Department, *in* Certified Mail Hearing at 5–6.

Consistent with the recommendations of the Executive Branch, over the next few years, Congress enacted several laws to amend certain statutes to authorize the use of certified mail in addition to registered mail. *See, e.g.*, Pub. L. No. 85-207, sec. 18, 71 Stat. 481, 484 (1957); Pub. L. No. 85-259, 71 Stat. 583, 583 (1957); Technical Amendments Act of 1958, Pub. L. No. 85-866, sec. 89(b), (c), 72 Stat. 1606, 1665–66; Pub. L. No. 86-106, sec. 17, § 148, 73 Stat. 239, 242 (1959); Pub. L. No. 86-199, 73 Stat. 427, 427 (1959). During this same period, Congress considered, but did not enact, three different bills that would have amended, among other things, the electoral-college provisions to allow the use of either registered or certified mail. *See* S. 3461, 85th Cong. § (a)(1) (1958); H.R. 11602, 85th Cong. § (a)(1) (1958); S. 652, 86th Cong. § (a)(1) (1959).

These efforts culminated in 1960, when USPS recommended and Congress passed a bill that amended 56 different statutory references to "registered mail." *See* Pub. L. No. 86-507, 74 Stat. 200 (1960). The amended provisions included a registered-mail requirement enacted on the same day as the electoral-college provisions, *id.* § 1(45), 74 Stat. at 203, but Congress made no changes to the electoral-college provisions. Congress thus understands the distinction between registered and certified mail and has decided whether and when to modify the registered-mail requirements to allow for other services.

In addition, when Congress amended sections 6, 11, and 12 of title 3 in 1984 to substitute the Archivist for the Administrator of General Services, it made no changes to the registered-mail requirements. Pub. L. No. 98-497, § 107(e)(1)–(3), 98 Stat. at 2291–92. Congress's decision to leave

untouched the registered-mail requirements when it amended sections 6, 11, and 12 means that those requirements continue to apply here, as similar requirements do elsewhere, *see, e.g.*, 15 U.S.C. § 2073(a); 28 U.S.C. § 2344; 29 U.S.C. §§ 1813(c), 1853(c); 42 U.S.C. §§ 300gg-22(b)(2)(E)(i), 6104(e)(1) (all requiring transmission by registered mail).

In light of Congress's treatment of other registered-mail requirements, we cannot read the electoral-college provisions as broadly as those provisions Congress expressly amended to authorize alternative transmission methods, such as certified mail. As the Supreme Court has explained: "We cannot ignore Congress' decision to amend [other] provisions but not make similar changes [here]. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009); *see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991); *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 492–93 (3d Cir. 2014). Here, we presume Congress meant for the registered-mail provisions to mean something different from those that were amended. Accordingly, state officials must use registered mail and may not use other delivery providers or other USPS services.

D.

There is little judicial precedent on statutory registered-mail requirements. But what there is supports the view that a requirement to use "registered mail" mandates transmission by USPS's registered-mail service. In *Johnson v. Burken*, 930 F.2d 1202 (7th Cir. 1991), the court considered an Illinois state law originally enacted in 1929 that required plaintiffs suing nonresident motorists to send a copy of the complaint to the defendants "by registered mail," *see* 1929 Ill. Laws 646–47 (now codified as amended at 625 Ill. Comp. Stat. 5/10-301(b)). The court rejected the argument that transmission by certified mail was sufficient, holding that although the "difference" between the two "may seem slight," "[c]ertified mail is not registered mail." 930 F.2d at 1206. The court said it had no "power of statutory revision" to "equate" the two, absent evidence that the Illinois legislature anticipated such an application. *Id.* at 1206–07. Just so here: registered mail means registered mail.

The Supreme Court has not directly addressed this issue, but the Court implied the same result in *Fleisher Engineering & Construction Co. v. United States ex rel. Hallenbeck*, 311 U.S. 15 (1940). There the Supreme

Court considered a statute that gave a subcontractor the right to sue a contractor for uncompensated labor or materials if the subcontractor gave the contractor written notice. *Id.* at 16 & n.1. The statute further instructed that such notice "shall be served . . . by registered mail." *Id.* (quoting 40 U.S.C. § 270b(a) (1940)). Although the "actual receipt of the notice and the sufficiency of its statements" had not been challenged by the contractor, the Court appeared to conclude, without discussion, that the proffered notice did not comply with the statute's service requirement because it had not been sent by registered mail. *Id.* at 16–18.

