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 a Writ of Certiorari to the Montana Supreme Court

BRIEF IN OPPOSITION OF RESPONDENTS MONTANA YOUTH ACTION, ET AL.

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December 23, 2024

QUESTION PRESENTED

Whether the Montana Supreme Court violated the Elections Clause by applying Montana's well-settled sliding scale scrutiny in analyzing a newly enacted and generalized restriction on voter registration, which only incidentally touches on federal elections.

PARTIES TO THE PROCEEDING

Petitioner is Christi Jacobsen, in her official capacity as Montana Secretary of State.

Respondents are Montana Youth Action, Forward Montana Foundation, Montana Public Interest Research Group ("MontPIRG"), Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe, the Montana Democratic Party, and Mitch Bohn.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Respondents Montana Youth Action, Forward Montana Foundation, and MontPIRG have no parent corporation, and no publicly held company holds 10 percent or more of their stock.

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INTRODUCTION

Just last year, this Court affirmed that the Elections Clause does not insulate state legislatures from the ordinary exercise of state court judicial review. *See Moore v. Harper*, 600 U.S. 1, 22 (2023). The Court rejected the contention "that the Elections Clause vests state legislatures with exclusive and independent authority when setting the rules governing federal elections." *Id.* at 26. And it declined to interfere when state courts engage in "ordinary judicial review" of such rules. *Id.* at 37. Petitioner asks the Court to revisit these questions on a procedural and factual background that offers no new or different opportunity to answer the question presented.

The Elections Clause provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. 1, § 4, cl. 1. *Moore* and its antecedents arose out of Election Clause challenges that involved Congressional redistricting, which by its terms only regulates federal elections. *See Moore*, 600 U.S. at 23–26. In the Congressional apportionment and redistricting context, state legislatures act at the apex of their Election Clause authority. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015). But even there, this Court has held that a state legislature acts "both as a lawmaking body created and bound by its state constitution, and as the entity assigned a particular authority by the Federal

Constitution" and that "[b]oth constitutions restrain the legislature's exercise of power." *Moore*, 600 U.S. at 27. As such, it has declined to exempt even state legislative regulation of Congressional redistricting from ordinary state judicial review. *Id.*

At issue here are general election laws that regulate state, local, and federal elections, not Congressional redistricting plans that apply only to federal elections. Petitioner is neither a member nor a representative of a state legislature seeking to vindicate the legislature's authority to engage in Congressional redistricting pursuant to the Elections Clause. Rather, she is a state election administrator tasked with implementing generally applicable state election laws. Nonetheless, she asks this Court to set aside the Montana Supreme Court's ordinary review of laws regulating state and local elections, based on longstanding and independent state constitutional grounds, merely because those laws also implicate federal elections. The Court should deny the Petition.

First, the Court lacks jurisdiction over the Petition for two reasons. It is untimely, having been filed more than 150 days after the Montana Supreme Court issued its decision. Moreover, Petitioner has failed to establish proper grounds for the Court's jurisdiction under 28 U.S.C. § 1257. She asserts no right or privilege under federal law and did not present the claims she raises here below.

Second, Petitioner does not raise any question warranting this Court's review. Petitioner does not identify any split of authority on the question of what standard applies for federal intervention when state

courts review generally applicable election laws. Moreover, the petition does not present any question of nationwide importance. This Court has emphatically rejected arguments that the Elections Clause insulates state legislatures from judicial review even in the context of Congressional districting, where state legislative authority under the Elections Clause is at its height. Yet Petitioner asks this Court to find that the Montana Supreme Court erred when it reached the same conclusion with respect to its own authority to review state legislative enactments under the Montana Constitution.

Finally, this case is not a good vehicle for resolving the questions presented. It is undisputed—and unremarkable—that the Montana Supreme Court has independent authority to evaluate election laws regulating state and local elections under the Montana Constitution. Its ruling therefore controls and would preclude the challenged laws' application to state and local elections, regardless of any action by this Court. This Court has been reluctant to interfere in state electoral processes under the Elections Clause where doing so would force a state to regulate state and federal elections differently. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 819. The mere fact that general election laws also implicate federal elections, absent more, does not justify federal intrusion into the state judicial process absent some independent federal constitutional infirmity. Indeed, it would be absurd to suggest that the Elections Clause imposes more stringent limits on state court review of generally applicable election laws—which largely govern state and local elections—than it does

over Congressional redistricting, which exclusively governs federal elections.

