No. 24-220

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 Writ of Certiorari to the Montana Supreme Court

BRIEF FOR *AMICUS CURIAE* NATIONAL REPUBLICAN SENATORIAL COMMITTEE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The National Republican Senatorial Committee (NRSC) is a registered "national committee" of the Republican Party, as defined by 52 U.S.C. §30101(14), and the Republican Party's senatorial campaign committee. Its membership includes all incumbent Republican Members of the United States Senate.

The NRSC supports and seeks to uphold the Constitution's guarantee of free and fair elections for all Americans. As a supporter of one of the two major-party candidates in all "Elections for Senators," the NRSC has a recurring interest in regulations of the "Manner" of these elections, which is reserved by the U.S. Constitution to the state legislatures. U.S. Const. art. I, §4, cl. 1. The NRSC therefore has a unique and profound interest in this case.

SUMMARY OF THE ARGUMENT

The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const., art. I, §4, cl. 1. As this Court recently reminded, the Clause "expressly vests power to carry out its provisions in 'the Legislature' of each State," not the State as a whole, and that is "a deliberate choice that this Court must respect." *Moore v. Harper*, 600 U.S. 1, 34 (2023).

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward its preparation or submission. *See* Sup. Ct. R. 37.6. Pursuant to Supreme Court Rule 37.2, all parties were timely notified of this brief.

To be sure, the Elections Clause takes state legislatures as it finds them, subject to constraints like gubernatorial veto, plebiscite, and judicial review by both federal and state courts. *See id.* at 22-25, 31. But there is a difference between judicial review and judicial usurpation. "[S]tate courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by" the Elections Clause. *Id.* at 37. And if they do, then "federal courts must not abandon their own duty to exercise judicial review" of that abusive usurpation. *Id.*

This case cries out for an exercise of that duty. The Montana Legislature enacted two commonplace election laws, one imposing a deadline to register to vote of noon the day before the relevant election, and another prohibiting people from getting paid to return other voters' ballots. Neither of those provisions is some outlier; in fact, both are more permissive than the laws of many of Montana's sister States. And the Montana Constitution cannot plausibly be read to prohibit either. To the contrary, the state constitution says in no uncertain terms that the legislature "*may*"—not *must*—"provide for a system of poll booth registration," i.e., same-day voter registration. Mont. Const. art. IV, §3 (emphasis added). And it explicitly commands that the legislature "shall insure the purity of elections and guard against abuses of the electoral process," *id.*, which is precisely what the legislature did when it enacted the modest reform of prohibiting people from profiting off of ballot harvesting.

Dissatisfied with what the Montana Constitution says, the Montana Supreme Court simply rewrote it.

According to the court, though the constitution says that the legislature "*may* provide for" same-day registration, what it really means is that the legislature *must* provide for same-day registration "as long as it [i]s workable in Montana." Pet.App.41a ¶68. And though the constitution affirmatively requires the legislature to "guard against abuses of the electoral process," what it really means is that the legislature can do so only when that does not entail "backtrack[ing]" on any previous regulation that "expand[ed] the right to vote." Pet.App.45a ¶74.

That is the very model of a decision that "so exceed[s] the bounds of ordinary judicial review as to unconstitutionally intrude upon the role" of the legislature. *Moore*, 600 U.S. at 37. It thus falls to this Court to exercise its duty to step in and say so, lest the decision pave the way for state courts all throughout the country to "arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at 36. This Court should grant certiorari and reject the Montana Supreme Court's effort to substitute its own policy preferences for those chosen by the state legislature and the people of Montana.

ARGUMENT

I. The Laws At Issue Here Are Commonplace Election Regulations That Courts Have Routinely Upheld.

The Elections Clause gives state legislatures broad discretion to enact laws governing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, §4, cl. 1. And rightly so, as "[c]ommon sense, as well as

constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). After all, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

In keeping with those settled principles, the Montana Constitution recognizes the primacy of the state legislature in regulating elections. Tracking the Elections Clause, it states that "[t]he legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections." Mont. Const. art. IV, §3. And it goes on to state that the legislature "may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process." *Id.* In 2021, the Montana legislature exercised that authority to enact legislation that, as relevant here, sets a voter-registration deadline of noon the day before an election, Pet.App.388a, and requires the Montana Secretary of State to promulgate regulations banning paid absentee ballot collection, Pet.App.418a.

