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.

ON PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

BRIEF FOR THE STATE OF TEXAS AND FOURTEEN ADDITIONAL STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

DREW C. ENSIGN

Holtzman Vogel
Baran Torchinsky
& Josefiak PLLC
2575 E Camelback
Road, Ste 860
Phoenix, AZ 85016

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON L. NIELSON
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov
(512) 936-1700

QUESTION PRESENTED

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 of State to promulgate regulations banning paid absentee ballot collection?

TABLE OF CONTENTS

Page

Question Presented I
Table of Authorities III
Interest of Amici Curiae 1
Summary of Argument 2
Argument 4

I. What Deadline to Set for Voter Registration Is a Quintessential Policy Choice for Legislatures 4

II. The Montana Supreme Court's Decision "Transgresses the Ordinary Bounds of Judicial Review" 8

A. The Montana Supreme Court's reasoning fails even under its own terms 8

B. Montana's courts lack express authorization to engage in lawmaking regarding registration deadlines 14

III. This Court's Review Is Vital as the Montana Supreme Court Effectively Admitted Its Intent to Usurp Legislative Power 16

Conclusion 18

TABLE OF AUTHORITIES

Page(s)

Cases:

Anderson v. Celebrezze,
460 U.S. 780 (1983) 2, 4, 5, 17

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,
576 U.S. 787 (2015) 1, 14-15

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) 1

Berger v. N.C. State Conf. of the NAACP,
597 U.S. 179 (2022) 2

Brnovich v. Democratic Nat'l Comm.,
594 U.S. 647 (2021) 7, 11

Burdick v. Takushi,
504 U.S. 428 (1992) 4, 17

Bush v. Gore,
531 U.S. 98 (2000) 13

Butte, A. & P. Ry. Co. v. Mont. U. Ry. Co.,
41 P. 232 (Mont. 1895) 13

Crawford v. Marion Cnty. Election Bd.,
553 U.S. 181 (2008) 5, 7

Ohio ex rel. Davis v. Hildebrant,
241 U. S. 565 (1916) 15

District of Columbia v. Heller,
554 U.S. 570 (2008) 13

FDIC v. Phila. Gear Corp.,
476 U.S. 426 (1986) 12

Gaustad v. City of Columbus,
877 P.2d 470 (Mont. 1994) 9

Page(s)

***Cases (ctd.)*:**

Gregory v. Ashcroft,
501 U.S. 452 (1991) 1
Harper v. Hall,
886 S.E.2d 393 (N.C. 2023) 12
Jama v. ICE,
543 U.S. 335 (2005) 8
Jarkesy v. SEC,
34 F.4th 446 (5th Cir. 2022), *aff'd on other grounds*, 144 S. Ct. 2117 (2024) 8
Merrill v. Milligan,
142 S. Ct. 879 (2022) 4-5
Mi Familia Vota v. Hobbs,
977 F.3d 948 (9th Cir. 2020) 5
Miller v. Johnson,
515 U.S. 900 (1995) 5
Moore v. Harper,
600 U.S. 1 (2023) 2-4, 8, 12-13, 16-17
Mullaney v. Wilbur,
421 U.S. 684 (1975) 4
Radio Station WOW, Inc. v. Johnson,
326 U.S. 120 (1945) 4
RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639 (2012) 10
Republican Party of Penn. v. Degraffenreid,
141 S. Ct. 732 (2021) 3
Ritter v. Migliori,
142 S. Ct. 1824 (2022) 7

Page(s)

***Cases (ctd.)*:**

Smiley v. Holm,
285 U. S. 355 (1932) 15, 16
Snyder v. United States,
144 S. Ct. 1947 (2024) 9
Storer v. Brown,
415 U.S. 724 (1974) 5
United States v. Boyle,
469 U.S. 241 (1984) 7
United States v. Correll,
389 U.S. 299 (1967) 9
United States v. Hansen,
599 U.S. 762 (2023) 9
United States v. Locke,
471 U.S. 84 (1985) 7
United States v. Rahimi,
144 S. Ct. 1889 (2024) 13
Wells Fargo & Co. v. Harrington,
169 P. 463 (Mont. 1917) 13

Constitutional Provisions:

U.S. Const. art. I, § 4, cl. 1 2
Ariz. Const. art. II, § 21 11
Colo. Const. art. II, § 5 11
N.C. Const. art. I, § 10 11
N.M. Const. art. II, § 8 11
Mo. Const. art. I, § 25 11
Mont Const.
art. II, § 13 10
art. IV, § 3 .... 3, 5, 8-10, 14, 16

Page(s)

***Constitutional Provisions (ctd.)*:**

Pa. Const. art I, § 5 11
Tex. Const. art. VI, § 2(c) 11

Statutes and Rules:

52 U.S.C. § 10101(a)(2)(B) 5
Ala. Code § 17-3-50 6
Alaska Stat. § 15.07.070 7
Ariz. Rev. Stat. § 16-120 6
Ark. Code § 7-5-201 7
Ca. Elec. Code § 2170 6
Colo. Rev. Stat. § 1-2-201 6
Conn. Gen. Stat. § 9-19j 6
D.C. Code § 1-1001.07 6
Del. Code tit. 15 § 2036 6
Fla. Stat. § 97.055 6
Ga. Code § 21-2-224 6
Haw. Rev. Stat. § 11-15.2 6
Idaho Code § 34-408A 6
Ill. Comp. Stat. 5/5-50 6
Ind. Code § 3-7-13-10 6
Iowa Code § 48A.7A 6
Kan. Stat. § 25-2311 6
Ky. Rev. Stat. § 116.045 6-7
La. Stat. § 18:135 7
Mass. Gen. Laws ch. 51, § 42G1/2(d) 6
Md. Code, Elec. Law § 3-306 6
Me. Stat. tit. 21-A, § 121-A 6
Mich. Comp. Laws § 168.497 6

Page(s)

***Statutes and Rules (ctd.)*:**

Minn. Stat. § 201.061 6
Miss. Code § 23-15-37 7
Mo. Rev. Stat. § 115.135 6
Mont. Code § 13-2-304 6
N.C. Gen. Stat. § 163-82.6 6
N.H. Rev. Stat. § 654:7 6
N.J. Stat. § 19:31-6 6
N.M. Stat. § 1-4-8 6
N.Y. Elec. Law § 5-210 6
Neb. Rev. Stat. § 32-302 6
Nev. Rev. Stat. § 293.5847 6
Ohio Rev. Code § 3503.19 7
Okla. Stat. tit. 26 § 4-110.1 6
Ore. Rev. Stat. § 247.017 6
25 Pa. Cons. Stat. § 3071 6
R.I. Gen. Laws § 17-9.1-3 7
S.C. Code § 7-5-150 7
S.D. Codified Laws § 12-4-5 6
Tenn. Code § 2-2-109 7
Tex. Elec. Code § 13.143 7
Utah Code § 20A-2-207 6
Va. Code § 24.2-416 6
Vt. Stat. tit. 17, § 2144 6
W. Va. Code, § 3-2-6 6
Wash. Rev. Code § 29A.08.140 6
Wis. Stat. § 6.29 6
Wyo. Stat. § 22-3-104 6

Page(s)

***Statutes and Rules (ctd.)*:**

U.S. Sup. Ct. R. 37.2 1

Other Authorities:

Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.) 12

Department of Justice, The National Voter Registration Act of 1993, https://perma.cc/74YD-RC4P (last visited Sept. 24, 2024) 5

George D. Braden et al., *The Constitution of the State of Texas: An Annotated and Comparative Analysis* (1974) 1

INTEREST OF AMICI CURIAE

For more than 200 years, our constitutional system—both state and federal—has "ensure[d] the protection of 'our fundamental liberties,'" by dividing power among different branches of each level of the federal system. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)); *see also, e.g.*, George D. Braden et al., *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 3 (1974) (describing how a similar principle was adopted by Texas). Ordinarily States "retain autonomy to establish their own governmental processes" in how to put these principles into practice. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n (AIRC)*, 576 U.S. 787, 816 (2015). This case presents the rare instance in which a state actor's decision to exceed the scope of its own power implicates federal law and thus the interest of amici States, the States of Texas, Alabama, Arkansas, Florida, Indiana, Iowa, Kansas, Louisiana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia.[1]

Recognizing the bedrock significance of *how* one chooses *who* wields power, the founders provided that "[t]he 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 alter such Regulations,

---

[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties were notified of amici curiae's intent to file an amicus brief in this case on September 17, 2024. No counsel for any party authored this brief in whole or in part, and no entity or person, other than amici curiae, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. That clause confers power specifically on State Legislatures, subject as always, "to constraints set forth in the State Constitution." *Moore v. Harper*, 600 U.S. 1, 25 (2023). Here, the Montana Supreme Court disregarded these fundamental principles, arrogating to itself the Elections-Clause authority of its Legislature—and thereby the power to control elections impacting other States far from Montana's borders. *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983) (noting the "uniquely important national interest" of regulating the presidential and vice-presidential elections).