Additionally, Petitioner has failed to argue, let alone show, that the Montana Supreme Court's decision, which applied ordinary constitutional scrutiny to comprehensive factual findings made during a nine-day trial featuring extensive factual and expert testimony, is wrong. Petitioner does not explain what standard, if not the balancing test she advocated for below, the court should have applied to the challenged laws, nor does she explain how the result would have been different under an alternative—and unidentified—standard. As there is no need for this Court to reach the questions presented by the Petition, it does not constitute a good vehicle for this court's review.

JURISDICTION

This Court lacks jurisdiction over the final judgment of the Montana Supreme Court because it does not involve the validity of a treaty or statute of the United States; nor is the validity of a state statute challenged as repugnant to the Constitution, treaties, or laws of the United States; nor does Petitioner enjoy, set up, or claim any right, privilege, or immunity under federal law. *See* 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The Petition concerns a generally applicable law restricting voter registration, which applies to state, local, and federal elections. Pet.App.2a. House Bill 176 ("HB 176") eliminated election day registration in Montana, which tens of thousands of

Montanans use to exercise their fundamental right of suffrage for all elections under the Montana Constitution. Pet.App.2a, 4a, 39a*; see also* Mont. Const. art. II, § 13.[1]

Respondents Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group ("MontPIRG") challenged HB 176 under the Montana Constitution, together with consolidated Respondents Western Native Voice, et al., and the Montana Democratic Party, et al. Pet.App.3a. Petitioner Christi Jacobsen, the Montana Secretary of State, defended the lawsuit. *Id*. No member of the Montana State Legislature intervened below to assert any rights or privileges afforded state legislatures under the Elections Clause. Petitioner,

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[1] The consolidated cases below involved challenges to four election laws enacted in 2021. The Montana Supreme Court applied varying levels of scrutiny in evaluating each of the four laws based on the degree of infringement upon the challengers' express right of suffrage under the Montana Constitution. Pet.App.33a (applying intermediate scrutiny to law restricting access to absentee ballots to individuals turning 18 before the election); 38a (applying strict scrutiny to restriction on voter registration); 55a (applying strict scrutiny to restriction on absentee ballot collection); 63a–64a (applying intermediate scrutiny to restrictions on acceptable voter ID).

This Petition involves only two of those laws—HB 176, which eliminated election day registration, and House Bill 530 ("HB 530"), which restricted paid absentee ballot collection. Pet.App.2a, 4a. Because Respondents Montana Youth Action, Forward Montana Foundation, and MontPIRG did not challenge HB 530, this response is limited to Petitioner's arguments with respect to HB 176.

who is not a member of the legislature, remains the sole defendant in the case. *Id*.

After a nine-day bench trial, a Montana state district court found that HB 176 violated the Respondents' rights to suffrage and to equal protection under the Montana Constitution. Pet.App.6a. The Montana Supreme Court upheld the lower court with respect to Respondents' suffrage claims. Pet.App.51a. Having found that HB 176 violated the right to suffrage, the court declined to reach and review the equal protection ruling. *Id*.

On appeal, Petitioner asked the Montana Supreme Court to apply its "well-established" balancing test for constitutional challenges to statutes. Pet.App.385a; *see also Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996). Petitioner was concerned the court would apply a rigid rule that would subject all laws implicating the right to vote to strict scrutiny. Pet.App.385a; *see also* Pet.App.377a (cautioning the court against "reflexively applying strict scrutiny to every law that touches the electoral process"). Instead, she urged the court to apply its traditional framework for constitutional challenges to statutes, which first looks to the existence and extent of the burden on a fundamental right and then applies the corresponding level of scrutiny. Pet.App.385a (citing *Wadsworth*, 275 Mont. 287).

