No. 24-220

In the Supreme Court of the United States

CHRISTI JACOBSEN, 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 BY THE MONTANA DEMOCRATIC PARTY AND MITCH BOHN

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QUESTION PRESENTED

Whether the Montana Supreme Court violated the Elections Clause by holding as a matter of Montana law, based on the evidence offered at trial, that two Montana statutes restricting voter registration and absentee-ballot return were subject to and did not survive strict scrutiny under the Montana Constitution?

PARTIES TO THE PROCEEDING

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

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

This Brief in Opposition is filed on behalf of the Montana Democratic Party and Mitch Bohn.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Respondent Montana Democratic Party has no parent corporation, and no publicly held company holds 10 percent or more of its stock.

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BRIEF IN OPPOSITION

Just two years ago in *Moore v. Harper*, the Court held that state laws regulating election procedures are subject to "ordinary judicial review" by state courts for compliance with state constitutional requirements. 600 U.S. 1, 37 (2023). This case involves just that: the Montana Supreme Court's utterly ordinary ruling that two Montana statutes run afoul of the Montana Constitution because they impermissibly interfere with fundamental rights and do not survive strict scrutiny. Petitioner may disagree with the Montana Supreme Court's ruling as a matter of Montana law, but the Petition presents no question of federal law that warrants this Court's review. For three reasons, the Court should deny the Petition.

I. First, the Petition raises no question warranting the Court's review.

A. There is no split of authority on the Elections Clause standard—the sole federal issue identified in the Petition—and the issue is entirely undeveloped in the state and lower federal courts. Petitioner does not cite any post-*Moore* decision from any other state or circuit court anywhere in the country, much less any decision applying a different Elections Clause standard or reaching an irreconcilable result on the Elections Clause issue. Even in this case, the Elections Clause was the subject of just a single page of Petitioner's opening brief and a single footnote of the Montana Supreme Court's decision.

B. The Petition also raises no issue of nationwide significance. Petitioner advances two Elections

Clause arguments. Petitioner's first argument turns entirely on the text and history of a constitutional provision unique to Montana, providing that the legislature "may provide for a system of" election day registration, Mont. Const. art. IV, § 3. Petitioner argues that the text and history of this provision gives the legislature unreviewable discretion to eliminate election day registration, and that the Montana Supreme Court violated the Elections Clause in ruling otherwise. Whether the Court agrees or not, that argument will affect only Montana, as only Montana has such a provision.

Petitioner's second argument—that state courts may not invalidate specific election statutes based on more general constitutional provisions—is irreconcilable with *Moore* itself, which upheld "ordinary judicial review" of state election laws under state constitutions. 600 U.S. at 37. Reviewing specific statutes for compliance with general constitutional provisions is the very essence of judicial review. Petitioner proffers no standard that would distinguish the Montana Supreme Court's decision in this case from the ordinary work that courts across the country undertake every day.

C. Petitioner focuses on these two undeserving arguments because she has waived any challenge to the substantive legal standard applied by the Montana Supreme Court. Like the *Moore* appellants, Petitioner does not dispute the legal standard applied by the state court as a matter of state law. Indeed, the Montana Supreme Court applied exactly the legal standard that Petitioner urged—a well-established, two-stage inquiry that first assesses the impact of the law

on fundamental rights and then applies strict scrutiny only if an impermissible interference is found. *See* Pet. App. 23a–24a ("App.") (citing *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173 (1996)). Petitioner may disagree with the court's *application* of that standard, but even she does not seek review of that fact-bound, state-law issue.

D. The issues Petitioner raises are also not outcome determinative. The Petition focuses exclusively on the holding that the challenged statutes violate the free and open elections clause, but the trial court also held that the challenged statutes violate rights to equal protection and free expression.

II. Second, the Court lacks jurisdiction under 28 U.S.C. § 1257(a). This case involves neither "the validity of a treaty or statute of the United States" nor an argument that a state statute is repugnant to federal law. *Id.* The Court therefore has jurisdiction only if a "title, right, privilege or immunity is specially set up or claimed under the [U.S.] Constitution" or federal law. *Id.* Petitioner's claim fails this test.

