No. 24-____

In the Supreme Court of the United States

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State
Petitioner,

v.

MONTANA DEMOCRATIC PARTY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Montana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In state court cases implicating the Elections Clause, this Court has a "duty to safeguard limits imposed by the Federal Constitution." *Moore* v. *Harper*, 600 U.S. 1, 35, 37 (2023). This Court alone can ensure that state courts do "not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution." *Id.* at 37. But it has not yet adopted any "test by which [it] can measure state court interpretations of state law" in those kinds of cases. *Id.* at 36.

The questions presented are:

1. When this Court reviews a state court's decision invalidating state Elections Clause legislation, what standard does it apply to decide whether that decision exceeds the bounds of ordinary judicial review?

2. Did the Montana Supreme Court's split decision below exceed the bounds of ordinary judicial review by invalidating under the Montana Constitution two Montana election integrity provisions—one setting the voter-registration deadline at noon the day before Election Day, and another requiring the Secretary to promulgate regulations banning paid absentee ballot collection?

LIST OF PARTIES TO THE PROCEEDINGS

Respondents Mitch Bohn, Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe, Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group were the plaintiffs in the district court and the appellees in the Montana Supreme Court.

STATEMENT OF RELATED PROCEEDINGS

Montana Supreme Court

Montana Democratic Party, et al. v. Jacobsen, No. DA 22-0667 (Mar. 27, 2024).

Montana Thirteenth Judicial District Court, Yellowstone County

Montana Democratic Party, et al. v. Jacobsen, No. DV 21-0451 (Sept. 30, 2022).

Montana Democratic Party, et al. v. Jacobsen, No. DV 21-0451 (July 27, 2022).

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INTRODUCTION

The Elections Clause "expressly vests power to carry out its provisions in 'the Legislature' of each State." *Moore* v. *Harper*, 600 U.S. 1, 34 (2023). Montana's Legislature exercised that power in 2021 to pass two election-integrity laws relevant here. The first moved Montana's voter-registration deadline for state and federal elections from the close of polling on election day to noon the day before. The second instructed Montana's Secretary of State, the Petitioner here, to adopt rules banning paid absentee ballot collection. But in a split 5-2 decision, a majority of the Montana Supreme Court invalidated both provisions under the Montana Constitution.

Whatever deference this Court would ordinarily give to a state court's decision interpreting state law is "tempered" when "required by [this Court's] duty to safeguard limits imposed by the Federal Constitution." *Id.* at 35. State courts cannot "read state law in such a manner as to circumvent federal constitutional provisions," *id.*, and "arrogate to themselves the power vested in state legislatures to regulate federal elections," *id.* at 36.

But that's what happened here. The majority opinion's "cascading analytical sleight of hand" and "faulty constitutional analysis provides analytical cover, under the guise of constitutional conformance review, to second-guess the facially non-discriminatory public policy determinations of the Legislature under Mont. Const. art. IV, §3." Pet'r's App. ("Pet.App.") 109a, ¶148 (Sandefur, J., concurring in part, dissenting in part). This Court's review is needed to correct that

"eva[sion]" of "federal law." *Moore*, 600 U.S. at 34. The Court should grant the petition.

OPINIONS BELOW

The Montana Supreme Court opinion (Pet.App.1a-149a), is published at 545 P.3d 1074 (Mont. 2024). The Montana district court's September 22, 2022 (Pet.App.150a-350a) and July 27, 2022 (Pet.App.351a-375a) opinions and orders are unpublished.

JURISDICTION

The Montana Supreme Court entered judgment on March 27, 2024. Pet.App.1a. On June 13, 2024, Montana applied for an extension of time to file a petition for a writ of certiorari. Justice Kagan granted that application, extending Montana's time to file a petition to and including August 24, 2024. Because that is a Saturday, Sup. Ct. R. 13.5 extends the deadline to August 26, 2024. Montana timely filed this petition. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[1]

U.S. Const., art. I, §4, cl.1:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or

[1] The Montana election-integrity legislation invalidated by the Montana Supreme Court majority below—Montana House Bills 176 ("HB176"), 506 ("HB506"), 530 ("HB530") and Senate Bill 169 ("SB169")—is included in the Appendix. Pet.App.387a-421a.

alter such Regulations, except as to the Places of chusing Senators.

Mont Const., art. II, §13:

All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Mont Const., art. IV, §3:

Elections. The legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuse of the electoral process.

