

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 OF CENTER FOR ELECTION
CONFIDENCE AS AMICUS CURIAE IN SUPPORT
OF PETITIONER**

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TABLE OF CONTENTS

Table of Authorities..... ii
Interest of *Amicus Curiae*..... 1
Summary of Argument..... 2
Argument 3
I. Montana’s Election Integrity Regulations Are
Entirely Consistent With Other States’ Election
Laws..... 3
A. The Majority Of States Do Not Allow Same-Day
Voter Registration On Election Day—Indeed,
Most States Close Voter Registration Long
Before Election Day 5
B. Half Of The States Impose Reasonable, Non-
Discriminatory Restrictions On Ballot Collection
and Delivery..... 8
II. The Petition Should Be Granted To Govern—And
Deter—The Growing Number Of Cases Seeking To
Displace Reasonable Time, Place, and Manner
Regulations 14
Conclusion 22

TABLE OF AUTHORITIES

Cases

<i>Baxter v. Philadelphia Bd. of Elections</i> , 2024 WL 4614689 (Pa. Commw. Ct. Oct. 30, 2024)	17
<i>Black Political Empowerment Project v. Schmidt</i> , 2024 WL 4002321 (Pa. Cmwlth. Aug. 30, 2024)	16
<i>BPEP v. Schmidt</i> , 322 A.3d 221 (Pa. 2024)	16
<i>Brnovich v. Democratic Nat’l Comm.</i> , 594 U.S. 647 (2021)	5, 8
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992)	9
<i>Bush v. Gore</i> , 531 U.S. 98 (2000)	5
<i>Crawford v. Marion Cnty. Election Bd.</i> , 553 U.S. 181 (2008)	4, 6, 9, 13
<i>Eakin v. Adams Cnty. Bd. of Elections</i> , W.D. Pa. No. 1:22-cv-00340	19
<i>Feldman v. Ariz. Sec. State’s Office</i> , 843 F.3d 366 (9th Cir. 2016)	13
<i>Genser v. Butler Cnty. Bd. of Elections</i> , No. 26 WAP 2024, 2024 WL 4553285 (Pa. Oct. 23, 2024)	19
<i>Griffin v. Roupas</i> , 385 F.3d 1128 (7th Cir. 2004)	9
<i>League of Women Voters of Kansas v. Schwab</i> , 549 P.3d 363 (Kan. 2024)	15
<i>Liebert v. Wisconsin Election Comm’n</i> , 2024 WL 2078216 (W.D. Wis. May 9, 2024)	21, 22

<i>Moore v. Harper</i> , 600 U.S. 1 (2023)	2, 3, 5
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	9
<i>Nader v. Keith</i> , 385 F.3d 729 (7th Cir. 2004)	9
<i>New PA Project Education Fund v. Schmidt</i> , 2024 WL 4410884 (Pa. Oct. 5, 2024)	17
<i>Pennsylvania State Conference of the NAACP v. Schmidt</i> , 97 F.4th 120 (3rd Cir. 2024)	19
<i>Priorities, USA v. Wisconsin Elections Comm’n</i> , 8 N.W.3d 429 (Wis. 2024)	20, 21
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	5
<i>Randall v. Sorrell</i> , 548 U.S. 230 (2006)	4
<i>Rise, Inc. v. Wisconsin Election Commission</i> , 11 N.W.3d 241 (Wis. Ct. App. 2024)	21
<i>Teigen v. Wisconsin Elections Comm’n</i> , 976 N.W.2d 519 (Wis. 2022)	20
<i>Veasey v. Abbott</i> , 830 F.3d 216 (5th Cir. 2016)	9
<i>Vet Voice Foundation v. Hobbs</i> , Wash. Supreme Ct. No. 102569-6.....	15
<i>Wrinn v. Dunleavy</i> , 440 A.2d 261 (Conn. 1982)	9
Statutes	
10 Ill. Comp. Stat. § 5/5-50	7
17 R.I. Gen. Laws § 17-9.1-3	6

25 P.S. § 3146.6(a).....	15, 18
25 P.S. § 3150.16(a).....	15, 18
25 Pa. Cons. Stat. § 3146.2a(a.3)(1)	13
25 Pa. Stat. § 3050(a.4)(5)(ii)(F).....	18
26 Okl. St. Ann § 4-110.1.....	6
52 U.S.C. § 10101(a)(2)(B)	19
Ala. Code § 17-11-9.....	10
Alaska Stat. § 15.07.070(c), (d).....	6
Alaska Stat. § 15.20.072(a)	13
Alaska Stat. § 15.20.072(g)	11
Ariz. Rev. Stat. § 16-1005(I)(2)	12
Ark. Code § 7-5-403.....	11
C.G.S.A. § 9-19j.....	7
Cal. Elec. Code § 2170	7
Cal. Elec. Code § 3017(e).....	11
Colo. Rev. Stat §§ 1-2-201, 1-2-217.7.....	7
Colo. Rev. Stat. § 1-7.5-107(4)(b)(I)(B)	11
Conn. Gen. Stat. § 9-140b	13
D.C. Code § 1-1001.07(g)(5)	8
Del. Code Title 15 §§ 2036, 2047.....	6
Fla Stat. § 104.0616(2)	11
Fla. Stat. § 97.055.....	6
Ga. Code § 21-2-385.....	12, 13
Ga. Code § 21-2-224.....	6
Haw. Rev. Stat. § 11-15.2	7
Idaho Code § 18-2324.....	12
Idaho Code § 18-2324(3)	11
Idaho Code § 18-2324(5)	10
Idaho Code § 34-408A.....	7