SUMMARY OF ARGUMENT

As this Court recognized less than two years ago, the Elections Clause expressly "vests power to carry out its provisions in 'the Legislature' of each State, a deliberate choice that this Court must respect." *Moore*, 600 U.S. at 34. "The Clause 'imposes' on state legislatures the 'duty' to prescribe rules governing federal elections," which is "specifically reserved to state legislatures." *Id.* at 10, 37 (citation omitted). As a result, "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 36. When they do, "federal courts must not abandon their own duty to exercise judicial review," *id.* at 37—notwithstanding their ordinary (and entirely proper) reluctance to become embroiled in intra-state fights regarding the structure of state government under state law, *see, e.g.*, *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 191 (2022).

Despite *Moore*'s relative youth, the Court should take this opportunity to flesh out a legal standard for deciding when a state court has "transgress[ed] the

ordinary bounds of judicial review." 600 U.S. at 36. As this case amply demonstrates, state courts have begun to read *Moore* as holding that the Elections Clause imposes no meaningful constraints on their authority to invalidate legislation enacted by State Legislatures under the Elections Clause. When as here "different officials dispute who has authority to set or change those rules," there is a recipe for "confusion because voters may not know which rules to follow." *Republican Party of Penn. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J. dissenting).

Resolving this dispute under ordinary principles of judicial review should have been easy: The 1972 Montana Constitution specifically reserved—and still reserves—to the *Legislature* the power to set "by law the requirements for . . . registration," which explicitly "*may* provide for a system of poll booth registration." Mont. Const. art. IV, § 3 (emphasis added). In doing so, Montana's constitutional convention explicitly rejected a proposal for mandating election-day registration by a 76-22 vote. App.121a. Consistent with that overwhelming preference of its founders, the Montana Legislature chose *not* to adopt election-day registration for the next 33 years, until 2005. App.39a. Then after the Legislature opted move the deadline to register back *a single day* in 2021—to noon the day before the election—this case ensued. It should have been dismissed as meritless.

Undeterred by the Montana Constitution's use of the permissive "may," however, the Montana Supreme Court held that the Legislature "must" adopt election-day registration based on little more than vibes from the Convention. Assuming that allowing the divined intent of the 1972 Convention to trump the Montana Constitution's actual text is ever within the "bounds of ordinary

judicial review," *Moore*, 600 U.S. at 37, the Montana Supreme Court ignored both the relevant constitutional text *and* this Court's prevailing *Anderson-Burdick* standard precisely *because* it gives "undue deference to state legislatures." App.9a, ¶15. Leaving aside that deferring to the Legislature is precisely what courts (state and federal) are supposed to do when it comes to election law, *e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992), such reasoning involves precisely the sort of "obvious subterfuge" that has caused this Court in other contexts to examine whether a putative state-law decision in fact violates federal law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945)).

This case thus squarely presents—and presents an excellent vehicle to resolve—the question of whether the Elections Clause and *Moore's* "bounds of ordinary judicial review" standard imposes *any* actual limitation on the authority of state courts. *Moore*, 600 U.S. at 37. If it does, the Montana Supreme Court's flimsy reasoning collapses under its own weight, and this Court recognized that it "ha[s] an obligation" to act "to ensure that state court[s]" do not violate the Elections Clause by exceeding their proper role. *Id.* at 34.

This Court should therefore grant the petition and reverse the decision below.