STATEMENT OF THE CASE

A. Before *Moore*, at least four members of this Court recognized that "the extent of a state court's authority to reject rules adopted by a state legislature for use in conducting federal elections" presented "an exceptionally important and recurring question of constitutional law." *Moore* v. *Harper*, 142 S. Ct. 1089, 1089 (2022) (Alito, J., joined by Thomas, J., and Gorsuch, J., dissenting from denial of application for stay); *see also id.* at 1090 (collecting cases where the occasion to address the issue was "inopportune" but noting "[w]e will have to resolve this question sooner or later"); *id.* at 1089 (Kavanaugh, J., concurring in denial of application for stay) (agreeing that this "issue is almost certain to keep arising until the Court definitively resolves it").

B. This Court partially resolved that recurring issue last year. *See Moore*, 600 U.S. at 34. On the merits,

the Elections Clause doesn't "exempt state legislatures from the ordinary constraints imposed by state law"—including state constitutional law—but "state courts do not have free rein." *Id.* That is, the Election Clause's express vesting of "power to carry out its provisions in 'the Legislature' of each state" was "a *deliberate choice* that this Court must respect." *Id.* (emphasis added). And that requires ensuring that state court interpretations of state law "do not evade federal law." *Id.*

Moore highlighted three areas "where the exercise of federal authority or the vindication of federal rights implicates questions of state law"—private property rights under the Takings Clause, state contract law and the Contracts Clause, and cases implicating the adequate-and-independent-state-grounds doctrine. *Id.* at 34-35. In each of these areas, "the concern [is] that state courts might read state law in such a manner as to circumvent federal constitutional provisions," so federal courts "temper[]" their deference to state court interpretations "when required by [their] duty to safeguard limits imposed by the Federal Constitution." *Id.* at 35.

Moore's bottom line: state courts may "apply state constitutional restraints when legislatures" act under their Elections Clause authority, but they "may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude on the role specifically reserved to state legislatures by [the Elections Clause]." *Id.* at 37; *see also id.* at 36 (state courts may not "arrogate to themselves the power vested in state legislatures to regulate federal elections"). But the Court left open the question of *how* to determine whether a state

court has transgressed that boundary and impermissibly interfered with a state legislature's authority.

Justice Kavanaugh joined the Court's opinion in full but wrote separately to suggest the appropriate "standard a federal court should employ to review a state court's interpretation of state law in a case implicating the Elections Clause." *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring). He settled on Chief Justice Rehnquist's standard: "whether the state court 'impermissibly distorted' state law 'beyond what a fair reading required.'" *Id.* (quoting *Bush* v. *Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)). That standard, he argued, should apply to both state interpretations of state statutes *and* state constitutions. *Id.* at 39. And in reviewing state court interpretations of state law, courts "necessarily must examine the law of the State as it existed prior to the action of the [state] court." *Id.* (quoting *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring)).

C. This case arises from legislation the Montana Legislature passed in 2021 to secure and protect the integrity of state and federal elections. The Montana Democratic Party and aligned interest groups challenged four such laws in Montana state court. Here, Petitioners seek relief from this Court as to only two of them: HB176 and HB530. HB176 amended Mont. Code Ann. §13-2-304 to move Montana's voter-registration deadline from the close of polls on election day to noon the day before. Pet.App.388a. HB530, in turn, required the Montana Secretary of State to promulgate regulations banning paid absentee ballot collection. Pet.App.418a.

After a nine-day bench trial, the district court found both bills facially unconstitutional under the Montana Constitution. Pet.App.6a, ¶10; Pet.App.76a, ¶129 (Sandefur, J., concurring in part, dissenting in part) (dissenting from majority's holding that HB176 and HB530 were "facially unconstitutional"). The district court held that both bills violated Montana's fundamental right to vote. Pet.App.6a, ¶10.

Is a split 5-2 decision,[2] the Montana Supreme Court affirmed. Pet.App.3a, ¶4. In doing so, the majority applied for the first time a new standard to election-integrity legislation that in its view balanced two provisions of the Montana Constitution. The majority first recognized that the Montana Constitution expressly protects the right to vote. Pet.App.8a, ¶13 (quoting Mont. Const. art. II, §13 ("elections shall be free and open" and "no power … shall … interfere to prevent the free exercise of the right of suffrage")). But the Montana Constitution also requires the Montana Legislature to "provide by law the requirements for residence, registration, absentee voting, and [election] administration" and to "insure the purity of elections." Pet.App.8a, ¶13 (quoting Mont. Const. art. IV, §3).