As a threshold question, the Montana Supreme Court considered whether the Montana Constitution precluded it from reviewing the legislature's elimination of election day registration. Pet.App.38a–41a. After analyzing the history and text of the

Montana Constitution, the court applied its ordinary tools of constitutional interpretation to find that HB 176 is subject to judicial scrutiny. Pet.App.42a ("HB 176 is subject to constitutional limitations."); *id.* ("This does not mean that election day registration is forevermore baked into our Constitution, but it does dispose of the Secretary's argument that the decision to eliminate it is not subject to judicial scrutiny."); *cf. Moore*, 600 U.S. at 22.

Next, the Montana Supreme Court did precisely as Petitioner asked by applying its "well-established" framework for constitutional review of statutes to HB 176. *See* Pet.App.42a; *see also* 385a (conceding that the Montana Supreme Court's "ordinary judicial review" involves determining whether a constitutional right is interfered with, determining the extent of the interference, and applying the corresponding level of scrutiny).

First, relying on evidence offered and deemed credible at trial, the court determined that HB 176 impermissibly interfered with the Montana Constitution's right of suffrage. Pet.App.42a–44a. The court based its decision on record evidence showing that tens of thousands of Montanans regularly use election day registration. *Id*. The court found the trial record demonstrated that HB 176 had already disenfranchised voters seeking to vote in state and local elections in 2021 and would continue to disenfranchise Montana voters in the future. Pet.App.42a–44a. The court also noted that the trial record demonstrated that HB 176 had a disparate

impact on first-time and Native American voters. Pet.App.44a.

Second, the court found that Petitioner had failed to carry her burden to show that the law was the least onerous path to a compelling government interest. Pet.App.46a. The court found that trial testimony from county election officials contradicted Petitioner's claims that election-day registration increased the burden on election administrators and decreased the integrity and reliability of elections. Pet.App.46a–49a. The court specifically found that any burden on election officials resulting from election-day registration is reduced only to the extent HB 176 results in fewer overall voter registrants—in other words, administrative burdens are only lessened when voters are disenfranchised as a result of the law. Pet.App.48a. Furthermore, the court found no evidence that election-day registration delayed tabulation, or otherwise implicated public confidence in elections. Pet.App.49a–50a.

Despite the Montana Supreme Court's robust analysis, Petitioner now claims that the court exceeded the bounds of ordinary judicial review by applying what Petitioner herself described as a "well-established framework" for constitutional challenges. Pet.App.385a. But Petitioner does not identify what standard the court ought to have used,[2] nor how

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[2] Petitioner references the federal *Anderson-Burdick* framework for evaluating burdens on the right to vote, *see* Pet.Br.6–7, which she described below as "similar" to the Montana Supreme Court's traditional analysis under

application of a different framework or different level of scrutiny would lead to a different result. Nor does she explain how the Montana Supreme Court's use of the test she proposed for evaluating HB 176 exceeds the bounds of ordinary judicial review, much less "impermissibly distorts state law beyond what a fair reading required." Pet.Br.5.

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction over the Petition.

A. The Petition is untimely.

The Petition is untimely and thus the Court lacks jurisdiction to hear this case. The time to file a petition for certiorari is "within ninety days" after entry of judgment, and the time to file may be extended only "for a period not exceeding sixty days." 28 U.S.C. § 2101(c). This limit is jurisdictional. *Bowels v. Russell*, 551 U.S. 205, 212 (2007). Because the

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Wadsworth. MYA App.4a; *id.* at 5a (describing the "close connection between the *Anderson-Burdick* test and this Court's traditional approach to constitutional rights"). But she does not assert here that the court should have used the *Anderson-Burdick* sliding scale analysis rather than its own balancing test under *Wadsworth*. Nor does she offer any suggestion that doing so would have in fact led to a different outcome—which is unsurprising given her repeated emphasis on the similarity of the tests below. *See, e.g.*, MYA App.4a–5 a. Both tests involve first weighing the burden and then applying the corresponding level of scrutiny, and Petitioner merely argued that HB 176 would survive scrutiny under either test. MYA App.1a–2a. As such, she can show no error in the court's analysis, much less error necessitating this Court's review.

Secretary filed her Petition more than 150 days after the Montana Supreme Court entered its judgment, it is untimely and thus should be denied. *See id.*; *see also* Br. of Respondents Western Native Voice, et al.