More recently, a dissenting opinion by Justice Thomas in *Henderson v. United States*, 517 U.S. 654 (1996), addressed a registered-mail requirement. The Suits in Admiralty Act ("SAA") required a plaintiff seeking to sue the federal government to "forthwith serve a copy" of his complaint on the U.S. Attorney for the district and to mail the Attorney General "a copy thereof by registered mail." Pub. L. No. 66-156, § 2, 41 Stat. 525, 526 (1920). Decades later, Rule 4 of the Federal Rules of Civil Procedure imposed a general 120-day time limit for service of process. Fed. R. Civ. P. 4(j) (1988). *Henderson* presented the question whether the 120-day rule set aside the SAA's forthwith-service requirement. The Court held that it did, concluding that the requirement amounted to a procedural rule, rather than a jurisdictional and therefore substantive one, that Rule 4 displaced. *Henderson*, 517 U.S. at 668–72. Though the majority did not discuss the meaning of the SAA's registered-mail requirement, it noted that the government had conceded at oral argument that either registered mail or certified mail would be sufficient under Rule 4. *Id.* at 667–68.[6]

Justice Thomas, joined by Chief Justice Rehnquist and Justice O'Connor, dissented. Because the provision waived sovereign immunity, he

[6] The government's concession at oral argument in *Henderson* did not rest on its interpretation of the registered-mail requirement in the SAA. By that time, Rule 4 had been amended to allow the use of registered or certified mail in serving the United States. *See* Fed. R. Civ. P. 4(d) (1988). Rather than an interpretation of the statutory text, then, the government's argument represented the view that the SAA's registered-mail requirement was procedural and that, at least for purposes of serving the United States, using certified mail would not alter substantive rights. *See* Tr. of Oral Arg. 28–29, 46–48, 53, *Henderson*, 517 U.S. 654 (No. 95-232) (The government's view that either registered or certified mail sufficed "wouldn't be an interpretation of the statute alone. That is, it would be an interpretation of the statute in conjunction with the Federal rule, in conjunction with the Rules Enabling Act[.]").

viewed the entire SAA provision, including the registered-mail requirement, to be jurisdictional, and thus incapable of being modified by Rule 4. *Id.* at 673–76 (Thomas, J., dissenting). That view of the SAA, Justice Thomas recognized, "may" cause a court's jurisdiction to "turn upon the plaintiff's use of registered mail." *Id.* at 678 n.4. In the face of the government's proposition at oral argument that, "in this day and age, certified and registered mail are practical equivalents for the purposes for which this requirement was designed," Tr. of Oral Arg. 29, *Henderson*, 517 U.S. 654 (No. 95-232), Justice Thomas still thought the SAA mandated using registered mail. "Though this may seem like an odd requirement from our modern perspective," he said, "the most sensible textual reading of the Act is still that Congress sought to impose a specific method of service in SAA cases without regard to the rules governing service generally." *Henderson*, 517 U.S. at 678 n.4 (Thomas, J., dissenting). "Congress is free," he noted, "to amend the statute if it determines that the SAA has fallen out of date with modern mailing practices." *Id.* Though the electoral-college provisions are not jurisdictional, there is also no separate procedural rule that purports to update their registered-mail requirements. Thus, the same reasoning regarding the interpretation of the registered-mail requirements applies here.

E.

For these reasons, we believe that "registered mail," as used in 3 U.S.C. §§ 6, 11, and 12, means the specific registered-mail service provided by USPS. Under those provisions, state officials must transmit their selection certificates and vote certificates by way of USPS as registered mail.