Ind. Code § 3-11-10-1(6)(C).....	12
Ind. Code 3-7-13-10	6
Iowa Code § 48A.7A.....	8
Iowa Code § 53.33(2).....	12
Kan. Stat. Ann. § 25-2311	6
Kan. Stat. Ann. § 25-2437(a)(1)(B)	11
Kan. Stat. Ann. § 25-2437(b)(1).....	11
Ky. Rev. Stat. § 116.045.....	6
Ky. Rev. Stat. § 117.0863.....	13
Ky. Rev. Stat. §§ 117.0863(2), 117.255(3).....	11
La. Stat. § 18:1308	12
La. Stat. § 18:1308(B).....	11
La. Stat. § 18:135	6
Mass. Gen. Laws ch. 51, § 26.....	7
Mass. Gen. Laws ch. 54, § 92.....	12
McKinney’s Election Law § 5-210.....	7
Md. Code Elec. Law, § 3-306	8
Md. Code Elec. Law § 9-307(b)(2).....	11
Me. Rev. Stat. § 753-B(2).....	11
Me. Rev. Stat. § 753-B(2)(C).....	11
Me. Rev. Stat. tit. 21, § 122(4).....	8
Mich. Comp. Laws § 168.497.....	8
Mich. Comp. Laws § 168.764a.....	12
Minn. Stat. Ann. §§ 201.054, 201.061	8
Minn. Stat. § 203B.08(1)(b)	11
Miss. Code Ann. § 23-15-37	6
Miss. Code Ann. § 23-15-907	12
Mo. Rev. Stat. § 115.135	6
Mo. Rev. Stat. § 115.291	12

Mont. Code §13-35-703(2).....	12
Mont. Code §13-35-703(3).....	11
N.C. Gen. Stat. § 163-231(b)(1).....	12
N.C. Gen. Stat. § 163-82.6B.....	7
N.D. Cent. Code § 16.1-01-04.1.....	7
N.D. Cent. Code § 16.1-07-06(3).....	12
N.D. Cent. Code § 16.1-07-08(1).....	11
N.H. Rev. Stat. § 654:7-a.....	8
N.H. Rev. Stat. § 657:17.....	12
N.J. Stat. Ann. § 19:63-4.....	11, 12
N.J. Stat. Ann. §19:63-9, §19:63-16.....	6
N.M. Stat. § 1-6-10.1.....	12
N.M. Stat. Ann. §§ 1-4-8, 1-4-5.7.....	8
Neb. Rev. Stat. § 32-302.....	7
Neb. Rev. Stat. § 32-943(3).....	11, 12
Nev. Rev. Stat. 293.5847.....	8
Ohio Rev. Code § 3503.19.....	6
Ohio Rev. Code § 3509.05(C)(1).....	12
Okla. Stat. tit. 26, § 14-104.1.....	10, 12
Or. Rev. Stat. § 247.017.....	7
S.C. Code § 7-15-385(G).....	12
S.C. Code §§ 7-15-385, 7-15-310(7), (8).....	12
Tenn. Code Ann. § 2-2-109.....	6
Tex. Elec. Code § 13.143.....	6
Tex. Elec. Code § 86.006(f)(1)–(2).....	12
Utah Code Ann. § 20A-2-207.....	8
Va. Code § 24.2-705(A).....	11, 13
Va. Code Ann. § 24.2-420.1.....	8
Vt. Stat. Ann. tit. 17, § 2144.....	8

Vt. Stat. Ann. tit. 17, § 2543(e).....	11
Vt. Stat. Ann. tit. 17, § 2543(f)	12
W. Va. Code, § 3-3-5(k)	12
W. Va. Code § 3-2-6.....	7
Wash. Rev. Code § 29A.08.140.....	8
Wis. Stat. § 6.84(1).....	20
Wis. Stat. § 6.87(4)(b)1.....	20
Wis. Stat. Ann. § 6.29.....	8
Wyo. Stat. § 22-3-104	8

Other Authorities

<i>18 Are Arrested in 1997 Miami Ballot Fraud</i> , N.Y. Times (Oct. 29, 1998).....	13
Andrew Hay, <i>North Carolina Orders New U.S. House Election After ‘Tainted’ Vote</i> , Reuters (Feb. 21, 2019).....	13
Ariz. Att’y Gen. Mark Brnovich, Press Release, <i>Yuma County Women Sentenced for their Roles in Ballot Harvesting Scheme</i> (Oct. 14, 2022)	13
Associated Press, <i>Four People Plead Guilty in North Carolina Ballot Probe of 2016 and 2018 Elections</i> , Sept. 26, 2022.....	10
Carter–Baker Comm’n on Fed. Elections Reform, <i>Building Confidence in U.S. Elections</i> (2005).....	9
John C. Fortier, <i>Absentee and Early Voting</i> (AEI Press 2006)	10
Tracy Campbell, <i>Deliver the Vote</i> (Carroll & Graff Publishers 2006)	10
VanderHart, <i>2 ballot boxes set on fire in Portland and Vancouver</i> , Oregon Public Broadcasting (Oct. 28, 2024).....	21