The majority thus sought to weigh the right to vote against the Legislature's duty to regulate elections. Pet.App.8a-9a, ¶¶13-14. In doing so, the majority rejected the federal *Anderson/Burdick* framework as a

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[2] Chief Justice McGrath and Justices McKinnon, Shea, and Gustafson joined the majority opinion, Pet.App.70a, and in her concurring opinion, Justice Baker agreed that HB176 and HB530 were facially unconstitutional, Pet.App.73a, ¶124. Justices Sandefur and Rice disagreed that HB176 and HB530 were facially unconstitutional. Pet.App.76a, ¶129; Pet.App.149a.

model, reasoning that *Anderson/Burdick* "now often gives undue deference to state legislatures so as not to 'transfer much of the authority to regulate election procedures from the States to the *federal* courts.'"[3] Pet.App.9a, ¶15 (emphasis in original) (quoting *Brnovich* v. *Democratic Nat'l Comm.*, 594 U.S. 647, 673-74 (2021)).

After rejecting *Anderson/Burdick*, the majority embarked on a meandering trek through state constitutional convention transcripts and legislative intent to find that the Montana Constitution secured "greater protection of the right to vote than the United States Constitution." Pet.App.11a, ¶17; *see also* Pet.App.11a-20a, ¶¶18-27. And in lieu of the *Anderson/Burdick* framework—which the majority decried as "somewhat amorphous," Pet.App.22a, ¶32—the majority held that "when a law *impermissibly interferes* with a fundamental right" it applies strict scrutiny. Pet.App.23a-24a, ¶34 (emphasis added). Applying that test requires a court "to examine the degree to which the law infringes upon" the right to vote. Pet.App.24a, ¶34. Strict scrutiny, the majority said, is inappropriate when the law when the law "only minimally burden[s] it." Pet.App.24a, ¶35. But how to separate impermissible interference from minimal burdens? The majority didn't say.

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[3] At least 18 States likely apply some form of the *Anderson/Burdick* framework for state constitutional right-to-vote challenges. *See* Emily Lau, *Explainer: State Const. Standards for Adjudicating Challenges to Restrictive Voting Laws*, STATE DEMOCRACY RSCH. INITIATIVE, UNIV. OF WISC. LAW SCH., at 2 (Oct. 3, 2023), https://perma.cc/4BZ5-YSBZ.

The majority held that by shifting the deadline for voter registration from the close of polls on election day to noon the day before, HB176 impermissibly interfered with Montanans' right to vote and thus had to survive strict scrutiny. Pet.App.38a, ¶63. Even though the Montana Constitution provides only that the legislature "*may* provide for a system of poll booth registration," *see* Mont. Const. art. IV, §3—which the majority recognized was "permissive language" that doesn't require election day registration, Pet.App.40a, ¶67—the majority still found that election-day registration was required if possible. *See* Pet.App.41a, ¶68. Why? Because "the Framer's intent"—not the constitutional text—"controls our interpretation of a constitutional provision." Pet.App.40a, ¶66. And the majority's view of that intent—which was not expressed in *and ultimately contrary to* the enacted constitutional text, *see* Pet.App.40a-42a, ¶67—clearly established (in the majority's view) that election day registration should be available. Pet.App.41a, ¶68.

The majority also explained that HB176 impermissibly burdened the right to vote because, since its adoption in 2005, more than 70,000 Montanans have used election day registration and thus most of these voters would be disenfranchised. Pet.App.42a-44a, ¶¶70-71; Pet.App.45a ¶74. This, the majority said, doesn't "mean that once the Legislature has expanded the right to vote it may never backtrack if the expansion was unwise." Pet.App.45a ¶74. The catch: the legislature just needs to show that the "backtrack[ing]" law survives strict scrutiny. *See* Pet.App.45a ¶74.

The majority also held that HB530—which required the Secretary to adopt an administrative rule

prohibiting the receipt of a pecuniary benefit in exchange for collecting and distributing ballots—impermissibly interferes with the right to vote, even though the Secretary hadn't then (and still hasn't) promulgated a rule. Pet.App.51a-52a, ¶87; Pet.App.53a, ¶90. And in this *facial* challenge, *see* Pet.App.7a, ¶11 ("facial challenge of a statute *must show* that a law is unconstitutional in *all its applications*" (emphasis added)), the majority held that HB530 was unconstitutional because the majority's read of the factual record showed that there are *some* unconstitutional applications—specifically with respect to Native American voters. *See* Pet.App.55a-57a, ¶97-99; Pet.App.57a-58a, ¶101.