There is nothing unusual, let alone radical, about either of those measures. Similar regulations can be found in the election laws of States all throughout the country, ranging in size from the likes of Wyoming to New York, spanning the political spectrum from Texas to Massachusetts. Advance-registration requirements

are nearly as old as the Republic[2] and remain in place in 30 of the 50 States, covering more than 200 million Americans.[3] Some States, like New York, have even enshrined those rules in their state constitutions.[4] The federal government has expressly blessed advance-registration deadlines of up to 30 days before a federal election through the National Voter Registration Act (NVRA), *see* 52 U.S.C. §20507(a)(1), and that is what 10 States have embraced.[5] Twelve

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[2] *E.g.*, 1800 Mass. Acts, ch. 74, §1. Massachusetts originally permitted registration up to the time "immediately preceeding" the opening of an election, *id.*, but it has moved the deadline back over time to meet the growing administrative burden of registering voters, *e.g.*, 1874 Mass. Acts ch. 376, §§8 & 9; *see Chelsea Collaborative, Inc. v. Sec'y of the Commonwealth*, 100 N.E.3d 326, 328-29 (Mass. 2018).

[3] Ala. Code §17-3-50; Alaska Stat. §15.07.070(d); Ariz. Rev. Stat. §§16-120(A), 16-144(A); Ark. Code §7-5-201(a); Del. Code Ann. tit. 15, §2036 (2015); Fla. Stat. §97.055(1)(a); Ga. Code §21-2-224(a); Ind. Code §3-7-13-11; Kan. Stat. §25.2311(a); Ky. Rev. Stat. §116.045(2); La. Rev. Stat. §18:135(A)(1); Mass. Gen. Laws ch. 51, §26; Miss. Code §§23-15-11, 23-15-37; Mo. Rev. Stat. §115.135(1); Mont. Code §13-2-304(1)(a); Neb. Rev. Stat. §32-302; N.J. Stat. §19:31-6; N.Y. Elec. Law §5-210(3); N.C. Gen. Stat. §163-82.6(d); Ohio Rev. Code §3503.19(A); Okla. Stat. tit. 26, §4-110.1(A); Or. Rev. Stat. §247.025; 25 Pa. Cons. Stat. §3071(b); R.I. Gen. Laws §17-9.1-3(a); S.C. Code §7-5-150; S.D. Codified Laws §12-4-5; Tenn. Code §2-2-109(a); Tex. Elec. Code §13.143(a); W. Va. Code §3-2-6(a); Wyo. Stat. §22-3-102(a).

[4] N.Y. Const. art. II, §5; *see, e.g.*, Ark. Const. amend. 51, §9(b); Del. Const. art. V, §4, cl. 2; Or. Const. art. II, §2(c); Ohio Const. art. V, §1; R.I. Const. art. II, §1.

[5] Alaska Stat. §15.07.070(d); Ariz. Rev. Stat. §16-120(A); Ark. Code §7-5-201(a); La. Rev. Stat. §18:135(A)(1); Miss. Code §§23-15-11, 23-15-37; Ohio Rev. Code §3503.19(A); R.I. Gen. Laws §17-

more States have deadlines between 20 and 30 days before the relevant election.[6] And no advance-registration State save Montana permits registration fewer than 10 days before the relevant election. Montana's advance-registration requirement is thus unusual only in that it is uniquely generous.

State laws limiting ballot harvesting are common as well—and have become even more so in the wake of the COVID-19 pandemic after concerns arose over a significant uptick in the practice of returning other voters' ballots in exchange for payment. *E.g.*, *Cook Cnty. Republican Party v. Pritzker*, 487 F.Supp.3d 705, 710-11 (N.D. Ill. 2020); *DCCC v. Ziriax*, 487 F.Supp.3d 1207, 1233-34 (N.D. Okla. 2020); *see* Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, 80 Wash. & Lee L. Rev. 359, 438-39 (2023). Some States prohibit ballot harvesting altogether, Ala. Code §17-11-9, or subject only to highly restrictive exceptions. More than a dozen States, ranging from New Jersey to Michigan to Utah and more, permit only a family member or authorized caregiver to return a voter's ballot.[7] Eleven more limit how many

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9.1-3(a); S.C. Code §7-5-150; Tenn. Code §2-2-109(a); Tex. Elec. Code §13.143(a).