ARGUMENT

I. What Deadline to Set for Voter Registration Is a Quintessential Policy Choice for Legislatures.

"Running elections state-wide is extraordinarily complicated and difficult," which even under the best of circumstances "require[s] enormous advance preparations by state and local officials, and pose[s] significant logistical challenges." *Merrill v. Milligan*, 142 S. Ct. 879, 880

(2022) (Kavanaugh, J., concurring in the grant of a stay). Thus, this Court has long recognized that "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). Moreover, because any such regulation is likely to inconvenience some voters more than others, *e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008), States are afforded "discretion to exercise the political judgment necessary to balance competing interests," *Miller v. Johnson*, 515 U.S. 900, 915 (1995). That discretion extends to the imposition of reasonable deadlines on election processes. *E.g.*, *Anderson*, 460 U.S. at 781.

The issue here is perhaps the prototypical example of a question left to the discretion of the state Legislature. Under the Civil Rights Act of 1964, a State may not prevent a citizen from registering for reasons immaterial to his eligibility to vote. 52 U.S.C. § 10101(a)(2)(B). And the National Voter Registration Act of 1993 (NVRA) requires States to make certain registration processes available to voters—for example, by allowing them to register when they get a driver's license or visit certain government offices. *See* Department of Justice, The National Voter Registration Act of 1993 (NVRA), https://perma.cc/74YD-RC4P (last visited Sept. 24, 2024) (summarizing the requirements imposed by the NVRA). Beyond these basic requirements, States may impose reasonable, neutral requirements on registration—including deadlines on when to register. *E.g.*, *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 952 (9th Cir. 2020).

The 1972 Montana Constitution specifically empowers the Legislature to make that decision. Mont. Const. art. IV, § 3. In the law challenged here, the Legislature

chose to move Montana's voter registration deadline from the close of polls on Election Day to 12 p.m. the previous day. Pet.App.388a. Even with that change, Montana remains more generous to late-registering voters than a *majority* of States are. Indeed, only twenty-two States (presently including Montana due to the decision below) and the District of Columbia allow same-day registration.[2] The remaining twenty-eight States require registration before election day, with twenty-two requiring registration fifteen or more days before Election Day.[3] This includes a number of the amici States.

---

[2] Arranged alphabetically, these States include California, Ca. Elec. Code § 2170; Colorado, Colo. Rev. Stat. § 1-2-201; Connecticut, Conn. Gen. Stat. § 9-19j; D.C., D.C. Code § 1-1001.07; Hawaii, Haw. Rev. Stat. § 11-15.2; Idaho, Idaho Code § 34-408A; Illinois, 10 Ill. Comp. Stat. 5/5-50; Iowa, Iowa Code § 48A.7A; Maine, Me. Stat. tit. 21-A, § 121-A; Maryland, Md. Code, Elec. Law § 3-306; Michigan, Mich. Comp. Laws § 168.497; Minnesota, Minn. Stat. § 201.061; Montana, Mont. Code § 13-2-304; Nevada, Nev. Rev. Stat. § 293.5847; New Hampshire, N.H. Rev. Stat. § 654:7; New Mexico, N.M. Stat. § 1-4-8; North Dakota (no registration regulation); Utah, Utah Code § 20A-2-207; Vermont, Vt. Stat. tit. 17, § 2144; Virginia, Va. Code § 24.2-416; Washington, Wash. Rev. Code § 29A.08.140; Wisconsin, Wis. Stat. § 6.29; and Wyoming, Wyo. Stat. § 22-3-104.

[3] Arranged by the latest deadlines and then alphabetically, these States include Massachusetts (10 days), Mass. Gen. Laws ch. 51, § 42G1/2(d); New York (10 days), N.Y. Elec. Law § 5-210; Nebraska (11 days), Neb. Rev. Stat. § 32-302; Alabama (15 days), Ala. Code § 17-3-50; Pennsylvania (15 days), 25 Pa. Cons. Stat. § 3071; South Dakota (15 days), S.D. Codified Laws § 12-4-5; Kansas (21 days), Kan. Stat. § 25-2311; New Jersey (21 days), N.J. Stat. § 19:31-6; Oregon (21 days), Ore. Rev. Stat. § 247.017; West Virginia (21 days), W. Va. Code, § 3-2-6; Delaware (24 days), Del. Code tit. 15 § 2036; North Carolina (25 days), N.C. Gen. Stat. § 163-82.6; Oklahoma (25 days), Okla. Stat. tit. 26 § 4-110.1; Missouri (27 days), Mo. Rev. Stat. § 115.135; Arizona (29 days), Ariz. Rev. Stat. § 16-120; Florida (29 days), Fla. Stat. § 97.055; Georgia (29 days), Ga. Code § 21-2-224; Indiana (29 days), Ind. Code § 3-7-13-10; Kentucky (29