Justice Sandefur, joined by Justice Rice, dissented from the majority's holdings on HB176 and HB530. They concluded that neither HB176 nor HB530 is facially unconstitutional. Pet.App.76a, ¶129. The dissent first took aim at the majority's conclusion that the Montana Constitution provides more protection to the right to vote than the United States Constitution, arguing that both protect the right to the same degree. Pet.App.79a-93a, ¶¶130-40. As for the challenged provisions, the dissent observed that the majority's faulty analysis "clear[ed] the … way for [it] to subjectively second-guess the Legislature, with *no deference* to legislative policy determinations" in service of the legislature's state constitutional duties. Pet.App.110a, ¶148 (emphasis added). Despite the majority's assurances that election-day registration isn't "baked in" to the Montana Constitution, the dissent saw that the majority's "flawed analysis clearly manifests that it is … for this Court in its infinite wisdom—not the Legislature in accordance with its *express constitutional*

authority—to decide whether any later legislative push-back is wise … without any deference to the Legislature." Pet.App.121a, ¶158. The majority's holding cited no "credible support" for "the *legal proposition* that the fundamental right to vote necessarily includes the *most convenient or most preferable way to vote*, particularly in light of the fact that a clear majority of the [Montana] Framers refused to enshrine election day registration into [Montana's] new [1972] Constitution, even in the face of a then-prevailing 40-day voter registration deadline." Pet.App.119a, ¶157.

Beyond that, the majority's holding threatens Montana's separation of powers. Courts, the dissent correctly concluded, do not have the "constitutional power or authority to act as a 'super-legislature' second-guessing 'the wisdom, need, and propriety' of legislative enactments'" that may "regulate the time, place, and manner of [the] exercise of the right to vote." Pet.App.147a, ¶171. But here, "in an unprecedented exercise of unrestrained judicial power" the majority struck down "public policy determinations made by the Legislature in the exercise of *its constitutional discretion* … on the most dubiously transparent of constitutional grounds." Pet.App.148a, ¶171.

REASONS FOR GRANTING THE PETITION

A year ago, this Court held that when state courts review state laws implicating the Elections Clause, they "may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Moore,* 600 U.S. at 36. But the Court declined to adopt a "test by which [it] can measure state

court interpretations of state law" in those cases. *Id.* at 37.

The Montana Supreme Court's opinion below presents an ideal vehicle to resolve this "important question" implicating federal law "that has not been, but should be, settled by this Court." Sup. Ct. R. 10. The Court should grant the petition and reverse the judgment below with respect to HB176 and HB530.

I. This case squarely presents the question this Court left open in *Moore v. Harper*—what are the "ordinary bounds of judicial review"?

The Montana Supreme Court's majority opinion invalidated two state election integrity provisions based on a "significantly flawed constitutional analysis," Pet.App.119a, ¶158 (Sandefur, J., concurring in part, dissenting in part), that "clearly manifests that it is and will be for this [Montana Supreme] Court in its infinite wisdom—not the Legislature in accordance with its express constitutional authority—to decide whether any" changes to election-integrity laws are "wise or 'unwise,' just as here, without any deference to the Legislature," Pet.App.121a, ¶158 (Sandefur, J., concurring in part, dissenting in part). The decision below thus squarely raises the question this Court left unanswered in *Moore*. This Court should grant the petition and answer it.

A. *Moore*'s decision to preserve federal-court review of state-court decisions implicating the Elections Clause rests on correct first principles. Even though this Court "generally defer[s] to state courts on the interpretation of state law," there are still "areas in

which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring). The Elections Clause is a classic example. Because the Constitution specifically delegates power to regulate federal elections to state *legislatures*, *see* Art. I, §4, cl. 1, "the text of the election law itself"—"not just its interpretation" by a state court—"takes on independent significance." *Bush*, 531 U.S. at 113. (Rehnquist, C.J., concurring). The act of reviewing state-court decisions interpreting the text of state laws governing federal elections thus falls within this Court's "duty to safeguard limits imposed by the Federal Constitution." *Moore*, 600 U.S. at 35.