[6] Del. Code Ann. tit. 15, §2036 (2015); Fla. Stat. §97.055(1)(a); Ga. Code §21-2-224(a); Ind. Code §3-7-13-11; Kan. Stat. §25.2311(a); Ky. Rev. Stat. §116.045(2); Mo. Rev. Stat. §115.135(1); N.J. Stat. §19:31-6; N.C. Gen. Stat. §163-82.6(d); Okla. Stat. tit. 26, §4-110.1(A); Or. Rev. Stat. §247.025; W. Va. Code §3-2-6(a).

[7] Ariz. Rev. Stat. §16-1005(H); Conn. Gen. Stat. §9-140b; Ga. Code §21-2-385(a); Iowa Code §53.33(2); Mass. Gen. Laws ch. 54, §92(a); Mich. Compl. Laws §168.764a; Miss. Code §23-15-907(2);

ballots one person may return.[8] Others, including California and Texas, take the approach Montana has taken, restricting the ability to profit from returning other voters' ballots.[9]

Courts have had little trouble upholding these ubiquitous measures. The Massachusetts Supreme Judicial Court, for instance, rejected a challenge under the "free and equal" clause of Massachusetts' constitution to the State's 20-day advance-registration law. *Chelsea Collaborative, Inc. v. Sec'y of the Commonwealth*, 100 N.E.3d 326 (Mass. 2018). In doing so, the court acknowledged that the right to vote is "fundamental," but it also recognized that the legislature may "enact reasonable laws and regulations that are, in its judgment, appropriate" to ensure that elections are "orderly and legitimate." *Id.* at 331, 333, 337. And the legislature had long required advance registration to further that interest. Because an advance-registration requirement "does not disenfranchise any voter" or cause "substantial …

Mo. Rev. Stat. §115-291(2); N.M. Stat. §1-6-10.1; N.H. Rev. Stat. §657.17; N.C. Gen. Stat. §163-226.3(a)(5); Ohio Rev. Code §3509.05(C)(1); Tex. Elec. Code §86.006; Utah Code §§20A-3a-501, 20A-3a-208; *see* Idaho Code §18-2324 (family exception and further exception for designee if paid by the voter herself).

[8] Ark. Code §7-5-403(a); Colo. Rev. Stat. §1-7.5-107(4)(b)(I)(B); Fla. Stat. §104.0616(2); Kan. Stat. §25-2437(c); La. Rev. Stat. §18:1308(B)(1); Minn. Stat. §203B.08(1)(b); Neb. Rev. Stat. §32-943(3); N.J. Stat. §19:63-9(a); N.D. Cent. Code §16.1-07-08(1); 17 Vt. Stat. Ann. §2543(f); W. Va. Code §3-3-5(k); *see* S.D. Codified Laws §§12-19-2.2 (advance notice to election officials required).

[9] *E.g.*, Cal. Elec. Code §3017(e)(1) (payment may not be based on number of ballots returned); Tex. Elec. Code §86.0052 (same); N.D. Cent. Code §16.1-07-08(1) (prohibiting any payment).

interference with the right to vote," *id.* at 334-35, the court subjected the law to only rational-basis review, which it easily survived.

New Jersey's 21-day advance-registration law has likewise withstood a state constitutional challenge. *Rutgers Univ. Student Assembly v. Middlesex Cnty. Bd. of Elections*, 141 A.3d 335 (N.J. Super. Ct. App. Div. 2016). Just as in *Chelsea Collaborative*, the court explained that, while the right to vote is "fundamental," "states are entitled to broad leeway in regulating elections to ensure they are carried out in a fair and efficient manner." *Id.* at 340. And "[o]ne of the ways this is done is through advance voter registration laws." *Id.* Indeed, New Jersey had a 40-day registration deadline that its framers "did nothing to disturb" when they enacted its current constitution. *Id.* Given the State's clear "interest in preventing voter fraud and ensuring public confidence in the integrity of the electoral process," and "the minimal burden" an advance-regulation requirement imposes, the court found the State's "important regulatory interests more than sufficient to justify the restriction." *Id.* at 344. In so holding, the court noted the absence of any evidence that "a twenty-one-day advance registration has *ever* been declared unconstitutional." *Id.* at 342 n.4 (emphasis added); *see also*, *e.g.*, *State ex rel. Lawhead v. Kanawha Cnty. Ct.*, 38 S.E.2d 897, 900 (W. Va. 1946) (upholding 30-day advance-registration law).