B. The Court lacks jurisdiction over the Petition under 28 U.S.C. § 1257.

This Court has limited jurisdiction to review judgments rendered by the highest court of a state. 28 U.S.C. § 1257. This case does not arise out of any of the statutory categories governing this Court's appellate jurisdiction over decisions by a state's highest court. *See id*. The judgment below does not implicate the validity of a federal law or treaty, nor does it present a question of whether HB 176 comports with federal law. *See* 28 U.S.C. § 1257(a). Nor did Petitioner "specially set up or claim" any federal right, privilege, or immunity. *Id*. Instead, she simply rehashes the same arguments for precluding state courts from engaging in judicial review that this Court rejected in *Moore*.

1. The Elections Clause does not confer any right, privilege, or immunity upon Petitioner.

Petitioner does not identify what federal right, privilege, or immunity she claims here. The Elections Clause confers no right, privilege, or immunity on any state actor, let alone Petitioner. Rather, the Elections Clause imposes a "duty" on state legislatures to provide for federal election regulation to ensure that such elections are held, and reserves for Congress the right to alter or amend regulations concerning federal elections. *See Moore*, 600 U.S. at 10; *see also Arizona*

v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 8 (2013). To the extent the Elections Clause confers any other right or privilege, it is on state legislatures, subject to the constraints of Congress, the U.S. Constitution, and the relevant state constitution. *See id.*; *see also Moore*, 600 U.S. at 27. Petitioner—the Montana Secretary of State—does not and cannot claim to represent the Montana Legislature and can assert no independent right under the Elections Clause. *See, e.g.*, *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) ("Ordinarily of course a litigant must assert his own legal rights and interests and cannot rest his claim on the rights or interests of a third party."); *Singleton v. Wulff*, 428 U.S. 106, 113 (1976) ("Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.").

2. Petitioner failed to specially set up or preserve any claim under the Elections Clause.

Petitioner also failed to specially set up her purported claims under the Elections Clause. She initially asserted in her opening brief before the court below that the Elections Clause reserves solely to state legislatures the power to regulate federal elections. Pet.App.377a. After this Court rejected exactly that argument in *Moore*, Petitioner abandoned the claim, arguing instead that the Montana Supreme Court had a "well-established" framework for judicial review of constitutional challenges to statutes, which requires it to determine the extent to which a

constitutional right is interfered with and apply the corresponding level of scrutiny. Pet.App.385a. Petitioner specifically urged the court to apply this framework, and not to simply apply strict scrutiny to "any election regulation implicating the right to vote in any way." *Id*.

The Montana Supreme Court did precisely as Petitioner asked. In analyzing all four challenged provisions below, the Court first determined whether and to what extent each law infringed on the right to vote and then applied a mix of middle-tier and strict scrutiny. Pet.App.33a, 38a, 55a, 63a–64a.

Dissatisfied with the results of the "well-established" test she argued for, Petitioner now claims that the court's application of this test "transgressed" the ordinary bounds of judicial review. Pet.Br.20. First, she makes the nonsensical argument that application of the test she requested violates the Elections Clause because the Montana Constitution, as well as the federal constitution, obligates the legislature to enact laws related to election administration. *Id.* Next, she contends that the right of suffrage under the Montana Constitution is too "vague" to support the court's innocuous conclusion that, even where state legislatures have authority to enact general election laws, those laws are still subject to constitutional scrutiny under the Montana Constitution. *See id*. at 21; *cf. Moore*, 600 U.S. at 27 (holding that legislative election regulations are subject to constitutional scrutiny).

Neither of these arguments were presented to the Montana Supreme Court. Instead, Petitioner

conceded that the court had a well-established framework for evaluating constitutional claims and invited it to apply that framework to Respondents' right of suffrage claims. *Compare* Pet.App.385a *with* Pet.App.42a. She never suggested that the right of suffrage is insufficiently specific to justify "overriding" particular election regulations. *See* Pet.App.377a, 385a; *cf.* Mont. Const. art. II, § 13 (stating not only that "all elections shall be free and open" but also that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage"). As a result, the court had no occasion to consider whether applying its traditional balancing test to right of suffrage claims would "transgress" ordinary bounds of judicial review.