A. For the "right, title, privilege or immunity" language to apply, the party seeking review "must claim the right *for himself*, and not for a third person in whose title he has no interest." *Henderson v. Tennessee*, 51 U.S. 311, 324 (1850) (emphasis added). Yet Petitioner—the Montana Secretary of State—claims no federal right for herself. The Elections Clause confers a right only on the legislature, which is not a party to the case.

B. In any event, Petitioner did not "specially set up or claim" the Elections Clause arguments she raises in the Petition when she was before the Montana Supreme Court. The only Elections Clause argument Petitioner made in the Montana Supreme Court—in a single page of a nearly 90-page brief—was that federal law precluded the Montana Supreme Court from "reflexively applying strict scrutiny to *every* law that touches the election process." App. 377a; App. 385a–386a. But the Montana Supreme Court did no such thing. The appeal below involved four elections statutes, and the Montana Supreme Court, upon evaluating the severity of the burden imposed by each, applied strict scrutiny to just two of them. App. 33a–70a. Nowhere below did Petitioner suggest that the arguments she makes in this Court—about the Montana Constitution's "may provide for" language and invalidation of a specific statute based on less specific constitutional language—were relevant to the Elections Clause analysis.

III. Finally, on the merits, the Montana Supreme Court's decision did not violate the Elections Clause. The Montana Supreme Court did exactly what *Moore* allows—it engaged in "ordinary judicial review." 600 U.S. at 37. It applied a straightforward constitutional analysis that first considered the impact of the challenged statutes on the right to vote, and then weighed that impact against the state's interest in enforcement under the well-established strict scrutiny standard. The court's analysis was based on the ample trial record in this case and firmly grounded in existing Montana law. There was nothing extraordinary or inappropriate about it.

The Court should deny the Petition.

STATEMENT

The consolidated cases below challenged four election law statutes that the Montana Legislature enacted in 2021, arguing that each was unconstitutional under the Montana Constitution:

- HB 506, which prohibited the issuance of absentee ballots to 17-year-olds who would turn 18 on or before election day;
- HB 176, which eliminated election day registration;
- HB 530, which prohibited the acceptance of a "pecuniary benefit" for returning voters' absentee ballots; and
- SB 169, which prohibited the use of student IDs as voter identification on election day.

App. 4a–6a.

The Thirteenth Judicial District Court entered partial summary judgment holding that HB 506 unconstitutionally interfered with the right to vote under the Montana Constitution. App. 6a. The remaining claims proceeded to a nine-day bench trial, at which the district court heard extensive fact and expert witness testimony. After trial, the district court held HB 176, HB 530, and SB 169 unconstitutional under the Montana Constitution as well.

Petitioner appealed to the Montana Supreme Court, which affirmed. App. 2a.

The Montana Supreme Court first addressed the legal standard governing right-to-vote claims under the Montana Constitution. App. 8a–32a. The court held as a matter of Montana law that such claims are not governed by the federal *Anderson-Burdick* standard. App. 23a–27a.[1] The court emphasized the Montana Constitution's "clear, explicit, unequivocal, and strong protection of the right to vote," and it held that the Montana Constitution provides greater protection for voting rights than the U.S. Constitution provides. App. 23a. The court also recognized, however, 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 process." App. 23a (quoting *Burdick*, 504 U.S. at 433). The court concluded that "retaining [its] state-constitution-driven analytical framework for evaluating challenges to voting regulations" best serves these competing interests. App. 23a.

The Montana Supreme Court therefore applied Montana's well-established, two-stage legal standard for addressing claims that laws violate fundamental rights under the Montana Constitution, grounding its analysis in case law dating back nearly thirty years. *See* App. 23a–24a (citing *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1173). At the first stage, the court "examine[s] the degree to which the law infringes upon" the right to vote. App. 24a. If the law "impermissibly interferes with the right to vote," then it is subject to strict scrutiny. App. 24a. If, however, the

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[1] *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

law "only minimally burden[s]" the right to vote, then it is subject to "middle-tier analysis," which "balance[s] the rights infringed and the governmental interest to be served." App. 24a–27a.