True, such deadlines impose some marginal inconvenience on voters as it requires them to take some action before election day if they wish to participate in the democratic process. But this Court has recognized in other contexts that though "'[d]eadlines are inherently arbitrary,' [such] fixed dates 'are often essential to accomplish necessary results.'" *United States v. Locke*, 471 U.S. 84, 94 (1985) (quoting *United States v. Boyle*, 469 U.S. 241, 249 (1984)). That is no less true here, as "[c]asting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 669 (2021). Minor "inconvenience[s]" imposed by such rules do not justify legislation by litigation because they "do[] not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198; *see also, e.g.*, *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissenting) ("A registered voter who does not follow the rules may be unable to cast a vote for any number of reasons.").

Indeed, to the best of amici States' knowledge, courts have never found an earlier date unlawful. The Montana Supreme Court certainly cited *no* examples of any other state-court decision otherwise.

---

days), Ky. Rev. Stat. § 116.045; Alaska (30 days), Alaska Stat. § 15.07.070; Arkansas (30 days), Ark. Code § 7-5-201; Louisiana (30 days), La. Stat. § 18:135; Mississippi (30 days), Miss. Code § 23-15-37; Ohio (30 days), Ohio Rev. Code § 3503.19; Rhode Island (30 days), R.I. Gen. Laws § 17-9.1-3; South Carolina (30 days), S.C. Code § 7-5-150; Tennessee (30 days), Tenn. Code § 2-2-109; and Texas (30 days), Tex. Elec. Code § 13.143.

II. The Montana Supreme Court's Decision "Transgresses the Ordinary Bounds of Judicial Review."

That Montana, unique among all its sister states, has this "manner" of elections set by its courts underscores that the court below has so "exceed[ed] the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by" the Elections Clause. *See Moore*, 600 U.S. at 37. Its reasoning—which, if applied broadly, would invalidate statutes applicable to half the country—cannot be squared with the text it purports to interpret. And notwithstanding that "'We the People' . . . are the fountainhead of all government power" in any republican system, *Jarkesy v. SEC*, 34 F.4th 446, 459 (5th Cir. 2022), *aff'd on other grounds*, 144 S. Ct. 2117, (2024), it arrogates to the Montana courts a power never delegated by the people of that great State.

A. The Montana Supreme Court's reasoning fails even under its own terms.

When it comes to who should set the deadline for voter registration, the court below should have started *and ended* its analysis with the text of the Montana Constitution. Article IV, section 3 explicitly provides: "*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." Mont. Const. art. IV, § 3 (emphasis added). As this Court recognizes, "[t]he word 'may' customarily connotes discretion. That connotation is particularly apt where, as here, 'may' is used in contraposition to the word 'shall.'" *Jama v. ICE*, 543 U.S. 335, 346 (2005) (internal citation omitted). Because Montana law works the same way, this text confirms that (1) the authority to

decide when to set the deadline for registration is reserved to the Legislature and (2) election-day registration (*i.e.*, "poll booth registration") is one of the permissible choices that the Legislature can make. *See, e.g.*, *Gaustad v. City of Columbus*, 877 P.2d 470, 471 (Mont. 1994).

1. The Montana Supreme Court's decision recognizes that the "Constitution uses permissive language that would allow the Legislature to enact election day registration." App.40a. Nevertheless, it flouts these principles, and effectively rewrites section 3's "may" as "must" based on its "review of the Constitutional Convention transcripts [which] does not lead us to the conclusion that the Legislature has the unfettered authority" to set the deadline for voter registration. App.40a. That result is curious given that section 3 does precisely that: It allows the Legislature to "provide by law the requirements for . . . registration," Mont. Const. art. IV, § 3, without any textual limitation.

Such a reading is particularly untenable given the statutory history of article IV, section 3. Although legislative history in the form of statements by individual legislators has long been discredited as a means of interpretation, statutory history forms an important part of the context of a legal document. *E.g.*, *Snyder v. United States*, 144 S. Ct. 1947, 1955 (2024). For example, this Court has long resisted efforts to transform its judicial review function into that performed by a Council of Revision precisely because the Founders were aware of—and deliberately chose to reject—the concept. *See United States v. Hansen*, 599 U.S. 762, 787 (2023) (Thomas, J., concurring) (discussing this history); *accord United States v. Correll*, 389 U.S. 299, 306-07 (1967)

("[W]e do not sit as a committee of revision to perfect the administration of the tax laws.").