But this Court has not yet identified the standard that applies to federal-court review of a state-court decision interpreting a state law enacted under the Elections Clause. That's not for lack of trying. The opinions in *Moore* acknowledged prior efforts to discern an answer. *See id.* at 36; *id.* at 38-39 (Kavanaugh, J., concurring).

Moore first pointed to Chief Justice Rehnquist's statement in *Bush* v. *Gore* that state court decisions implicating the Elections Clause exceed the bounds of ordinary judicial review when they "impermissibly distort" state law "beyond what a fair reading required." 600 U.S. at 36 (quoting *Bush*, 531 U.S. at 115). Chief Justice Rehnquist's formulation captures "essentially the same point" as other potential tests discussed in *Moore*—the views of Justice Souter and the Solicitor General. *Id.* at 39 (Kavanaugh, J., concurring). In Justice Souter's view, a state court decision exceeds the bounds of ordinary judicial review when it "has

displaced the state legislature's provisions." *Bush*, 531 U.S. at 130 (Souter, J., dissenting). To decide that issue, a federal court must look at whether "the law as declared" by the state court is "different from the provisions made by the legislature," to which the federal Constitution "commits responsibility." *Id.* Though Justice Souter concluded that the Florida Supreme Court's decisions in that case were "within the bounds of reasonable interpretation," and "the law as declared" was "consistent with Article II," *id.* at 131, his opinion "implies that, had the state court's ruling gone beyond the bounds of reasonable interpretation, it would have violated the legislature's prerogatives under Article II." Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 518 (2021); *accord Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) ("As I understand it, Justice Souter's standard, at least the critical language, is similar: whether the state court exceeded 'the limits of reasonable' interpretation of state law."). And the Solicitor General in *Moore* "proposed another similar approach: whether the state court reached a 'truly aberrant' interpretation of state law." 600 U.S. at 38-39 (Kavanaugh, J., concurring) (quoting Br. for United States as Amicus Curiae 27).

Because those formulations "convey essentially the same point," this Court should adopt Chief Justice Rehnquist's "straightforward" standard, *id.* at 39 (Kavanaugh, J., concurring), and hold that a state court exceeds the ordinary bounds of judicial review when its decision "impermissibly distort[s]" a state election law "beyond what a fair reading required." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring). Applying this standard will "ensure that state court interpretations of" state law governing federal elections "do

not evade federal law." *Moore,* 600 U.S. at 34. After all, a "significant departure" from a state legislature's "legislative scheme" for regulating elections "presents a federal constitutional question." *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring). And "federal courts must not abandon their own duty to exercise judicial review." *Moore,* 600 U.S. at 37.

B. This Court's precedents show at least two ways that a state court's decision about a state election law "impermissibly distort[s]" the state constitution "beyond what a fair reading requires." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

First, this Court has reviewed whether a state court has properly applied a state constitutional provision that *plainly allows (or forbids)* a state legislature's exercise of its Elections Clause authority. *Ohio ex rel. Davis v. Hildebrant* is illustrative. There, the Ohio Supreme Court allowed a state law drawing new congressional districts to be put to a popular vote by referendum. 241 U.S. 565, 566 (1916). That decision fell within the bounds of ordinary judicial discretion because the Ohio Constitution plainly allowed the state's voters "to approve or disapprove by popular vote any law enacted by the general assembly"—even redistricting laws. *Id.*

Smiley v. Holm cut the other way. 285 U.S. 355 (1932). There, the Minnesota Supreme Court held that the Governor violated the Elections Clause by exercising the veto power granted to him in the state constitution on a redistricting map. This Court reversed. Its reasoning shows that the Minnesota court's holding exceed the bounds of ordinary judicial review because state legislatures enacting laws under the Elections

Clause can be forced to follow the "*manner* … in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 367-68 (emphasis added). When a state constitution specifies a plain mechanism of state lawmaking—such as a gubernatorial veto—it exceeds the ordinary bounds of judicial review to conclude that this plain mechanism does not also apply to Elections Clause legislation.

Second, this Court has examined whether a state court has "unconstitutionally intrude[d] upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution," *Moore*, 600 U.S. at 37, by interpreting a *facially ambiguous* state constitutional provision to invalidate an unambiguous state election law that law does not plainly conflict with that ambiguous constitutional text. The paradigmatic case in this category is *Bush* v. *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam). There, this Court vacated a Florida Supreme Court decision that extended a statutory 7-day ballot-count deadline to 12 days based in part on the textually ambiguous "right to vote set forth in the Declaration of Rights of the Florida Constitution." *Id.* at 75.