The adoption of this legal standard was largely undisputed. Petitioner herself endorsed the *Wadsworth* standard as "well established" under Montana law, App. to Br. in Opp. 4a ("BIO App."), noted it provides a "similar framework" to the federal *Anderson-Burdick* test, BIO App. 13a, and asked "only that th[e Montana Supreme Court] apply its well-established method for evaluating constitutional challenges," App. 386a. Petitioner's arguments then focused on the application of the *Wadsworth* standard, asserting that the challenged laws should be upheld under that standard. *See* BIO App. 2a–6a.

Applying that two-stage standard to the four challenged laws, the Montana Supreme Court held that two of the challenged laws—HB 506 and SB 169—only minimally burdened the right to vote. App. 34a, 63a–64a. The court therefore subjected those laws to middle-tier analysis, not strict scrutiny. *Id.* Petitioner does not seek review of that portion of the Montana Supreme Court's decision. Pet. 5.

The Montana Supreme Court held that the other two challenged laws, HB 176 and HB 530, impermissibly interfere with the right to vote and therefore trigger strict scrutiny. App. 38a, 55a.

With respect to HB 176, the Montana Supreme Court first rejected Petitioner's argument that the Montana Constitution gives the legislature

unreviewable discretion to eliminate election day registration because it provides that the legislature "may provide for" election day registration. App. 40a (quoting Mont. Const. Art. IV, § 3). The court explained that the enactment history of that provision showed the intent that "election day registration should be available as long as it was workable," rather than any intent to insulate the decision to eliminate such registration from ordinary judicial scrutiny under other constitutional provisions. App. 41a–42a.

The Montana Supreme Court then held that HB 176's elimination of election day registration impermissibly interfered with the right to vote. App. 42a–45a. The court pointed to record evidence showing that 70,000 Montanans had used election day registration to register, that election day registration increases turnout by 2 to 7 percent, and that specific witnesses had testified that they were unable to vote in 2021 because of the elimination of election day registration. App. 43a–44a. The court also relied on evidence of a disparate impact on Native Americans and first-time voters. App. 44a.

Applying its own precedent, the Montana Supreme Court accordingly concluded that HB 176 was subject to strict scrutiny and further held that Petitioner failed to show it was necessary to serve a compelling state interest. App. 45a–51a. The court explained that the record did not support Petitioner's argument that election day registration created extra work for election workers, but instead showed that it merely shifted some work from one busy time to another. App. 46a. The court also found no record support for Petitioner's argument that election day registration

delayed the tabulation of votes. App. 50a. The court therefore affirmed the trial court's injunction against enforcement of HB 176.

As for SB 530's prohibition on payments for absentee ballot collection, the Montana Supreme Court held that it impermissibly interfered with the right to vote based primarily on its disproportionate impact on Native Americans. App. 55a–57a. The court explained that the "extensive record" showed that many Native American voters live far from polling places and post offices and do not have mail service to their homes. App. 55a. The record showed that for this reason, Native American voters disproportionately rely on paid ballot collection services. App. 56a. And the record showed that in 2020, when such services were limited because SB 530's prohibition was not enjoined until just days before election day, turnout by on-reservation voters declined by 3.5%, far more than for other voters. App. 56a.

The court therefore applied strict scrutiny to SB 530. App. 58a. The court acknowledged a compelling state interest in preserving election integrity. App. 58a. But the court held that SB 530 was not narrowly tailored to serve that interest because a narrower prohibition on payments per ballot collected, along with existing prohibitions on undue influence, would equally serve that interest. App. 58a–59a. The court also emphasized the lack of record evidence of ballot-collection–related voter fraud in Montana. App. 59a–60a. For those reasons, the court held that SB 530 failed strict scrutiny. App. 60a.