Constitutional Provisions

Ark. Const., amend. 51, § 9(b).....	6
Mont. Const., Art. II, § 13.....	2
N.C. Const., Art. I, § 10.....	3
Pa. Const., Art. I, § 5.....	16

INTEREST OF *AMICUS CURIAE*¹

Center for Election Confidence, Inc. is a non-profit organization that promotes ethics, integrity, and professionalism in the electoral process. CEC works to ensure that all eligible citizens can vote freely within an election system of reasonable procedures that promote election integrity, prevent vote dilution and disenfranchisement, and instill public confidence in election systems and outcomes. To accomplish these objectives, CEC conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. CEC is a resource for lawyers, journalists, policymakers, courts, and others interested in the electoral process. CEC also periodically engages in public-interest litigation to uphold the rule of law and election integrity and files amicus briefs in cases where its background, expertise, and national perspective may illuminate the issues under consideration. CEC's *amicus* brief (1) demonstrates that the two election integrity provisions at issue in this case are consistent with the mainstream election laws of States across the country and (2) addresses the proliferation of litigation throughout the Nation targeting commonplace election laws aimed at ensuring fair and efficient elections.

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.

SUMMARY OF ARGUMENT

This Court recently stressed that, because “the Elections Clause vests power to carry out its provision in ‘the Legislature’ of each State,” courts may not use expansive language in state constitutions to “arrogate to themselves the power vested in state legislatures to regulate federal elections.” *Moore v. Harper*, 600 U.S. 1, 34, 36 (2023). Yet that is precisely what the Montana Supreme Court did when it struck down mainstream voter registration and ballot collection regulations under the broad statement that “elections shall be free and open” in the Montana Constitution (Art. II, § 13). This Court’s intervention is necessary to ensure that state legislatures retain the broad regulatory power—guaranteed by the Elections Clause—to design and operate electoral systems that are fair, free of fraud, and efficient.

Section I below describes how each of the challenged election integrity regulations are consistent with other States’ efforts to manage elections to ensure their efficiency, integrity, and accuracy. Cataloguing voter-registration and ballot-collection laws around the Nation confirms that the Montana Legislature’s approach is consistent with the widespread adoption of similar legislation. The commonplace nature of Montana’s rules is a strong indication that they do not prevent Montana’s elections from being “free” or “open.”

The petition should also be granted because the need to establish a boundary for judicial usurpation of state legislative authority over elections is growing as novel lawsuits proliferate. Opponents of reasonable time, place, and manner voting regulations are actively urging courts

around the Nation to essentially legislate under the guise of interpreting vague and laconic words in state constitutions, thereby substituting the judiciary’s policy preferences for well-established rules set by legislatures. *Cf. Moore*, 600 U.S. at 7 (plaintiffs brought claims under North Carolina constitutional provision that “[a]ll elections shall be free”) (citing N.C. Const., Art. I, § 10).

Section II describes some of this litigation. Given the partisan nature of these challenges, it is no coincidence that such efforts are focused most heavily on traditional swing states for presidential elections: Pennsylvania in particular has seen a barrage of litigation challenging customary regulation of absentee voting. That these efforts are displacing an ever-increasing number of reasonable election regulations set by legislatures, however, underscores the urgency of granting the petition. The systematic usurpation of state legislative authority over election rules will continue until state supreme courts understand that this Court will enforce its statement that they “do not have free rein” to exercise the “power vested [by the Constitution] in state legislatures to regulate federal elections.” *Moore*, 600 U.S. at 34, 36.

ARGUMENT

I. Montana’s Election Integrity Regulations Are Entirely Consistent With Other States’ Election Laws.

This petition concerns two election laws that plaintiffs claim operate to deny Montanans their right to vote in “free and open” elections: a law that moved the State’s voter-registration deadline from the close of polling on

election day to noon the day before (HB 176, Pet.App.388a), and legislation that directed the Montana Secretary of State to adopt rules banning paid absentee ballot harvesting (HB530, Pet.App.418a). The Montana Legislature enacted these laws as part of an election administration system calibrated to *protect* all Montanans' fundamental right to vote while ensuring integrity and uniformity in the process. A review of other states' election laws confirms that Montana's voter registration and ballot collection regulations fall squarely within the mainstream of the Nation's voting regulations.

This Court has regularly and appropriately considered the experiences of other states—and the election administration rules fashioned in response to those experiences—as relevant touchstones for determining the lawfulness of rules in a particular case. For example, in evaluating whether Indiana's voter identification law violated the Fourteenth Amendment, the Court surveyed the “different methods of identifying eligible voters at the polls” that states use and noted the “increasing number of States [that] have relied primarily on photo identification.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008); *see also id.* at 222–23 (Scalia, Thomas, and Alito, JJ., concurring) (citing briefs comparing various other states' voter identification laws relative to Indiana's law and *Randall v. Sorrell*, 548 U.S. 230, 253 (2006), where the Court compared Vermont's campaign contribution limits with those in other states). Similarly, in evaluating whether Arizona's ban on voters voting outside of their precincts violated the Fifteenth Amendment and Section 2 of the Voting Rights Act, the Court looked to other

states' election laws and determined that such a ban was "widespread" among the states. *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 681–82 (2021) (citation omitted).