State supreme courts have taken an equally dim view of challenges to ballot-harvesting restrictions. In *League of Woman Voters of Kansas v. Schwab*, 549 P.3d 363 (Kan. 2024), for instance, the Kansas

Supreme Court rejected a challenge to a law that "prohibit[ed] any person from collecting and returning more than 10 advance ballots for other voters." *Id*. at 368-69. Plaintiffs argued that the law "infringe[d] on the right to suffrage" in the Kansas constitution. *Id*. at 384. The court disagreed, explaining that a "limitation on the number of advanced ballots that may be delivered by one person can in no way be characterized as an added qualification on the right to be an elector." *Id*. Instead, the court held, it is simply "a regulation of the mechanics of an election." *Id*. And the court correctly recognized the primacy of the legislature in regulating those mechanics—as the Elections Clause commands.

II. The Montana Supreme Court Usurped The Role That The Elections Clause Reserves To Montana's Legislature.

Of course, state legislatures remain constrained by both federal and state law when exercising their power to regulate elections, and, in this context as in any other, courts may strike down laws that run afoul of those constraints. *See Moore*, 600 U.S. at 34. But in reviewing election laws for compliance with those requirements, "state courts may 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. And "federal courts must not abandon their own duty to exercise judicial review" over claims that a state *court* has usurped the role that the Constitution assigns to the state *legislature*. *Id.*

This is about as clear a case of judicial usurpation as this Court will see. The Montana Constitution is not silent on advance-registration requirements. It explicitly states that the legislature "*may* provide for a system of poll booth registration," i.e., same-day voter registration. Mont. Const. art. IV, §3 (emphasis added). That permissive, rather than mandatory, approach is no accident: Whether to require versus permit same-day registration was extensively debated at the Montana constitutional convention—and the framers opted for the permissive approach to allow the legislature flexibility to establish or disestablish it as it saw fit. *See* Pet.App.40a-41a ¶67; Pet.App.81a-82a ¶131 (Sandefur, J., dissenting). Any claim that the Montana Constitution requires same-day registration thus borders on frivolous. Indeed, at the time of the convention, Montana had a 40-day registration deadline that the new constitution did not disturb. Pet.App.83a ¶133 (Sandefur, J., dissenting). The legislature subsequently reduced it to 30 days, and that deadline stood for another 35 years, until the legislature decided to exercise its constitutional authority to permit same-day registration in 2005.

The Montana Supreme Court admitted (as it had to) that the state constitution speaks in unmistakably "permissive language." Pet.App.40a ¶67. But it decided to read into the constitution a different rule. Citing the purported "intent" of the constitution's framers, the court insisted that when they enshrined in the constitution the words "*may* provide for a system of poll booth registration," Mont. Const. art. IV, §3 (emphasis added), what they really meant was *must* provide for such a system "as long as it [i]s workable in Montana," Pet.App.41a ¶68. So because

the State had same-day registration for about 15 years and some people used it, the court concluded that the legislature no longer has the discretion the state constitution plainly grants it to decide whether that practice should be retained. *See* Pet.App.42a-43a ¶70.

That is the epitome of a decision that so "transgress[es] the ordinary bounds of judicial review" as to "arrogate[] to the court the power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36. The state constitution not only expressly empowers the legislature to set "the requirements for … registration," but speaks *directly* to the question of same-day registration. Mont. Const. art. IV, §3. The state court just refused to accept what it says. When a state court simply rewrites a state constitution to make it more to its liking, it is no longer interpreting state law but evading it. And when a state court rewrites a state constitutional provision about the regulation of elections, it is "evad[ing] federal law" too, as the Elections Clause "expressly vests power to carry out its provisions in 'the Legislature' of each State," not the courts of each State. *Moore*, 600 U.S. at 34. It is no more for state courts than for federal courts to override that "deliberate choice." *Id.*

The Montana Supreme Court's decision fared no better when it came to the ballot-harvesting provision. The court claimed to find the power to invalidate that measure in the Montana Constitution's "free and open" elections clause. *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."); Pet.App.8a ¶¶13-14, Pet.App.12a ¶19. According to the court, *any*

measure that "backtrack[s]" on a previous measure that "expanded the right to vote" must survive strict scrutiny to avoid being deemed an impermissible "interfere[nce]" with the right to vote (which, unsurprisingly, it concluded this law could not do). Pet.App.45a ¶74; *see* Pet.App.24a-26a ¶¶35-38; Pet.App.32a ¶46; Pet.App.42a-51a ¶¶68-84.