Here, the members of the 1972 Convention specifically considered a proposal to adopt a mandate that registration be permitted up through election day and overwhelmingly rejected such a mandate by a 76-22 vote. *See* App.121a (Sandefur, J., concurring in part and dissenting in part) ("[T]he Court has now certainly 'baked' election day registration into our Constitution for now, a feat which an overwhelming 76-22 majority of *the actual Framers* of our Constitution *squarely refused to do*."). As the court's majority observed—but refused to acknowledge as controlling—"the mandatory language was . . . replaced with the permissive language in Montana's Constitution today." App.41a (majority opinion).

2. To justify its effort to erase that discretion which the Montana Constitution's text explicitly provides, the court below primarily relied upon that constitution's Free Election Clause, which provides: "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. II, § 13. Because article IV, section 3 specifically addresses the question of registration requirements and election-day registration, allowing the far more general provision of article II, section 13 to control the result violates yet another bedrock principle of textual interpretation. *See*, *e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("[I]t is a commonplace of [textual] construction that the specific governs the general." (first alteration in original) (citation omitted)).

3. Even on its own terms, however, the analysis fails because the Free Election Clause says nothing about registering to vote—let alone a right to election-day

registration. App.18a. Instead, the court interpolates such a right into the general language of the Free Elections Clause from statements of individual convention attendees that "voting is not a privilege that the state merely hands out" but instead that "the right to vote is so sacred and so important that it does deserve Constitutional treatment." App.18a-19a.[4] This is, however, a non-sequitur because "[c]asting a vote . . . requires compliance with certain rules" and enforcing those rules does nothing to diminish the importance of that right. *Brnovich*, 594 U.S. at 669.

Analogs to Montana's Free Election Clause are ubiquitous in her sister States.[5] Yet *none* of those States'

---

[4] *See also* App.19a (stating that "I came over here to preserve the rights of the public[,]" and "the right to vote is certainly the most sacred right of them all"); *see also* App.19a n.5 (defending reliance on individual statements because "a full reading of the discussion shows that the vast majority of delegates were in favor of a strong and protective right to vote" and therefore the individual statements "manifest a collective intent" on which the court would rely).

[5] *See, e.g.*, Ariz. Const. art. II, § 21 ("All elections shall be free and equal, and no power ... shall at any time interfere to prevent the free exercise of the right of suffrage."); Colo. Const. art. II, § 5 ("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."); Mo. Const. art. I, § 25 ("[A]ll 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."); N.C. Const. art. I, § 10 ("All elections shall be free."); N.M. Const. art. II, § 8 ("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."); Pa. Const. art I, § 5 ("Elections shall be free and equal; and no power . . . shall . . . interfere to prevent the free exercise of the right of suffrage."); Tex. Const. art. VI, § 2(c). ("The privilege of free suffrage shall be protected by laws regulating elections and prohibiting under adequate penalties all undue influence in elections from power, bribery, tumult, or other improper practice.").

courts have interpreted those equivalent provisions to mandate election-day registration—even though more than half of States disallow the practice. *Supra* pp.6-7 & nn.2-3. For good reason. As an earlier iteration of the litigation leading to *Moore* explained, "the historical context of [such] free elections clause—both colonial and English—indicates that 'free elections' refers to elections free from interference and intimidation" of the type exercised by the Stewart Monarchs in the lead-up to the Glorious Revolution. *Harper v. Hall*, 886 S.E.2d 393, 438 (N.C. 2023). Such abuses, which the "drafters of the English Bill of Rights characterized . . . as 'utterly and directly contrary to the known laws and statutes, and freedom of this realm,'" bear no resemblance to a law requiring a prospective voter to register twenty-four hours before they present themselves at the polls. *Id.* at 436 (quoting Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.)).