"With very rare exceptions," this Court "has adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Petitioner has not shown that her invitation to apply the Montana Supreme Court's well-established framework to the claims below required the court below to determine whether doing so would "transgress" the bounds of ordinary judicial review. She therefore failed to specially set up or claim any federal right, privilege, or immunity sufficient to justify this Court's review. *See* 28 U.S.C. § 1257.

II. The Petition raises no question warranting this Court's review.

A. The Petition does not identify any split of authority.

There is no split of authority on the standard for evaluating state court judicial review under the Elections Clause. Petitioner does not identify a single case where state courts have struggled to identify or apply traditional tools of constitutional analysis in the context of state legislative enactments touching on federal elections. Nor has she identified a single case where this Court has determined that a state exceeded the ordinary bounds of judicial review.

Petitioner identifies several state courts that have interpreted their own constitutions differently than the court below. But none of those cases involved this Court's review of those laws' application to federal elections under the Elections Clause. *See* Pet.Br.16, n.4. That state courts are likely to interpret their individual constitutional provisions differently from other states is an unremarkable proposition. Moreover, it goes to show that applying the "ordinary bounds" test, as Petitioner frames it, will require this Court to first identify the ordinary bounds of judicial review in each state before determining whether those bounds have been transgressed.

The lack of any split over how the Court should exercise appellate review over state court decisions related to generally applicable election laws that touch on federal elections indicates that there is little need for this Court to exercise its supervisory authority at this time.

B. The Petition does not raise an issue of nationwide significance.

The questions raised by the Petition do not have national significance because they have already been resolved by *Moore*.

The bulk of the Petition takes issue with the means by which the Montana Supreme Court reached its determination that HB 176 was subject to constitutional scrutiny, rather than its application of that scrutiny to HB 176. *See* Pet.Br.20–22. But this Court has already held that the Elections Clause does not preclude state courts from ensuring election laws are consistent with state constitutions. *Moore*, 600 U.S. 27. That is all that the court did below. And nothing in *Moore* suggests that the Elections Clause invites this Court to intrude on state courts' determinations of their own authority pursuant to their state constitution. *See id*. at 34 ("State courts are the appropriate tribunals . . . for the decision of questions arising under their local law, statutory or otherwise.") (quoting *Murdock v. Memphis*, 20 Wall. 590 (1875)). Rather, *Moore* simply held that when a state court is constitutionally authorized to review election laws, it must do so within the ordinary bounds of judicial review. *Id*. at 36.

Petitioner's brief nonetheless characterizes the Montana Supreme Court's ruling below as having "transgressed" ordinary bounds by reaching the unexceptional conclusion that, regardless of the legislature's obligation to enact general rules governing the administration of elections, those laws are nonetheless subject to constitutional scrutiny.

Pet.Br.20. But this anodyne judgment is precisely the same one this Court reached in *Moore*. *Compare* Pet.App.17a (holding that "the responsibility imposed on the Legislature to provide by law for [the] administration of elections" does not "allow the Legislature to enact laws contravening" other constitutional rights); Pet.App.42a ("HB 176 is subject to constitutional limitations."); *id.* ("This does not mean that election day registration is forevermore baked into our Constitution, but it does dispose of the Secretary's argument that the decision to eliminate it is not subject to judicial scrutiny."); *with Moore*, 600 U.S. at 27 (holding that "[b]oth [state and federal] constitutions restrain the legislature's exercise of power" over elections); *id*. at 30 (holding that the legislature's "exercise of such authority in the context of the Elections Clause is subject to the ordinary constraints on lawmaking in the state constitution"). Indeed, like this Court, the Montana Supreme Court reached its conclusion by first examining the history of the constitutional provision at issue, *see* Pet.App.11a–20a; *Moore*, 600 U.S. at 19–22, and then reviewing its past precedent applying the same, *see* Pet.App.20a–32a; *Moore*, 600 U.S. at 22–30. And like this Court, the Montana Supreme Court found that the Montana Constitution's grant of authority to the state legislature to regulate elections does not preclude state court review of election laws. Pet.App.17a; *Moore,* 600 U.S. at 27. The court's exercise of judicial review is therefore entirely ordinary. Because it is also wholly consistent with *Moore*, it does not give rise to any questions of national significance.