That the regulations such as the ones enjoined here are entirely common confirms the importance of granting the petition. For the Montana Supreme Court to subject these regulations to "strict scrutiny" and enjoin them for supposedly prohibiting "free and open" elections is a quintessential example of a state court "impermissibly distort[ing] 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)).

A. The Majority Of States Do Not Allow Same-Day Voter Registration On Election Day—Indeed, Most States Close Voter Registration Long Before Election Day.

The first law challenged here moved Montana's voter-registration deadline from the close of polls on election day to noon the day before. HB176, Pet.App.388a (amending Mont. Code Ann. § 13-2-304). It is beyond dispute that states must have some system in place to ensure that only eligible voters cast ballots and that all ballots properly cast are counted. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (internal quotation marks omitted). "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the

interest in orderly administration and accurate record-keeping provides a sufficient justification for carefully identifying all voters participating in the election process.” *Crawford*, 553 U.S. at 196.

Requiring voters to register in advance of an election furthers the State’s ability to conduct an orderly and fair election. The majority of states impose voter registration cutoffs long before election day. Fourteen states end registration 30 days or so before the election.² Three states close registration between three and four weeks prior to an election;³ another four states end registration 21 days before election day.⁴ Nebraska’s registration period

² Alaska, Alaska Stat. § 15.07.070(c), (d) (30 days); Arkansas, Ark. Const., amend. 51, § 9(b) (30 days); Louisiana, La. Stat. § 18:135 (30 days); Mississippi, Miss. Code Ann. § 23-15-37 (30 days); Ohio, Ohio Rev. Code § 3503.19 (30 days); Rhode Island, 17 R.I. Gen. Laws § 17-9.1-3 (30 days); South Carolina, S.C. Code § 7-5-150 (30 days); Tennessee, Tenn. Code Ann. § 2-2-109 (30 days); Texas, Tex. Elec. Code § 13.143 (30 days); Arizona, Ariz. Rev. Stat. § 16-120 (29 days); Florida, Fla. Stat. § 97.055 (29 days); Georgia, Ga. Code § 21-2-224 (29 days); Indiana, Ind. Code 3-7-13-10 (29 days); Kentucky, Ky. Rev. Stat. § 116.045 (29 days).

³ Missouri, Mo. Rev. Stat. § 115.135 (27 days); Oklahoma, 26 Okl. St. Ann § 4-110.1 (25 days); Delaware, Del. Code Title 15 §§ 2036, 2047 (24 days).

⁴ Kansas, Kan. Stat. Ann. § 25-2311; New Jersey, N.J. Stat. Ann. §19:63-9, §19:63-16; Oregon, Or. Rev. Stat.

closes “on the second Friday preceding any election”⁵—11 days out—and both New York and Massachusetts end registration 10 days before an election.⁶ North Carolina allows registration through the state’s early voting period that ends three days before election day.⁷ And North Dakota does not require voter registration because the state’s “Voter ID Law” requires a valid form of identification to vote.⁸ In total, 28 states close registration before election day—and the overwhelming majority of most of those states close registration at least three weeks ahead of time. By contrast, only 20 states (and Washington, D.C.) permit some form of same-day registration allowing to cast a ballot on election day.⁹

§ 247.017; West Virginia, W. Va. Code § 3-2-6.

⁵ Neb. Rev. Stat. § 32-302.

⁶ New York, McKinney’s Election Law § 5-210; Massachusetts, Mass. Gen. Laws ch. 51, § 26.

⁷ N.C. Gen. Stat. § 163-82.6B.

⁸ N.D. Cent. Code § 16.1-01-04.1; *see* North Dakota Secretary of State, Voting in North Dakota, <https://www.sos.nd.gov/elections/voter/voting-north-dakota> (“North Dakota is the only state without voter registration as our Voter ID Law requires a valid form of ID to vote.”).

⁹ California, Cal. Elec. Code § 2170; Colorado, Colo. Rev. Stat §§ 1-2-201, 1-2-217.7; Connecticut, C.G.S.A. § 9-19j; Hawaii, Haw. Rev. Stat. § 11-15.2; Idaho, Idaho Code § 34-408A; Illinois, 10 Ill. Comp. Stat. § 5/5-50; Iowa, Iowa

In short, Montana’s law is far more permissive than the predominant practice around the country.

B. Half Of The States Impose Reasonable, Non-Discriminatory Restrictions On Ballot Collection and Delivery.

The second election law challenged here prohibits the paid collection and return of other voters’ absentee ballots. Pet.App.418a. Montana’s regulation is consistent with the practice of other states that impose various restrictions on ballot collection practices to prevent undue influence or other inappropriate behavior associated with “ballot harvesting.” *See, e.g., Brnovich*, 594 U.S. at 686 (“[P]revention of fraud is not the only legitimate interest served by restrictions on ballot collection. . . . [T]hird-party ballot collection can lead to pressure and intimidation.”). “Ensuring that every vote is cast freely, without intimidation or undue influence, is . . . a valid and important state interest.” *Id.* at 672.