In the face of this history, the Montana Supreme Court was entirely wrong to fixate on that State's 1972 Convention views on this particular provision. True enough, "[t]he Framers' intent controls [a court's] interpretation." App. 11a; *see also* App.18a-20a (surveying the convention history of the "intent"). But the 1972 version of the clause "carr[ied] forward, verbatim, the same language from [Montana's] 1889 Constitution without discussion, or controversy." App.79a (Sandefur, J., concurring in part and dissenting in part). This is strong evidence that no change in substantive law was actually intended. *See, e.g.*, *FDIC v. Phila. Gear Corp.*, 476 U.S. 426, 437 (1986). That is telling because the Free Election Clause has never been previously read to require election-day registration. App.39a.

4. The post-ratification history further demonstrates what the text already reflects: The Montanans who took part in the 1972 Convention did not believe they had created any such mandate. This Court has explained that "the examination of a variety of legal and other sources" from the years immediately following the drafting of the Constitution can help the Court "to determine *the public understanding* of a legal text in the period after its enactment or ratification." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *see also, e.g.*, *United States v. Rahimi*, 144 S. Ct. 1889, 1917-19 (2024) (Kavanaugh, J., concurring). Again, the Montana Supreme Court has long recognized and applied the same principles in other contexts. *E.g.*, *Wells Fargo & Co. v. Harrington*, 169 P. 463, 465 (Mont. 1917) (noting that a "construction was placed upon the language of the Constitution, substantially contemporaneous with its adoption"); *Butte, A. & P. Ry. Co. v. Mont. U. Ry. Co.*, 41 P. 232, 240 (Mont. 1895) (looking to "the early and continued legislative practice under the constitution").

Here, on the day the 1972 Constitution was ratified and "in the ensuing 35 years before enactment of election day registration in 2005, the voter registration deadline was still 30 days before election day." App.83a (Sandefur, J., concurring in part and dissenting in part). If that "deadline [was] thus *clearly constitutional*, at least *in the minds and resulting acts of the Framers*," it is hard to see how a deadline that is less than 30 *hours* before election day violates the Free Election Clause. *See id.*

***

In sum, at every turn, the Montana Supreme Court "'impermissibly distorted' state law 'beyond what a fair reading required.'" *Moore*, 600 U.S., at 38 (Kavanaugh, J., concurring) (quoting *Bush v. Gore*, 531 U.S. 98, 115

(2000) (Rehnquist, C.J., concurring)). To reach its preferred policy outcome, the Montana Supreme Court (1) rewrote section 3's explicitly permissive language granting authority to the Legislature to impose a mandate that a clear majority of delegates at its constitutional convention had rejected; (2) permitted the more general Free Election Clause to trump the far more specific provision of article IV, section 3; (3) relied on the 1972 Convention to ascertain the meaning of that Free Election Clause, even though that convention had not altered the prior text of that provision whatsoever; and (4) entirely disregarded that for most of the existence of Montana's current Constitution, the State provided a far more restrictive rule on voter registration than is currently at issue here. The resulting decision simply bears no resemblance to "ordinary judicial review" and instead palpably "exceeded the bounds of" it. *See id.* at 36.

B. Montana's courts lack express authorization to engage in lawmaking regarding registration deadlines.

Although this Court has recognized that States may (without violating the Elections Clause) select "an alternative legislative process" such as "vesting the lawmaking power of redistricting in an independent commission," *id.* at 25 (quotation marks omitted), the Montana Supreme Court has no such constitutional fig leaf behind which to hide its judicial creativity.

This Court has made clear that a State may place its election-regulating power in entities beyond its Legislature. In *AIRC*, this Court held that a State, consistent with the recognized authority to reclaim delegated lawmaking powers for the people generally through popular referenda, was permitted under the Elections Clause to reallocate redistricting power to an independent

commission using the same state constitutional mechanism. 576 U.S. at 824. That is, the Arizona Constitution *itself*—not a state court construing highly generic text present in many state and colonial constitutions dating back to the English Bill of Rights, *supra* p. 12—*explicitly* established the electorate "as a coordinate source of legislation on equal footing" with the Legislature. *Id.* at 795. The Court reasoned that because the Elections "Clause surely was not adopted to diminish a State's authority to determine its own *lawmaking* processes," the Court found this division of legislative power within a single State to be entirely consistent with the Constitution. *Id.* at 824 (emphasis added).