In these cases, a federal court safeguards federal power by reviewing state decisions that rest on open-ended or "vague" provisions in state constitutions—such as "free and equal" clauses in a state constitution—to invalidate a state elections law. *See Republican Party v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting from denial of certiorari). A "state constitutional provision guaranteeing 'free and equal' elections" does not give states courts "the authority to override" "very specific and unambiguous

rules adopted by the legislature for the conduct of federal elections." *Id. at* 739 (Alito, J., joined by Gorsuch, J., dissenting from denial of certiorari); *see also Republican Party v. Boockvar*, 141 S. Ct. 1 (2020) (statement of Alito, J., joined by Thomas, J., and Gorsuch, J.) (casting doubt on state court decision that "justified its decree as necessary to protect voters' rights under the Free and Equal Elections Clause of the State Constitution").[4]

This second category emphasizes that state courts must "respect" the Framers' "deliberate choice" to "expressly vest[] power" to regulate federal elections in "the Legislature." *Moore*, 600 U.S. at 34. The Elections Clause "confer[s] on state legislatures, not state courts, the authority to make rules governing federal elections." *Boockvar*, 141 S. Ct. at 2 (statement of Alito, J.). Its "comprehensive words" let state legislatures "provide a complete code for congressional elections." *Smiley*, 285 U.S. at 366. That clause would be

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[4] And many state courts rightly decline to apply their "free and equal" or "free and open" elections clauses to state laws regulating the time, place, and manner of elections. *See, e.g.*, *Thurston* v. *League of Women Voters of Ark.*, 687 S.W.3d 805, 814 (Ark. 2024) (refusing to apply Arkansas' "free and equal election clause" to invalidate state laws "regulating the manner and method of absentee voting," "photo identification requirements," and "anti-influence prohibition[s]"); *Crum* v. *Duran*, 390 P.3d 971, 972, 973-77 (N.M. 2017) (refusing to apply New Mexico's Free and Open Clause to invalidate state law requiring primary votes to designate affiliation with major political party at least 28 days before the primary election); *League of Women Voters of Del., Inc.* v. *State Dep't of Elections*, 250 A.3d 922, 925, 935-38 (Del. Ch. 2020) (refusing to apply Delaware's "free and equal" elections clause to invalidate an emergency law that extended the right to vote by mail but retained existing deadlines).

rendered "meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Boockvar*, 141 S. Ct. at 2 (statement of Alito, J.); *see also Degraffenreid*, 141 S. Ct. at 733 (dissenting from denial of certiorari) ("Because the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections, petitioners presented a strong argument that the Pennsylvania Supreme Court's decision violated the Constitution by overriding 'the clearly expressed intent of the legislature.'") (quoting *Bush*, 531 U.S. at 113 (Rehnquist, C. J., concurring)); *Palm Beach Cnty.*, 531 U.S. at 76.

C. For both categories of cases, this Court should use the usual tools of judicial interpretation. It reviews whether the state court "employ[ed] the traditional tools of judicial decisionmaking." *Biden* v. *Nebraska*, 600 U.S. 477, 507 (2023). The "first and most important rule" in judicial interpretation, whether constitutional or statutory, "is to heed the text." *United States* v. *Rahimi*, 144 S. Ct. 1889, 1910-11 (2024) (Kavanaugh, J., concurring); *e.g.*, *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) ("[T]he text of the statute controls our decision."). And here, because the Elections Clause delegates authority to regulate federal elections specifically to the state *legislatures*, "the text of the election law" "takes on independent significance." *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring). Thus a court must "give effect, if possible, to every clause and word of [the] statute." *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883).

A court should also look at a law's context. *See Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring) ("In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court."). And it may properly look at history. *See Rahimi*, 144 S. Ct. at 1912 (Kavanaugh, J., concurring) ("When properly applied, history helps ensure that judges do not simply create … meaning 'out of whole cloth.'" (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1183 (1989))). Indeed, a court "must stick close to the text and the history, and their fair implications." *Id.* (quoting Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 8 (1971)).