All of the parties' arguments and the Montana Supreme Court's analysis focused on Montana law. Petitioner devoted just one page of her nearly 90-page opening brief, and two pages of her reply brief, to the federal Elections Clause. In her opening brief, she argued only that "[d]epriving the Legislature of the ability to regulate elections wholesale—by reflexively applying strict scrutiny to every law th[at] touches the electoral process, for example—would" violate the Elections Clause. App. 377a. In her reply, she similarly argued that applying strict scrutiny indiscriminately to "*all* election laws, regardless of the burdens such laws impose" would violate the U.S. Constitution. App. 385a. The Montana Supreme Court rejected her Elections Clause argument in a footnote, quoting this Court's holding in *Moore* that the "Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review." App. 25a–26a n.7.

REASONS FOR DENYING THE PETITION

I. The Petition raises no question warranting the Court's review.

A. There is no split of authority on the Elections Clause standard.

The Petition identifies no split of authority over the sole federal question it raises: the standard governing whether state courts' judicial review of state election laws so "transgress[es] the ordinary bounds of judicial review" as to violate the Elections Clause. *Moore*, 600 U.S. at 36. There is no such split.

The Court adopted the "ordinary bounds of judicial review" standard less than two years ago in *Moore*. The issue has barely come up since. The Petition does not cite a single other case that was decided after *Moore* and applied the *Moore* standard. With just one case on the subject—the decision of the Montana Supreme Court—there cannot possibly be a split of authority that requires this Court's intervention. And to the extent other courts have implicitly addressed the issue, they have found no violation of the Elections Clause, just as the Montana Supreme Court found here. *See, e.g.*, *Genser v. Butler Cnty. Bd. of Elections*, Nos. 26 WAP 2024, 27 WAP 2024, 2024 WL 4553285, at *22 (Pa. Oct. 23, 2024) (Dougherty, J., concurring) (rejecting the dissent's argument that the majority's statutory construction holding violated the Elections Clause under *Moore*).

Lacking a federal-law split, Petitioner points instead to disagreements between state supreme courts over questions of *state* law. Petitioner argues that other state supreme courts have interpreted their state constitutional protections for voting more narrowly than the Montana Supreme Court did here. Pet. 16 n.4 (citing *Thurston v. League of Women Voters of Ark.*, 687 S.W.3d 805, 814 (Ark. 2024), *Crum v. Duran*, 390 P.3d 971, 972, 973–77 (N.M. 2017), and *League of Women Voters of Del., Inc. v. State Dep't of Elections*, 250 A.3d 922, 925, 935–38 (Del. Ch. 2020)).

This, however, is a mere state-law disagreement. None of the three decisions Petitioner cites said a word about the federal Elections Clause—they addressed only their own state constitutional protections for voting. And contrary to Petitioner's

characterization, none of these cases "decline[d] to apply" or "refus[ed] to apply" state constitutional protections of voting to state elections laws, either. Pet. 16 n.4. Each simply held on the merits that the challenged law did not violate the state constitution. *See Thurston*, 687 S.W.3d at 814 (upholding challenged election law after construing the Arkansas free and equal election clause "narrowly" as protecting only "the right to vote free from outside influence" and to an "outcome [that] reflects the will of the voting majority"); *Crum*, 390 P.3d at 973–77 (upholding challenged election law after holding that challenges under the New Mexico free and equal election clause are governed by the federal *Anderson-Burdick* standard); *League of Women Voters of Del.*, 250 A.3d at 935 (similar). State courts "are the final judicial authority upon the meaning of their state law," so the different answers reached by these state courts and the Montana Supreme Court to questions about their respective states' laws raise no federal issue that could justify this Court's review. *See Greenough v. Tax Assessors of City of Newport*, 331 U.S. 486, 497 (1947).

