No. ________

In the Supreme Court of the United States

CHRISTI JACOBSEN, in her official capacity
as Montana Secretary of State
Applicant,
v.

MONTANA DEMOCRATIC PARTY, et al.,
Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

AUSTIN KNUDSEN
Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
PETER M. TORSTENSEN, JR.
Deputy Solicitor General
Counsel of Record
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
(406) 444-2026
christian.corrigan@mt.gov
peter.torstensen@mt.gov

Counsel for Applicant

APPLICATION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

In accordance with Supreme Court Rules 13.5, 30.1, and 28 U.S.C. § 2101(c), Applicant Christi Jacobsen respectfully requests a 60-day extension of time, to and including August 26, 2024, within which to file a petition for writ of certiorari to review the judgment of the Montana Supreme Court in this case. Because the 60-day period provided by Supreme Court Rule 13.5 lands on Saturday, August 24, 2024, it extends until Monday, August 26, 2024. *See* Sup Ct. R. 30.1 ("[T]he period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.").

1. The Montana Supreme Court entered judgment on March 27, 2024. *Montana Democratic Party, et al.* v. *Jacobsen*, 2024 MT 66, 545 P.3d 686. App.1a-3a. Unless extended, the deadline to file a petition for writ of certiorari will be June 25, 2024. Applicant has not sought or received an extension, and this application is being filed more than ten days before the petition is due. Sup. Ct. R. 13.5. This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1257(a).

2. This case involves a critical question following this Court's decision in *Moore* v. *Harper*, which held that "state courts 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." 600 U.S. 1, 37 (2023). That question is: What showing is required to show that a state court has so far exceeded 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 U.S. Constitution?

3. 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").

4. This Court partially resolved that issue last term in *Moore*, holding that "state courts do not have free rein" to evaluate state election law legislation. *See* 600 U.S. at 34. *Moore* provided that "state courts 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" *Id.* at 37. But it 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.

5. During the 2021 legislative session, the Montana Legislature passed four election laws—HB506, HB176, HB530, and SB169. App.5a. Respondents challenged each of these laws in different cases, which were consolidated before the district court. App.5a. HB506 prohibits an absentee ballot from being issued to an elector before they turn 18. App.5a-6a. HB176 shifts election-day registration deadline for most people to noon the day before the election. App.6a. HB530 directs Applicant to promulgate rules prohibiting acceptance of a "pecuniary benefit" to assist voters by returning their ballots for them. App.6a. And SB169 imposes additional requirements for voters using "secondary" IDs (*i.e.*, postsecondary education photo IDs) to verify their eligibility to vote. App.7a. After trial, the district court found each law unconstitutional, and the Montana Supreme Court affirmed. App.5a.

6. The Montana Supreme Court's decision below is egregiously wrong, and it highlights the need for this Court's guidance on how to determine whether a state court has impermissibly interfered with a state legislature's authority.

7. First, the Court subjects all election regulations to a judicial determination that the legislature's action was "reasonable," and that its asserted interest is "more important that the infringement of the right." App.26a-27a. But by finding that a law which "minimally burdens" the "fundamental right to vote" is subject to this so-called "middle-tier scrutiny," *see* App.24a-26a, the Montana Supreme Court in effect invalidates the Montana Constitution's express grant of authority to the

legislature to regulate elections, *see* Mont. Const., art. IV, § 3, and likely "strayed beyond the limits derived from the Elections Clause, *see Moore*, 600 U.S. at 36.

8. Second, the Court exceeded the ordinary bounds of judicial review by imposing a one-way ratchet on all election regulations: once a right is extended, any effort to impose reasonable limits now requires the state to satisfy middle-tier or strict scrutiny. App.41a-42a. But this too cannot be squared with the Montana Constitution's delegation of prospective authority to the legislature to regulate Montana's elections. Mont. Const., art. IV, § 3.

9. As Justice Sandefur declared in dissent, the majority opinion, "in an unprecedented exercise of unrestrained judicial power" opted to "override public policy determinations made by the Legislature in the exercise of its constitutional discretion, however ill-advised to some," and "[struck] down three distinct legislative enactments on the most dubiously transparent of constitutional grounds." App.123a-124a. Because the Montana Supreme Court has assumed a *de facto* new role as the final arbiter of all election legislation in Montana, this Court's review is urgently needed.

10. What's more is that 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. *See Moore*, 142 S. Ct. 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"). Because this case doesn't

involve a request for relief before an impending election, *see id.*, it presents an ideal vehicle to address, after full briefing and argument, the standard for determining whether a state court has impermissibly interfered with a state legislature's authority.

11. Between now and the current due date of the petition, counsel has substantial obligations in other pending cases, including preparing a petition for writ of certiorari in *Montana* v. *Gibbons*, DA-0413 (Mont.), briefing a motion to dismiss in *Free Speech Coalition, Inc., et al.* v. *Knudsen*, No. 9:24-cv-00067 (D. Mont.), and reviewing and responding to discovery requests in other matters.

12. Applicant requests an extension to decide whether to file a petition for certiorari and to prepare a petition that fully addresses the important and far-reaching issues raised by the decision below. For these reasons, Applicant respectfully requests that her time to file a petition for writ of certiorari be extended to and including August 26, 2024.

DATED: June 12, 2024

/s/ *Peter M. Torstensen, Jr.*
PETER M. TORSTENSEN, JR.
Counsel of Record
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
(406) 444-2026
peter.torstensen@mt.gov

Counsel for Applicant