If a state elections law's text is unclear, a court may employ other "interpretative tool[s]." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461 (2002). For example, a court can "turn to other canons of interpretation." *Green* v. *Brennan*, 578 U.S. 547, 554 (2016); *see also, e.g.*, *Nat'l Assn. of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 668-69 (2007) (employing text, history, and canon against surplusage); *City of Arlington* v. *FCC*, 569 U.S. 290, 309 (2013) (Breyer, J., concurring in part and concurring in the judgment) (explaining that "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction" are "relevant" in interpreting a law).

The "judicial power" is also "constrained" by "[r]ules about the deference due the legislative process." *June Med. Servs. L.L.C.* v. *Russo*, 591 U.S. 299, 409 (2020) (Gorsuch, J., dissenting). It is "well settled"

that court "must give the widest deference to legislative judgments that concern the character and urgency of the problems with which the State is confronted." *In re Gault*, 387 U.S. 1, 70 (1967) (Harlan, J., concurring in part and dissenting in part). For it is "the legislature, not the judiciary" that is the "main guardian of the public needs." *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

"When judges disregard these principles and enforce rules inspired only by extratextual sources and [their] own imaginations, they usurp a lawmaking function reserved for the people's representatives." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harv. Coll.*, 600 U.S. 181, 310 (2023) (Gorsuch, J., joined by Thomas, J., concurring) (quotation marks omitted). The ordinary bounds of judicial review forbid such "judicial improvisation." *Id.* at 310.

II. The Montana Supreme Court's decision falls outside the ordinary bounds of judicial review.

Attempting to secure its state's elections and prevent fraud, the Montana Legislature enacted two common-sense election provisions here. HB176 shifts the voter registration deadline for most people from the close of polls on election day to noon the day before the election. Pet.App.4a, ¶6. HB530 directs the Secretary of State to promulgate rules prohibiting paid absentee ballot collection. Pet.App.5a, ¶7. By invalidating these modest legislative judgments based on ambiguous provisions of the Montana Constitution, the Montana Supreme Court has "strayed beyond the limits derived from the Elections Clause" and claimed for itself "the

power vested in state legislatures to regulate federal elections." *Moore,* 600 U.S. at 36.

In its decision below, the Montana Supreme Court majority "transgress[ed] the ordinary bounds of judicial review" at each turn. *Id.* First, the majority "impermissibly distort[ed]" state law "beyond what a fair reading required" by failing to employ the traditional tools of judicial decisionmaking. *See Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring). As to the registration-deadline provision, the majority contorted the Montana Constitution's text and the history of the Montana Constitutional Convention to reach its desired result. Though the majority acknowledged that the Montana Constitution itself provides that the Legislature "*may* provide for a system of [election day registration]," Pet.App.40a, ¶65 (emphasis in original), it nevertheless concluded that this permissive language was, in fact, mandatory. Pet.App.40a-41, ¶¶67-68. As the convention history shows, the Montana Constitution initially "directed the Legislature to implement election day registration with mandatory language." Pet.App.40a, ¶67 ("The Legislature shall provide for a system of [election day registration]."). But soon after, the Framers "reopened the debate" because, in the majority's view, they were "uncomfortable with the mandatory language in case election day registration turned out to be unworkable." Pet.App.41a, ¶67. The Framers thus "overwhelmingly" rejected the proposed mandatory language and "replaced [it] with permissive language." Pet.App.41a, ¶67. Despite this clear text and history to the contrary, the court nevertheless concluded that the "the Framers' intent was that election day registration" should be mandatory "as long as it was workable in Montana." Pet.App.41a, ¶68. This

amounts to little more than "faulty constitutional analysis" that "provides analytical cover, under the guise of constitutional conformance review, to second-guess the facially non-discriminatory public policy determinations of the Legislature under Mont. Const. art. IV, §3." Pet.App.109a, ¶148 (Sandefur, J., concurring in part, dissenting in part).

Second, the Montana Supreme Court majority "impermissibly distort[ed]" state law "beyond what a fair reading required," *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring), by invalidating the challenged provisions based on a facially ambiguous state constitutional provision providing that "elections shall be free and open." Pet.App.8a, ¶13; Pet.App.1a, ¶19. The majority relied on the state Constitution's "strong protection of the right to vote" allegedly found in the "free and open" provision. Pet.App.12a, ¶19; *see* Mont. Const. art. II, §13 ("All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."). This is exactly the kind of "vague" provision that members of this Court have repeatedly said does not give state courts "the authority to override" "very specific and unambiguous rules adopted by the legislature for the conduct of federal elections." *Degraffenreid*, 141 S. Ct. at 739 (Alito, J., joined by Gorsuch, J., dissenting from denial of certiorari). Nor does the decision below "respect" the Framers' "deliberate choice" to "expressly vest[] power" to regulate federal elections in "the Legislature." *Moore*, 600 U.S. at 34.