Code § 48A.7A; Maine, Me. Rev. Stat. tit. 21, § 122(4); Maryland, Md. Code Elec. Law, § 3-306; Michigan, Mich. Comp. Laws § 168.497; Minnesota, Minn. Stat. Ann. §§ 201.054, 201.061; Nevada, Nev. Rev. Stat. 293.5847; New Hampshire, N.H. Rev. Stat. § 654:7-a; New Mexico, N.M. Stat. Ann. §§ 1-4-8, 1-4-5.7; Utah, Utah Code Ann. § 20A-2-207; Vermont, Vt. Stat. Ann. tit. 17, § 2144; Virginia, Va. Code Ann. § 24.2-420.1; Washington, Wash. Rev. Code § 29A.08.140; Wisconsin, Wis. Stat. Ann. § 6.29; Wyoming, Wyo. Stat. § 22-3-104; Washington, D.C., D.C. Code § 1-1001.07(g)(5).

Indeed, this Court has long recognized that the states' interest in "protecting the integrity and reliability of the electoral process" extends to "detering and detecting voter fraud," as well as to "safeguarding voter confidence." *Crawford*, 553 U.S. at 191. Let there be no doubt: "[T]he risk of voter fraud [is] real." *Id.* at 196. "Absentee ballots remain the largest source of potential voter fraud." Carter–Baker Comm'n on Fed. Elections Reform, *Building Confidence in U.S. Elections* 46 (2005). "[E]lection fraud [is] successful precisely because [it is] difficult to detect," *Burson v. Freeman*, 504 U.S. 191, 208 (1992), so state legislatures must be "permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986).

Courts have recognized for decades that fraud is *especially* "facilitated by absentee voting," *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004) (citations omitted), because "voting by mail makes vote fraud much easier to commit," *Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004) (citation omitted). *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc) (recognizing the "reality of fraud . . . in the mail-in ballot context"); *Wrinn v. Dunleavy*, 440 A.2d 261, 270 (Conn. 1982) ("[T]here is considerable room for fraud in absentee voting."); *see also Crawford*, 553 U.S. at 225 (Souter, J., dissenting) ("absentee-ballot fraud . . . is a documented problem"). And abuse of third-

party ballot harvesting, especially for money, is well-documented.¹⁰ States are responding to these threats with reasonable regulation of absentee voting.

Strict Prohibitions On Ballot Collection. When evaluating a claim that prohibiting paid ballot-harvesting prevents elections from being “free and open,” it is important to note at the outset that one state (Alabama¹¹) only allows voters to return their own ballots, and another (Oklahoma¹²) does the same thing by prohibiting “absentee ballot harvesting” altogether. For its part, Idaho provides enhanced criminal penalties for paid ballot collectors who violate the state’s ballot harvesting laws.¹³

Limits On Who Can Collect Ballots. Overall, about half of the States expressly permit someone chosen by a voter to return advance ballots. Those states have taken a variety of steps to regulate ballot collection to ensure election integrity and reduce the risk of fraud and abuse. At least eleven states that have restrictions prohibiting certain people—like candidates, campaign workers, or agents of

¹⁰ See, e.g., Associated Press, *Four People Plead Guilty in North Carolina Ballot Probe of 2016 and 2018 Elections*, Sept. 26, 2022, bit.ly/3V0K8Qn; Tracy Campbell, *Deliver the Vote* 286–89 (Carroll & Graff Publishers 2006); John C. Fortier, *Absentee and Early Voting* 54–56 (AEI Press 2006).

¹¹ Ala. Code § 17-11-9.

¹² Okla. Stat. tit. 26, § 14-104.1.

¹³ Idaho Code § 18-2324(5).

the voter's employer or union—from returning ballots for others.¹⁴

Limits On The Number of Ballots That Can Be Collected. Another common approach—pursued by at least 15 states—is to limit the number ballots that can be collected.¹⁵ Ten states limit ballot collection at five or fewer

¹⁴ Alaska, Alaska Stat. § 15.20.072(g); California, Cal. Elec. Code § 3017(e); Idaho, Idaho Code § 18-2324(3); Kansas, Kan. Stat. Ann. § 25-2437(b)(1); Kentucky, Ky. Rev. Stat. §§ 117.0863(2), 117.255(3); Maine, Me. Rev. Stat. § 753-B(2); Maryland, Md. Code Elec. Law § 9-307(b)(2); Nebraska, Neb. Rev. Stat. § 32-943(3); New Jersey, N.J. Stat. Ann. § 19:63-4; North Dakota, N.D. Cent. Code § 16.1-07-08(1); Vermont, Vt. Stat. Ann. tit. 17, § 2543(e); Virginia, Va. Code § 24.2-705(A).

¹⁵ Arkansas, Ark. Code § 7-5-403 (limiting ballot collection to two ballots per election and prohibiting the possession of more than two absentee ballots at any time); Colorado, Colo. Rev. Stat. § 1-7.5-107(4)(b)(I)(B) (ten ballots per election); Florida, Fla Stat. § 104.0616(2) (felony to collect than two vote-by-mail ballots per election); Idaho, Idaho Code § 18-2324(3) (six ballots per election); Kansas, Kan. Stat. Ann. § 25-2437(a)(1)(B); Louisiana, La. Stat. § 18:1308(B) (limiting collection for non-immediate-family member to one ballot every election); Maine, Me. Rev. Stat. § 753-B(2)(C) (person may only possess five absentee ballots at a time); Minnesota, Minn. Stat. § 203B.08(1)(b) (three ballots per election); Montana, Mont. Code § 13-35-703(3) (six ballots per election); Nebraska,

ballots; Montana allows six; Colorado and Kansas permit the collection of ten; and Vermont stands alone in allowing the delivery of up to 25 ballots. Eighteen states limit who may collect ballots (such as a family or household member, etc.).¹⁶ And at least six states restrict who may have