The same is true of Petitioner's argument that other states impose pre-election day registration deadlines or limit who may return absentee ballots. Pet. 24. The Elections Clause expressly authorizes the enforcement of different laws governing "[t]he Times, Places and Manner of holding Elections" for Congress in different states. U.S. Const. art. I, § 4, cl. 1. Nothing about the existence of different procedures in different states suggests an Elections Clause violation or the need for the Court's review in this or any other case.

B. The Petition raises no issue of nationwide significance.

The issues the Petition raises also lack nationwide significance. As the Court explained in *Moore*, the "questions presented" by the Elections Clause "are complex and context specific." 600 U.S. at 36. Resolution by this Court of the two Elections Clause arguments Petitioner makes here would do little to provide guidance on *Moore*'s application in other cases involving other laws in other states, because the first argument is unique to the Montana Constitution, and the Court already rejected the second in *Moore*.

Petitioner's first argument turns entirely on the text and history of a provision unique to the Montana Constitution, stating that the legislature "may provide for a system of poll booth registration." Pet. 8 (quoting Mont. Const. art. IV, § 3). Petitioner delves into a protracted analysis of the history and intent behind this specific provision of the Montana Constitution to argue that the Montana Supreme Court's holding with respect to the elimination of election day registration amounts to a "faulty constitutional analysis." Pet. 20–21. Whatever the Court thinks of that argument on the merits, it is of no significance outside the state of Montana, because no other state has a similar constitutional provision, much less one adopted under similar circumstances. The question therefore lacks any nationwide significance that could justify the Court's review—it seeks state-specific error correction at best.

Petitioner's second argument for an Elections Clause violation, far from raising an "important

question of federal law that has not been" settled by this Court, Sup. Ct. Rule 10(c)—has already been addressed and rejected in *Moore*. Petitioner argues that the Elections Clause prevents a state court from holding a specific statute unconstitutional based on a "vague" constitutional restriction. Pet. 21; *compare* Pet. for Writ of Certiorari at i, *Moore v. Harper*, No. 21-1271 (Mar. 17, 2022) (describing question presented as whether a state's judiciary "may nullify" election laws "based on vague state constitutional provisions" regarding "fair" or "free" elections). But the Court's acceptance in *Moore* of "ordinary judicial review" of state elections laws for state constitutionality forecloses that line of argument.

Constitutional provisions are almost always vaguer than statutes; this Court recognized more than two hundred years ago that constitutions never have "the prolixity of a legal code." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). Yet holding statutes unconstitutional under such provisions is the literal definition of "judicial review." *Judicial Review*, *Black's Law Dictionary* (12th ed. 2024) ("A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional."). When *Moore* authorized "ordinary judicial review," it therefore necessarily authorized state courts to apply general state constitutional provisions to specific state statutes governing elections. Justice Thomas's dissent in *Moore* recognized as much. 600 U.S. at 63–64. Petitioner's contrary argument relies entirely on a dissent in a separate case from Justices Alito and Gorsuch, who did not join the Court's opinion in *Moore*. Pet. 21 (citing *Republican Party of Pa. v.*

Degraffenreid, 141 S. Ct. 732 (2021) (Alito, J. joined by Gorsuch, J., dissenting from denial of certiorari)).

C. Petitioner waived any challenge to the Montana legal standard applied below.

Petitioner's exclusive focus on these two arguments—the first entirely Montana-focused, the second so broad that it is inconsistent with *Moore* itself—would severely limit this Court's ability to meaningfully answer any questions left open in *Moore* in this case. And Petitioner will have no choice but to continue to focus on those arguments, because—much like the *Moore* appellants—she waived any argument that the legal standard applied by the state court was contrary to state law.

The problem for Petitioner is that the Montana Supreme Court applied exactly the legal standard Petitioner herself urged it to apply. Petitioner insisted below that the "test for determining which level of scrutiny is well-established. If a law impermissibly interferes with a fundamental right, strict scrutiny is warranted." BIO App. 4a (citing *Driscoll v. Stapleton*, 2020 MT 247 ¶ 18). And she urged that "the reviewing court must first determine whether the law 'impermissibly interferes' with the exercise of" a fundamental right. *Id.* (quoting *Wadsworth*, 275 Mont. at 302).