There is not even a hint of that novel one-way-ratchet theory in the "free and open" clause—or anywhere else in the Montana Constitution. To the contrary, the constitution explicitly commands that the legislature "shall insure the purity of elections and guard against abuses of the electoral process." Mont. Const. art. IV, §3. The legislature thus has the *duty* to step in when, as here, it determines that an existing practice creates the potential for abuse. Yet by the Montana Supreme Court's telling, efforts to fulfill that duty are subject to a strong presumption of unconstitutionality. That turns the state constitution on its head.

In short, not once but twice, the court stripped the legislature of a power that the state constitution explicitly grants. If that does not rise to the level of "'impermissibly distort[ing]' state law 'beyond what a fair reading require[s],'" *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)), it is hard to see what would.

III. This Petition Presents An Ideal Opportunity To Make *Moore*'s Promise A Reality.

This case provides an excellent opportunity to reaffirm—and, in Montana, reinstate—the primacy of state legislatures in regulating federal elections. This

Court has sanctioned considerable incursion on the regulatory power that the Elections Clause gives to state legislatures alone, permitting it to be subjected to gubernatorial veto, plebiscitary veto, procedural and substantive state constitutional constraints, and even reassignment to other bodies. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 841 (2015) (Roberts, C.J., dissenting) (collecting cases). But the Court has at least continued to hold the separation-of-powers line, acknowledging that "state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures." *Moore*, 600 U.S. at 37. And the Court has admonished that "federal courts must not abandon their own duty to exercise judicial review" when state courts do so. *Id.*

The decision below confirms the wisdom of that admonishment, as it provides a roadmap for courts to "supplant the legislature altogether." *Ariz. State Legislature*, 576 U.S. at 841 (Roberts, C.J., dissenting). After all, many States—including many with laws similar to the ones challenged here—have "free and equal" clauses in their constitutions like the one the decision below invoked.[10] If the Montana

[10] Ariz. Const. art. II, §21; Ark. Const. art. 3, §2; Cal. Const. art. II, §3; Colo. Const. art. II, §5; Del. Const. art. I, §3; Idaho Const. art. I, §19; Ill. Const. art. III, §3; Ind. Const. art. 2, §1; Ky. Const. §6; Md. Decl. of Rights art. 7; Mass. Const. pt. 1, art. IX; Mont. Const. art. II, §13; Neb. Const. art. I, §22; N.H. Const. pt. 1, art. 11; N.M. Const. art. II, §8; N.C. Const. art. I, §10; Okla. Const. art. III, §5; Or. Const. art. II, §1; Pa. Const. art. I, §5; S.C. Const. art. I, §5; S.D. Const. art. VII, §1; Tenn. Const. art. I, §5; Tex.

Supreme Court can get away with reading into such a "vague" provision "the authority to override … very specific and unambiguous" aspects of the Montana Constitution, then other state courts dissatisfied with how their legislatures have exercised their Elections Clause power will inevitably be tempted to do the same. *Republican Party of Pa. v. Degraffenreid*, 141 S.Ct. 732, 733 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* at 739 (Alito, J., dissenting from denial of certiorari).

Making matters worse, the Montana Supreme Court's one-way-ratchet reasoning poses a particular threat to the proper functioning of the Elections Clause. *See* Derek T. Muller, *The Democracy Ratchet*, 94 Ind. L.J. 451, 453 (2019). "This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems,'" and that is no less true when it comes to administering elections. *Ariz. State Legislature*, 576 U.S. at 787. Indeed, the framers' decision to vest the power to regulate federal elections in state legislatures reflects the reality that this is a dynamic context that should be governed principally by the political process—and a more local one, at that. Inventing out of whole cloth a rule that legislatures cannot take back anything they have once bestowed frustrates the very experimentation that the Elections Clause facilitates. As the only court with the ability to police that kind of incursion on the legislative prerogative that the Elections Clause protects, it falls to this Court to step

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Const. art. VI, §2(c); Utah Const. art. I, §17; Vt. Const. ch. 1, art. 8; Va. Const. art. I; §6; Wash. Const. art. I, §19; Wyo. Const. art. I, §27.

in and make sure that the promise it made in *Moore* does not prove empty.

This case provides an excellent vehicle to do so—not only because the decision below is such an egregious display of the usurpation phenomenon, but because it is not complicated by *Purcell* or mootness considerations. *See* Pet.22. The Court can consider the question presented on an ordinary plenary briefing schedule, without the pressures of an emergency application or impending election. More importantly, the Court can assure state legislatures and state courts throughout the country that there will indeed still be a real check should state courts try to usurp the power that the Election Clause vests in the state legislatures alone.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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