III. This case is not a good vehicle for resolving the questions posed by Petitioner.

The case is not a good vehicle for two reasons. First, it involves generally applicable election laws that primarily govern state and local elections. As such, even if this Court were to override the Montana Supreme Court's evaluation of HB 176 with respect to federal elections, Petitioner does not claim—nor could she—that this Court has jurisdiction to override the ruling as it applies to state and local elections. *See Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 819; *see also Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (noting that state legislature's power over federal elections under the Elections Clause "is matched by state control over the election process for state offices"). For good reason, this Court has been reluctant to intrude on state court decision-making where doing so risks depriving states of the convenience of establishing uniform regulations for all elections in the state. *See id.*; *see also* Mont. Code Ann. § 13-1-201, (requiring the Secretary of State to obtain and maintain uniformity in the application, operation, and interpretation of election laws).

In *Ariz. Indep. Redistricting Comm'n*, the Court considered whether using the initiative process to transfer redistricting authority over congressional elections from the legislature to an independent commission violated the Elections Clause. 576 U.S. at 804. Finding that it did not, the Court noted that "the Arizona Legislature does not question, nor could it, employment of the initiative to control state and local elections." *Id.* at 819. It rejected the idea that the

Elections Clause requires states to regulate state and federal elections differently:

> In considering whether Article I, § 4, really says "No" to similar control over federal elections, we have looked to, and borrow from, Alexander Hamilton's counsel: "[I]t would have been hardly advisable . . . to establish, as a fundamental point, what would deprive several States of the convenience of having the elections for their own government and for the national government" held at the same times and places, in the same manner.

Id. (alterations in original) (quoting The Federalist No. 61, at 374).[3]

In light of these considerations, this case presents a poor vehicle for resolving the questions posed by Petitioner, because it does not solely involve state court authority over federal elections, as is the case with Congressional districting, but rather involves generally applicable election laws that primarily govern state and local elections.

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[3] While *Ariz. Indep. Redistricting Comm'n* indicates that courts are reluctant even to force states into different regimes for drawing Congressional versus state legislative maps, 576 U.S. at 804, the impact of doing so is substantially less than requiring states to administer concurrent state, local, and federal elections under different rules. Thus, it is unsurprising that this Court's review of state court decisions under the Elections Clause has largely focused on challenges to Congressional redistricting plans, *see, e.g.*, *Moore*, 600 U.S. 1, rather than generally applicable election laws.

Second, this case presents a poor vehicle because it does not actually present the questions Petitioner poses. It is undisputed that the laws at issue here are subject to ordinary state judicial review. *See Moore*, 600 U.S. at 22. But even assuming *arguendo* that the court below exceeded its bounds, Petitioner has failed to make any showing that the law would survive any alternative test. Because Petitioner offers no alternative test or outcome, it is unnecessary and inadvisable to reach the question of whether the balancing test applied by the court below constitutes ordinary judicial review. Nor is it necessary to determine what standard this Court should apply when deciding whether a state court exceeded ordinary bounds.

Indeed, Petitioner does not identify what test she believes the Montana Supreme Court ought to have applied in evaluating HB 176, if not the balancing test she suggested below—which she described as "well-established" and "similar" to the *Anderson-Burdick* test referenced in her brief. Pet.App.385a; App. to Montana Youth Action Respondents' Brief in Opposition ("MYA App.") 5a. Nor does she argue that, had a different test been applied, HB 176 would have been upheld. She does not identify what constitutes the "ordinary bounds of judicial review" under Montana law, nor does she appear to ever actually contest the judgment below—just the means by which it was reached.

Stripped of its rhetoric, the Petition does not present a question about what standard this Court should apply in determining whether a state court

exceeds the bounds of ordinary review. Instead, it presents nothing more and nothing less than the same question this Court resolved last year: whether the Elections Clause carves out an exception to state judicial review of state legislative enactments merely because they touch on federal elections. As this Court said: "We hold that it does not." *Moore*, 600 U.S. at 22.