Neb. Rev. Stat. § 32-943(3) (agent can only return ballots for two voters in any election); New Jersey, N.J. Stat. Ann. § 19:63-4 (three ballots per election or five ballots for family members who share a household); New Hampshire, N.H. Rev. Stat. § 657:17 (four absentee ballots in any election); North Dakota, N.D. Cent. Code § 16.1-07-06(3) (four ballots in an election); South Carolina, S.C. Code § 7-15-385(G) (five ballots in an election); Vermont, Vt. Stat. Ann. tit. 17, § 2543(f) (twenty-five ballots); and West Virginia, W. Va. Code, § 3-3-5(k) (two absentee ballots in any election).

¹⁶ Arizona, Ariz. Rev. Stat. § 16-1005(I)(2); Georgia, Ga. Code § 21-2-385; Idaho, Idaho Code § 18-2324; Indiana, Ind. Code § 3-11-10-1(6)(C); Iowa, Iowa Code § 53.33(2); Louisiana, La. Stat. § 18:1308; Massachusetts, Mass. Gen. Laws ch. 54, § 92; Mississippi, Miss. Code Ann. § 23-15-907; Michigan, Mich. Comp. Laws § 168.764a; Missouri, Mo. Rev. Stat. § 115.291; Montana, Mont. Code § 13-35-703(2); New Hampshire, N.H. Rev. Stat. § 657:17; New Mexico, N.M. Stat. § 1-6-10.1; North Carolina, N.C. Gen. Stat. § 163-231(b)(1); Ohio, Ohio Rev. Code § 3509.05(C)(1); Oklahoma, Okla. Stat. tit. 26, § 14-104.1; South Carolina, S.C. Code §§ 7-15-385, 7-15-310(7), (8); and Texas, Tex. Elec. Code § 86.006(f)(1)–(2).

their ballot collected, often limiting advance ballots to voters who have a disability or are otherwise unable to vote in person.¹⁷

Montana’s effort to ban paid absentee ballot collection is consistent with efforts around the Nation to ensure the integrity and reliability of the election process. These commonsense regulatory measures are surely within the states’ Elections Clause authority, as shown by the well-documented history of abuses in ballot harvesting. *See, e.g.*, Ariz. Att’y Gen. Mark Brnovich, Press Release, *Yuma County Women Sentenced for their Roles in Ballot Harvesting Scheme* (Oct. 14, 2022); Andrew Hay, *North Carolina Orders New U.S. House Election After ‘Tainted’ Vote*, *Reuters* (Feb. 21, 2019); *18 Are Arrested in 1997 Miami Ballot Fraud*, *N.Y. Times* (Oct. 29, 1998). Montana’s prohibition must be viewed against this backdrop, as absentee voting carries the perception of fraud risk that can undermine confidence in elections. “[A]bsentee voting may be particularly susceptible to fraud, or at least perceptions of it.” *Feldman v. Ariz. Sec. State’s Office*, 843 F.3d 366, 390 (9th Cir. 2016). Put simply, “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Crawford*, 553 U.S. at 197.

¹⁷ Alaska, Alaska Stat. § 15.20.072(a); Connecticut, Conn. Gen. Stat. § 9-140b; Georgia, Ga. Code § 21-2-385; Kentucky, Ky. Rev. Stat. § 117.0863; Pennsylvania, 25 Pa. Cons. Stat. § 3146.2a(a.3)(1); and Virginia, Va. Code § 24.2-705(A).

In sum, the Montana laws enjoined as unconstitutional are entirely consistent with other states' election regulations, many of which were affirmed by this or other federal courts without a hint that they would prevent elections from being "free" or "open." The Montana Supreme Court's decision is so contrary to any reasonable understanding of what constitute "free and open" elections, and so inconsistent with the longstanding practice of other states and the rulings of this Court and other courts, that the decision below represents a textbook case of "arrogation" to the judiciary of power vested in the Montana Legislature to regulate federal elections. Lest reasonable election rules be displaced across the country, this Court's intervention is necessary to affirm the primacy of the Constitution's grant of broad regulatory power to state legislatures.

II. The Petition Should Be Granted To Govern—And Deter—The Growing Number Of Cases Seeking To Displace Reasonable Time, Place, and Manner Regulations.

Opponents of traditional time, place, and manner election regulations are stretching state constitutional theories to nullify a variety of statutes and rules around the Nation and usurp the authority of state legislatures. They are alleging in state courts that, completely unbeknownst to voters, political parties, and candidates that have operated under these voting regulations—for decades in some cases—those regulations actually violate broad state constitutional standards guaranteeing the right to vote in "free" and "open" elections. Most of these cases seek to

eliminate regulations designed to deter fraud in absentee and mail-in voting. That some state courts are willing to indulge these radical theories underscores the importance of granting the petition.

Just as in *Moore*, these efforts have been concentrated in swing states.¹⁸ We focus here on cases in Pennsylvania and Wisconsin.