Since 1928, there have been significant changes in the availability of commercial carriers and the forms of service offered by USPS. But such changes do not overcome the meaning of the statutory text. *See Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 88–89 (2017) (explaining that changes in industry practice do not allow a court to "rewrite a constitutionally valid statutory text" to address a question Congress did not face). USPS continues to offer registered-mail service in a manner akin to that which was offered in 1928. Though other commercial carriers now offer services providing safeguards analogous to those registered mail provided in 1928 (and provides today), those services are not "registered

mail" as provided by the statute.[7] And for the same reason, it is of no moment that USPS offers other services (as it did in 1928), because they are not "registered mail" and, in fact, they do not provide the same kinds of safeguards. Certified mail, for example, provides the sender with a record of delivery but does not require postal workers to create a chain of custody. DMM § 503.3.1.1. Indeed, certified mail is "dispatched and handled in transit as ordinary mail." *Id.* USPS's tracking system also falls short of the safeguards provided by registered mail in 1928. It provides only date-and-time information at several points in the delivery process, based on scans by postal employees who handle mail being tracked with all other mail. *Id.* § 503.7.1.1; *USPS Tracking®–The Basics*, https://faq.usps.com/s/article/USPS-Tracking-The-Basics (last visited Feb. 14, 2020). The service remains distinct from that offered by registered mail.

We recognize that the National Archives and Records Administration has previously advised state officials that they may use "registered mail or commercial carrier" to send electoral certificates to the Archivist (but not for the certificates that they must send to the President of the Senate, the secretary of state of the State, or the Chief Judge of the District Court). Office of the Federal Register, National Archives and Records Administration, *Electoral College Instructions to State Officials: Responsibilities of States in the Presidential Election* 3–4 (undated instructions for 2016 election). The agency has given this advice in part because USPS does not allow the sender to receive real-time updates about registered mail as it is being delivered and because USPS does not provide a guaranteed delivery date for registered mail. *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Gary M. Stern, General Counsel, National Archives and Records Administration at 2, 5 (Sept. 16, 2019). In addition, you have explained that USPS employs certain security measures, like irradiating packages, for items being sent to Washington, D.C., which may slow down the delivery process or damage the items. *See id.* at 5. For these and additional reasons, the Archivist reasonably believes that providing States with the option to use a variety of carriers and services furthers Congress's goal of ensuring that electoral certificates will arrive at the seat of government in a timely manner.

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[7] *See, e.g.*, FedEx Custom Critical®, *Surface Expedite Exclusive Use*, https://customcritical.fedex.com/us/services/surfaceexpedite/exclusive.shtml (last visited Feb. 14, 2020); *UPS Express Critical®*, https://www.upsexpresscritical.com/cfw (last visited Feb. 14, 2020).

We appreciate these practical concerns, and Congress could well take them into account in revising the statute. But they are not sufficient to overcome the plain text of the provisions' references to "registered mail" and the other aspects of statutory construction discussed above. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13–14 (2000) ("It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome . . . is a task for Congress[.]"). So long as federal law requires delivery by registered mail, state officials are obliged to transmit their selection certificates and vote certificates accordingly.

III.

Having concluded that state officials must send their certificates by USPS registered mail, we next address whether the Archivist may accept a State's certificates sent by a different means. Because the relevant provisions place no restrictions on the Archivist's ability to accept the certificates delivered to him and impose no penalties for failure to comply with the registered-mail provisions, we believe that the Archivist may accept such certificates that are not sent by registered mail.

Congress enacted the electoral statutory scheme to ensure that it has the proper vote certificates in its possession by January 6 to allow it to determine the results of the election. *See* 3 U.S.C. § 15. To that end, the electoral-college provisions impose strict procedural deadlines and provide redundancy by ensuring that multiple copies of the vote certificates will be available to Congress. When Congress amended the statute to require transmission by registered mail, it also increased the number of vote certificates that the electors must create. Rather than the previous three vote certificates, Congress now requires that the electors sign and seal six certificates, *id.* § 9, and distribute those certificates among four different people in diverse positions in state and federal government, *id.* § 11. As one Congressman said, the scheme is "overprotect[ive]." 1928 House Hearing, *supra* note 3, at 5 (statement of Rep. Hatton Sumners).