The court below applied the same tools of judicial review as this Court did in *Moore*, and reached the same conclusion regarding its own power to review state laws regulating elections. *See* Pet.App.11a–32a; *Moore*, 600 U.S. at 19–30. It applied what Petitioner described as its "well-established" balancing test for constitutional scrutiny to a factual record developed over a nine-day trial, taking into consideration the testimony of both fact and expert witnesses, including election officials. Pet.App.41a, 385a. Ultimately, it concluded that HB 176 impermissibly interfered with the Montana Constitution's robust right of suffrage, and that the Petitioner failed to carry her burden to show that it was justified. Pet.App.51a. Under the ordinary presumption that HB 176 is subject to judicial review in state court, *see Moore*, 600 U.S. at 22, Petitioner cannot show that the court erred in its analysis of either the law or the facts—and she offers this Court no avenue for doing so either. As a result, this case presents a poor vehicle for resolving the question of when judicial review by a state court would exceed ordinary bounds, and what standard this Court might apply in reviewing that question.

CONCLUSION

For the foregoing reasons, the Court should deny review.

December 23, 2024

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — EXCERPTS FROM APPELLANT'S OPENING BRIEF, NO. DA 22-0667, SUPREME COURT OF THE STATE OF MONTANA, FILED MAY 1, 2023

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. DA 22-0667

MONTANA DEMOCRATIC PARTY AND
MITCH BOHN, WESTERN NATIVE VOICE, *et al.*,
MONTANA YOUTH ACTION, *et al.*,

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, IN HER OFFICIAL
CAPACITY AS MONTANA SECRETARY OF STATE,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

* * *

[13]Argument

I. HB 176 is constitutional.

[21]**B. HB 176 is narrowly tailored to advance compelling state interests.**

Even if strict scrutiny applies, or HB 176 severely burdened the right to vote, HB 176 survives either

Anderson-Burdick or the *Wadsworth* test. First, the District Court did not acknowledge the State's compelling interests. *See* FOFCOL, ¶¶ 570–[22]573. Second, the District Court wrongly concluded that HB 176 was not narrowly tailored to those interests.

* * *

APPENDIX B — EXCERPTS FROM APPELLANT'S REPLY BRIEF, NO. DA 22-0667, SUPREME COURT OF THE STATE OF MONTANA, FILED AUGUST 14, 2023

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. DA 22-0667

MONTANA DEMOCRATIC PARTY AND MITCH BOHN, WESTERN NATIVE VOICE, *et al.*, MONTANA YOUTH ACTION, *et al.*,

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, IN HER OFFICIAL CAPACITY AS MONTANA SECRETARY OF STATE,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

* * *

[1]**INTRODUCTION**

* * *

Appendix B

[4]**I. Appellees are wrong on the standards governing this case; this Court reviews decisions on the constitutionality of statutes de novo and applies deferential scrutiny to election laws like these that do not impose a substantial burden.**

* * *

[7]**B. Heightened scrutiny of time, place, and manner regulations that do not impose a severe burden is inappropriate.**

* * *

[10]Trying to counter the close connection between the *Anderson-Burdick* test and this Court's traditional approach to constitutional questions involving [11] fundamental rights, Appellees point to a series of state supreme court cases. Appellees contend the supreme courts of Idaho, Illinois, North Carolina, Washington, and Kansas have all approved applying strict scrutiny to any election regulation. None of these cases stand for that principle because each involved direct restrictions on the right to vote. Instead, these decisions show why the regulations here, targeted towards the delivery of absentee ballots, the close of voter registration, and the use of voter identification, are time, place, and manner regulations that should not be subject to strict scrutiny.

* * *

Appendix B

[12]While this Court has not had occasion to explicitly adopt the *Anderson-Burdick* test for challenges to neutral, evenly applied election regulations, its precedent dictates a similar framework. *Wadsworth*, 275 Mont. at 302, 911 P.2d [13]1173–1174; Sec. Op. Br., 20; RITE Amicus Br., 5–8, 12–13. If the Constitution is to be read as a consistent whole, Appellees' claim to strict scrutiny must fail.

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