The Montana Supreme Court agreed. It explained that "Montana caselaw holds that when a law impermissibly interferes with a fundamental right, we apply a strict scrutiny analysis." App. 23a–24a (citing *Wadsworth*, 275 Mont. at 302). It then held that the

right to vote is "fundamental" under Montana law, App. 24a, so it went on to "examin[e] the degree to which" each challenged law infringes upon that right, App. 24a, 42a–45a, 55a–58a.[2]

Accordingly, if the Court grants the Petition, the substantive legal standard adopted and applied by the Montana Supreme Court will have to be taken "on face value and as fairly reflecting [Montana] law," *Moore*, 600 U.S. at 37 (quoting oral argument transcript). And while Petitioner may disagree with the Montana Supreme Court's *application* of that legal standard to the record in this case, the fact-bound question of the

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[2] Although Petitioner notes on background that the Montana Supreme Court "rejected the federal *Anderson/Burdick* framework," Pet. 6, she does not contend that the Elections Clause required use of the *Anderson-Burdick* standard, or that the court's use of the *Wadsworth* standard instead of *Anderson-Burdick* "impermissibly distorts" Montana law in violation of the Elections Clause. *Moore*, 600 U.S. at 36 (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)). Nor could she, because she argued below that the *Wadsworth* standard reaffirmed and applied by the Montana Supreme Court in this case "dictates a similar framework" to the *Anderson-Burdick* test. BIO App. 13a; BIO App. 11a (noting "the close connection between the *Anderson-Burdick* test and this Court's traditional approach to constitutional questions involving fundamental rights"); BIO App. 3a ("Like this Court's traditional test, applying th[e] tailored [*Anderson-Burdick*] standard requires this Court to first evaluate the magnitude of the asserted injury."). According to Petitioner, the outcome of the analysis is the same regardless of which test is used. *See* BIO App. 4a (arguing that "HB 176 survives either *Anderson-Burdick* or the *Wadsworth* test"); BIO App. 6s (arguing "[w]hether under this Court's precedent . . . or *Anderson-Burdick* . . ., HB 176 survives even the most stringent application of either test.").

proper application of a Montana constitutional standard to the particular facts of this case so obviously does not raise a federal issue warranting this Court's review that even Petitioner herself does not purport to seek review on that basis. *See* Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."); Pet. 19–22 (raising only the arguments about "may enact" and the "vague" nature of the free and open elections clause).

As a result, if the Court grants the Petition, it will find scant opportunity to provide additional meaningful guidance on the "complex and context specific" questions left open in *Moore*. 600 U.S. at 36. Much as in *Moore*, Petitioner waived the type of arguments about state-law legal standards that might provide meaningful guidance elsewhere. Instead, the Court will find itself enmeshed in fights over the enactment history of an unusual provision in the Montana Constitution along with a renewed challenge to the very concept of state judicial review of election laws that the Court so recently rejected in *Moore*.

D. The issues Petitioner raises are not outcome determinative.

The importance of the issues in the Petition is further undermined by the fact that the issues Petitioner raises will not necessarily be outcome determinative even in this case. Petitioner focuses exclusively on the Montana Supreme Court's ruling that HB 176 and SB 530 violate the Montana Constitution's free and open elections clause. But the trial court also held HB 176 laws unconstitutional under the Montana

Constitution's right to equal protection, and held SB 530 unconstitutional under its equal protection, due process, and free speech provisions. App. 325a–327a, 333a–341a. The Montana Supreme Court did not reach those independent arguments because it affirmed on the basis of the right to vote. App. 51a, 60a. But if this Court were to reverse that holding, the Montana Supreme Court might well reach the same ultimate result on those alternative grounds on remand, leaving the Petition without any effect even in Montana, much less elsewhere.