That proposition flowed directly from this Court's decision in *Ohio ex rel. Davis v. Hildebrant*. *See* 241 U. S. 565 (1916). There, this Court held that the Elections Clause allowed a provision in the Ohio Constitution which authorized the people "to approve or disapprove by popular vote any law enacted by the general assembly." *Id.* at 566. In the process, the Court rejected any notion that "to include the referendum within state legislative power for the purpose of apportionment is repugnant to [the Elections Clause] of the Constitution," and the Court affirmed the popular authority to exercise legislative power in that way. *Id.* at 569. Like the later *AIRC* decision, key to *Hildebrant* was that "the referendum constituted a part of the state constitution and laws[] and was contained within the legislative power." *Id.* at 568.

This focus on the text of the legislative process—or processes—as delineated in the Constitution can be seen in other cases as well. For example, in *Smiley v. Holm*, 285 U. S. 355 (1932), this Court affirmed that consistent with the Election Clause, the Minnesota Legislature was required to obtain a gubernatorial signature for any bill

to become law, *id.* at 363—including its redistricting plan, *id.* at 367-68. In so doing, this Court once again pointed to the *express* nature of the state constitution: "[I]t follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments." *Id.* at 367.

No such specific provision of law prescribes a method by which the Montana Supreme Court can impose specific election requirements on the state legislature. To the contrary, Montana's constitution explicitly gives its *Legislature* the power to "provide by law the requirements for . . . registration" and further expressly makes the choice of whether to permit election-day registration permissive. Mont. Const. art. IV, § 3 (providing that the Legislature "*may* provide for a system of poll booth registration" (emphasis added)).

In holding otherwise based on general language of the Free Election Clause, the court below squarely violated the Elections Clause. Moreover, for all the reasons set forth in the Petition and above, the Montana Supreme Court plainly "transgress[ed] the ordinary bounds of judicial review such that [it] arrogate[d] to [itself] the power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36.

III. This Court's Review Is Vital as the Montana Supreme Court Effectively Admitted Its Intent to Usurp Legislative Power.

Given the newness of *Moore*, had this been a mistake, such an error might not require this Court's review. Here, one final indication demonstrates such intervention is vital: The court below effectively *admitted* its intent to substitute its policy views for that of the Legislature in clear violation of *Moore*.

Specifically, the Montana Supreme Court rejected this Court's prevailing *Anderson-Burdick* standard for assessing the validity of state election laws precisely *because* it gave "undue deference to state legislatures" and thwarted "transfer[ring] much of the authority to regulate election procedures from the States to the . . . courts." App.9a ¶15. In other words, the Montana Supreme Court rejected the *Anderson-Burdick* standard *because* it left too much of the Legislature's power under the Elections Clause in the Legislature's hands.

By openly declaring that the motivation underlying its decision was to ensure that power to regulate elections was transferrable from the Legislature to the courts, the Montana Supreme Court effectively confessed to "arrogat[ing] to [itself] the power vested in" the Montana Legislature. *See Moore*, 600 U.S. at 36. That admission underscores not just the violation of the Elections Clause here but also that *Moore*'s preservation of traditional notions of judicial review did not write the Election Clause completely out of the Constitution.

CONCLUSION

The petition for certiorari should be granted and the Montana Supreme Court's judgment reversed.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON L. NIELSON
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov
(512) 936-1700

DREW C. ENSIGN

Holtzman Vogel
Baran Torchinsky
& Josefiak PLLC
2575 E Camelback
Rd. Ste 860
Phoenix, AZ 85016

SEPTEMBER 2024

Counsel for Additional Amici States:

STEVE MARSHALL
Attorney General
of Alabama

TIM GRIFFIN
Attorney General
of Arkansas

ASHLEY MOODY
Attorney General
of Florida

THEODORE E. ROKITA
Attorney General
of Indiana

BRENNA BIRD
Attorney General
of Iowa

KRIS KOBACH
Attorney General
of Kansas

LIZ MURRILL
Attorney General
of Louisiana

MICHAEL T. HILGERS
Attorney General
of Nebraska

DREW WRIGLEY
Attorney General
of North Dakota

GENTNER DRUMMOND
Attorney General
of Oklahoma

ALAN WILSON
Attorney General
of South Carolina

MARTY JACKLEY
Attorney General
of South Dakota

SEAN REYES
Attorney General
of Utah

PATRICK MORRISEY
Attorney General
of West Virginia