But despite these numerous procedural details, none of the electoral-college provisions speaks to the Archivist's acceptance (or rejection) of electoral certificates that are not sent by registered mail. The statute's "registered mail" requirement imposes a duty on state officials, not the Archivist. The statute does not address the Archivist's responsibilities

should he receive electoral certificates sent by another means. Instead, the statute obligates the Archivist (or the President of the Senate) to seek backup copies of the certificates only when he does not *receive* them, irrespective of the mode of delivery. Section 12 directs the Archivist (if the President of the Senate is absent) to request a duplicate certificate from the state secretary of state if "no certificate of vote and list[s] . . . from any State *shall have been received* by the President of the Senate or by the Archivist." 3 U.S.C. § 12 (emphasis added). Similarly, section 13 directs the Archivist (again if the President of the Senate is absent) to send a messenger to the district judge if "no certificates of votes from any State *shall have been received* at the seat of government." *Id.* § 13 (emphasis added). These provisions require that the certificates be "received"; they do not address the means of delivery. The Archivist's duties under sections 12 and 13 are triggered by the failure to receive the certificates, not the failure of a state official to send the certificates through registered mail, the proper method of transmission.

Judicial precedent supports the general proposition that the violation of a procedural requirement relating to a method of transmission, at least when taken alone, need not stand in the way when the purpose of that requirement has been achieved by a different means. Again, the Court's analysis in *Fleisher Engineering* is instructive. Although the statute's notice-by-registered-mail requirement had not been satisfied, the Court nevertheless affirmed the subcontractor's right to sue, holding that the structure of the statute indicated that "a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provision as to the manner of serving notice." *Fleisher Engineering*, 311 U.S. at 18. The Court held that the purpose of the "provision as to manner of service was to assure receipt of the notice," which the contractor had conceded in the case, and "not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received." *Id.* at 18–19. "In the face of such receipt, the reason for a particular mode of service fails." *Id.* at 19.

Other court decisions are to similar effect. Courts, for instance, have rejected contract claims premised upon the absence of notice by registered mail, where the contracting party admits to having received actual notice through other means. *See Sports Center, Inc. v. Riddell, Inc.*, 673 F.2d

786, 792 (5th Cir. 1982) ("The only variance is that the notice was by regular mail rather than by registered mail. Since it is shown that the notice was received, in the context of this case, the mode of postal delivery is insignificant."); *Cardiomed, Inc. v. Kardiothor, Inc.*, No. 91-4032, 1991 WL 224245, at *3–4 (10th Cir. Oct. 31, 1991) ("The purpose of providing for service of a notice by personal delivery or registered mail is to assure receipt of the notice and avoid disputes about receipt. . . . Under the circumstances [where the party received notice], Cardiomed got what it bargained for in the agreement.").[8] In *Finer Foods, Inc. v. U.S. Department of Agriculture*, 274 F.3d 1137, 1139 (7th Cir. 2001), the court rejected the argument that the court lacked personal jurisdiction because the Department of Agriculture had received a petition for review by fax rather than by mail, as the Hobbs Act required (although in that case the notice appears also to have been mailed, but not received in view of security screening imposed after the 9/11 attacks).

Taken as a whole, these precedents establish that where a party in fact receives notice, the court may treat the purposes of the statutory or contractual provision as having been fulfilled, even if the sender did not comply with a registered-mail requirement. We think that a similar principle should govern the circumstances in which the Archivist receives a State's electoral certificates through a means other than by registered mail. Nothing suggests that the registered-mail requirements are "jurisdictional," such that a failure to honor them would require that the certificates be rejected. The 1928 amendments were designed to ensure the safe transmission of the States' electoral certificates to the President of the Senate and the Archivist, while eliminating the expense occasioned by the use of special messengers. Although the arrival of vote certificates by some means other than registered mail might raise concerns about the authenticity of those certificates, Congress assigned to itself—rather than to the Archivist—the duty to resolve any such objections. 3 U.S.C. § 15 (prescribing the process by which Congress will resolve "all objections so made to any vote or paper from a State"). Accordingly, there does not seem to be any legal reason why the Archivist would be required to reject the proffered certificates out of hand.

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[8] There was no basis for the Seventh Circuit to apply this principle in *Johnson v. Burken*, discussed above, in which the complaint sent by certified (rather than registered) mail was not received by the defendant. *See* 930 F.2d at 1204.

IV.

For these reasons, we conclude that 3 U.S.C. §§ 6, 11, and 12 require state officials to transmit their selection and vote certificates to the Archivist by USPS registered mail. The electoral-college provisions do not require the Archivist to reject certificates that he receives even if state officials have transmitted them by some other means.

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