This Court need not take Petitioner's word for it. In dissent, Justice Sandefur explained that the majority opinion employed "an unprecedented exercise of

unrestrained judicial power" and opted to "override public policy determinations made by the Legislature in the exercise of its constitutional discretion, however ill-advised to some," to strike "down three distinct legislative enactments on the most dubiously transparent of constitutional grounds." Pet.App.148a, ¶171 (Sandefur, J. concurring in part and dissenting in part). In short, the Montana Supreme Court has assumed a de facto new role as the final and exclusive arbiter of all federal election legislation in Montana. This Court's review is urgently needed to determine whether that court has "arrogate[d] to [itself] the power vested in" the Montana Legislature "to regulate federal elections." *Moore*, 600 U.S. at 36.

III. This case is an ideal vehicle for resolving these exceptionally important questions.

This is an ideal vehicle for answering the questions presented for at least four interrelated reasons.

First, prior petitions have presented these questions in the shadow of a looming (or just-finished) election. *See, e.g.*, *Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari); *Boockvar*, 141 S. Ct. at 2 (statement of Alito, J., joined by Thomas, J., and Gorsuch, J.). This petition, in contrast, does not. Nor does Petitioner seek emergency relief. So this Court can answer these questions after plenary merits briefing and oral argument through its regular-order deliberative process.

Second, the vehicle problems that prevented answering these questions in *Moore* do not exist here. There, "[t]he legislative defendants did not meaningfully present the issue in their petition for certiorari

or in their briefing, nor did they press the matter at oral argument." 600 U.S. at 36. The *Moore* petitioners likewise disclaimed that they were arguing that "North Carolina's Supreme Court did not fairly interpret its State Constitution." *Id.* at 37. Neither hurdle exists here. This petition squarely presses the argument that the Montana Supreme Court's majority opinion improperly interpreted the Montana Constitution in ways that resulted in the majority opinion's intruding on the Montana Legislature's Election Clause authority. If the Court grants this petition, Petitioner will also focus merits briefing and oral argument on those errors.

Third, this Court need not rely on Petitioner's arguments alone to find that those errors in the Montana Supreme Court majority's opinion exceeded the bounds of ordinary judicial review. Two dissenting members of that court explained at length why the majority opinion constitutes "an unprecedented exercise of unrestrained judicial power overriding public policy determinations made by the Legislature in the exercise of its constitutional discretion." Pet.App.148a, ¶171 (Sandefur, J., concurring in part, dissenting in part). This "faulty constitutional analysis" merely "provides analytical cover, under the guise of constitutional conformance review, to second-guess the facially non-discriminatory public policy determinations of the Legislature under Mont. Const. art. IV, §3." Pet.App.109a, ¶148. By granting this petition, this Court can rely on reasoning from members of the Montana Supreme Court itself to conclude that the majority "read state law in such a manner as to circumvent federal constitutional provisions." *Moore*, 600 U.S. at 35.

Finally, given the increased focus nationwide on safeguarding the security of state and federal elections, these questions will continue to arise until this Court resolves them. Petitioner seeks review of holdings invalidating registration-deadline changes and rules governing ballot collectors. These are mine-run election-integrity issues throughout the country. *See, e.g.*, N.Y. State Bd. of Elec., *Registration and Voting Deadlines* (last visited Aug. 21, 2024), shorturl.at/FlIqz (New York voters must register 10 days before the general election); Sec. of Commonwealth of Mass., *Registering to Vote* (last visited Aug. 21, 2024), shorturl.at/FN1IW (Massachusetts voters must register 10 days before the general election); Conn. Gen. Stat. Ann. §9-140b (limiting ballot collection to family member or designated caregiver); Mich. Comp. Laws Ann. §168.764a(1) (Step 6(c) limits ballot collection to immediate family member or household member). That means both that disputes over issues like these are "almost certain to keep arising until the Court definitively resolves" them, *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay), and that clarifying them now could forestall future requests for this Court's intervention in less ideal time constraints.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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