Pennsylvania. Pennsylvania law requires that absentee voters place their ballot in an inner “secrecy” envelope and then place it in an outer envelope “on which is printed the form of declaration of the elector. . . . The elector shall then fill out, date and sign the declaration printed on such envelope.” 25 P.S. § 3146.6(a) (“§ 3146.6(a)”). Pennsylvania law imposes identical requirements for mail-in voters. *Id.* § 3150.16(a) (“§ 3150.16(a)”). A trio of recent cases have challenged the simple requirement that the declaration be dated as a violation of the Pennsylvania Constitution.

- *Black Political Empowerment Project (BPEP) v. Schmidt*. In May 2024, multiple groups filed a petition in

¹⁸ To be sure, opponents of time, place, and manner regulations have not limited their challenges to swing states. *See, e.g., League of Women Voters of Kansas v. Schwab*, 549 P.3d 363 (Kan. 2024) (challenge under Kansas Constitution to signature verification requirement and limit on ballot harvesting); *Vet Voice Foundation v. Hobbs*, Wash. Supreme Ct. No. 102569-6 (challenge to Washington’s statutory signature verification requirement for mail ballots on theory that it violates “free and equal” provision of state constitution).

Pennsylvania’s Commonwealth Court to enjoin Commonwealth and election officials in Philadelphia and Allegheny Counties from enforcing the absentee and mail-in declaration dating requirements. Petition for Review, No. 283 M.D. 2024 (Pa. Commw. Ct. May 28, 2024). Petitioners claimed the law “serves no purpose whatsoever,” *id.*, ¶ 89, and thus violates the Pennsylvania Constitution’s Free and Equal Elections Clause, which provides: “Elections shall be free and equal; 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. The Commonwealth Court applied strict scrutiny, found the dating requirements “serve no compelling government interest,” and enjoined their enforcement. *Black Political Empowerment Project v. Schmidt*, 2024 WL 4002321, *32 (Pa. Cmwlth. Aug. 30, 2024).

Intervenor Republican Party of Pennsylvania appealed this ruling to the Pennsylvania Supreme Court. On September 13, 2024, the Pennsylvania Supreme Court vacated the Commonwealth Court’s order for lack of subject matter jurisdiction in light of petitioners’ failure to name the county boards of election of all 67 Pennsylvania counties. 322 A.3d 221 (Pa. 2024).

- *Baxter v. Philadelphia Board of Elections*. While BPEP’s appeal was pending, two voters sued in the Court of Common Pleas to require Philadelphia to count their undated absentee ballots in a special election. Petition for Review, No. 2024-02481 (Pa. Ct. Common Pleas Sept. 9, 2024). The Philadelphia Board of Elections had rejected plaintiffs’ ballots for failing to comply with Section

3146.6(a)'s date requirement. Just as in *BPEP*, petitioners alleged that this requirement “serves no purpose,” *id.* ¶ 39, and violates Pennsylvania’s Free and Equal Elections Clause, *id.* ¶¶ 55–63. The Court of Common Pleas agreed and granted the petition. Order, *Baxter v. Philadelphia Bd. Of Elections*, No. 2024-02481 (Pa. Ct. Common Pleas Sept. 26, 2024).

The Commonwealth Court, applying strict scrutiny, affirmed on appeal. *Baxter v. Philadelphia Bd. of Elections*, 2024 WL 4614689 (Pa. Commw. Ct. Oct. 30, 2024). It decided that an undated declaration “substantially follows the requirements of the Elections Code,” and that a “meaningless” and “minor irregularity” such as failing to include the statutorily required date should be excused in favor of the Free and Equal Elections Clause. *Id.* at *17–18.

- *New PA Project Education Fund v. Schmidt*. Multiple groups brought an identical challenge directly in the Pennsylvania Supreme Court in late September 2024. No. 112 MM 2024 (Pa. Sept. 24, 2024). Petitioners asked the court to exercise its “King’s Bench” jurisdiction to prevent every Pennsylvania county election official from rejecting absentee and mail-in ballots that violate the date requirements set out in § 3146.6(a) and § 3150.16(a). The Pennsylvania Supreme Court denied the application, stating that “[t]his Court will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election.” *New PA Project Education Fund v. Schmidt*, 2024 WL 4410884, *1 (Pa. Oct. 5, 2024).

In another case soon thereafter, however, the Pennsylvania Supreme Court showed far less concern about the *Purcell* principle that courts should not change rules close to elections. *See Purcell*, 549 U.S. at 4–5 (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”). The court reversed course in a challenge to a different portion of the § 3146.6(a) and § 3150.16(a) absentee and mail-in ballot rules—that voters “shall” mark their ballot and seal it with the inner “secrecy” envelope that is then enclosed in the outer envelope.

In *Genser v. Butler County Board of Elections*, petitioners challenged the rejection of their 2024 primary ballots due to the lack of an inner secrecy envelope. No. 24-20116 (Pa. Ct. Commons Pleas Apr. 29, 2024). They did not dispute that their “naked ballots” violated the statutory requirements. Instead, they argued that the Free and Equal Elections Clause should be interpreted to require the election board to allow them to cast a provisional ballot, despite the fact that the Pennsylvania Election Code states that provisional ballots “shall not be counted if the elector’s [mail] ballot is timely received by a county board of elections.” 25 Pa. Stat. § 3050(a.4)(5)(ii)(F). Less than two weeks before the 2024 general election, the Pennsylvania Supreme Court agreed. Because the naked ballot could not be counted and was “void,” the court reasoned, it was as if “no ballot was received,” so petitioners’ provisional ballots had to be counted. *Genser v. Butler*

Cnty. Bd. of Elections, No. 26 WAP 2024, 2024 WL 4553285, at *18 (Pa. Oct. 23, 2024).¹⁹

It bears emphasizing that these state court cases replicate a strategy to challenge some of the same Pennsylvania absentee voting regulations under the “Materiality Provision” of the Civil Rights Act. 52 U.S.C. § 10101(a)(2)(B).²⁰ The Third circuit, however, rejected a challenge to Pennsylvania’s absentee ballot signature and date requirements. *Pennsylvania State Conference of the NAACP v. Schmidt*, 97 F.4th 120 (3rd Cir. 2024). A separate challenge alleging that date requirement violates federal law is ongoing. *Eakin v. Adams Cnty. Bd. of Elections*, W.D. Pa. No. 1:22-cv-00340.

Wisconsin. The Wisconsin Elections Code states that its absentee ballot regulations were designed to “prevent the potential for fraud or abuse,” “to prevent overzealous solicitation of absent electors,” and “to prevent undue in-

¹⁹ On November 1, 2024, this Court denied an emergency application for a stay of the Pennsylvania Supreme Court’s ruling pending disposition of a petition for a writ of certiorari. No. 24A408.

²⁰ This portion of the Civil Rights Act prohibits “deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B).

fluence on an absent elector.” Wis. Stat. § 6.84(1). Opponents of absentee ballot rules have targeted Wisconsin’s regulations:

- *Priorities USA v. Wisconsin Election Commission*. The lead plaintiff in this case states with unusual candor that it “exist[s] to build progressive power.” Priorities USA, <https://priorities.org>. Plaintiffs alleged that Wisconsin’s practice of banning absentee ballot drop boxes violated the general right to vote in the Wisconsin Constitution, art. III, § 1. Wisconsin law provides that absentee ballots “shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” Wis. Stat. § 6.87(4)(b)1. During Covid, the Wisconsin Elections Commission authorized voters to deliver absentee ballots to drop boxes, but the Wisconsin Supreme Court halted that practice in *Teigen v. Wisconsin Elections Comm’n*, 976 N.W.2d 519 (Wis. 2022). The *Teigen* court ruled that “ballot drop boxes are illegal” because ballots are not “mailed” or “delivered in person, to the municipal clerk,” when they are employed. *Id.* at 526.

Plaintiffs asked the Wisconsin Supreme Court to overrule *Teigen*, and it did. The court decided that delivering an absentee ballot to a drop box constituted “deliver[y] in person, to the municipal clerk” under the statute. *Priorities, USA v. Wisconsin Elections Comm’n*, 8 N.W.3d 429, 435–38 (Wis. 2024). The court reasoned that “[a] drop box is set up, maintained, secured, and emptied by the munic-

ipal clerk. This is the case even if the drop box is in a location other than the municipal clerk’s office.” *Id.* at 436.²¹ This departure was further justified as “consistent with the discretion afforded to municipal clerks in running Wisconsin’s elections at the local level,” *id.*, a curious basis on which to ground a constitutional decision.

- *Rise, Inc. v. Wisconsin Election Commission.* This case involves a challenge to Wisconsin’s statutory requirement that absentee ballot witnesses set out their address on their certification. Wis. Stat. § 6.87(2). The Court of Appeals of Wisconsin decided that a witness need only provide “sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with.” 11 N.W.3d 241, 244 (Wis. Ct. App. 2024).

As in Pennsylvania, the Wisconsin state challenges were paired with an effort by closely aligned plaintiffs to convince a federal court to water down Wisconsin’s absentee ballot regulations. In *Liebert v. Wisconsin Election Comm’n*, 2024 WL 2078216 (W.D. Wis. May 9, 2024), for example, plaintiffs alleged that Wisconsin’s witness requirements for absentee voting violated the Voting Rights Act and the Materiality Provision of the Civil Rights Act.

²¹ Since this decision, the security of remote drop boxes has been called into serious question by events in the Portland, Oregon area, where vandals set fire to two drop boxes. See, e.g., VanderHart, *2 ballot boxes set on fire in Portland and Vancouver*, Oregon Public Broadcasting (Oct. 28, 2024) <https://www.opb.org/article/2024/10/28/ballot-box-burned-portland-vancouver/>.

The district court dismissed these claims, noting that “[i]t may be debatable whether the witness requirement is needed, but it is one reasonable way for the state to try to deter abuses such as fraud and undue influence in a setting where election officials cannot monitor the preparation of a ballot.” *Id.* at *1.

In short, having largely failed to enjoin reasonable time, place, and manner voting regulations under federal law, many so-called voting rights groups are now asking state courts to nullify them. Without this Court’s intervention, these lawsuits will proliferate even further, and state supreme courts will continue usurping legislatures by enjoining traditional election integrity regulations under hopelessly broad state constitutional provisions. The Court should stop this malignant trend by answering the question left open by *Moore*—and thereby restore the balance struck by the Framers’ decision to trust state legislatures to establish election rules.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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