II. The Court lacks jurisdiction under Section 1257.

The Court also lacks jurisdiction to grant the Petition because the Petition does not fall into any of the categories of cases covered by 28 U.S.C. § 1257(a). Section 1257(a) grants less than full federal-question jurisdiction over certiorari petitions from state court decisions. It authorizes such review in just three categories of cases: (1) "where the validity of a treaty or statute of the United States is drawn in question," (2) "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States," and (3) "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Section 1257(a)'s first two categories do not apply here. As to the first, no treaty or federal statute is challenged as invalid—the case below challenged only the validity of Montana laws. As to the second, while

the validity of Montana statutes was questioned in this case, those statutes were challenged *only* as repugnant to the Montana Constitution, and not as conflicting with federal law. And Petitioner's Elections Clause argument does not posit that any Montana statute is "repugnant to" federal law either. Just the opposite—Petitioner argues that federal law requires *enforcing* the challenged Montana statutes despite their state-law unconstitutionality. *See* Pet. 19–22. Such an argument falls clearly outside the plain text of § 1257's second category.

That leaves § 1257's third category. For two reasons, this category does not apply either. First, Petitioner does not claim a "title, right, privilege, or immunity" for herself under federal law, only a right that belongs to the Montana legislature. And second, Petitioner did not "specially set up or claim" the federal law arguments she makes now in the Montana Supreme Court, raising only a different Elections Clause argument. Each of those deficiencies presents an independent jurisdictional barrier to the Court's review.

A. Petitioner does not claim a "title, right, privilege, or immunity" for herself.

Section 1257(a)'s third category, allowing review "where any title, right, privilege, or immunity is specially set up or claimed under" federal law, does not apply here because Petitioner claims no federal right for herself. The Court has long held that for there to be "jurisdiction to this Court" under the "title, right, or privilege" language of Section 1257 and its predecessors, the party seeking review "must claim the

right *for himself*, and not for a third person in whose title he has no interest." *Henderson*, 51 U.S. at 323 (emphasis added); *see also Hale v. Gaines*, 63 U.S. 144, 160 (1859) ("The plaintiff in error must claim (for himself) some title, right, privilege or exemption, under an act of Congress, &c. . . . to give this court jurisdiction.").[3]

Here, Petitioner can claim no federal right of her own under the Elections Clause that could support jurisdiction because the Elections Clause grants rights only to "the Legislature" of each state. U.S. Const. art I, § 4, cl. 1; *see also* Pet. 23 (arguing that the decision below "intrud[ed] on the Montana Legislature's Election Clause authority"). And for the same reason, Petitioner lacks standing to assert her Election Clause claim even if the Court had statutory jurisdiction to hear it. *Cf. Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015) (holding Arizona Legislature had standing as "an institutional plaintiff asserting an institutional injury" to bring Elections Clause challenge to ballot initiative creating redistricting commission).

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[3] The relevant statute at the time of these decisions was Section 25 of the Judiciary Act of 1789, which provided this Court with jurisdiction "upon a writ of error" to review state supreme court decisions "where it is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party." Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

Prior Elections Clause and Electors Clause cases have not suffered from this same problem. In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), jurisdiction was granted by what is now Section 1257(a)'s second category—the case involved claims that a state referendum law violated the Elections Clause. *Id.* at 566.[4] In *Bush*, the petitioner's separate due process and equal protection claims provided an independent basis for jurisdiction under Section 1257. *See* 531 U.S. at 103. And most recently in *Moore*, the petitioners were North Carolina legislators who claimed a federal-law right for themselves under the Elections Clause—the right to enact congressional districts without review by the North Carolina Supreme Court. *See* 600 U.S. at 12.[5]

This case, however, is different. Unlike in *Hildebrant*, there is no affirmative claim that a state statute violates the Elections Clause. Unlike in *Bush*, there is no separate federal claim to convey jurisdiction—Petitioner's request for this Court's review is based solely on the Elections Clause. And unlike in

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[4] At the time, the relevant provision was the portion of Section 25 of the Judiciary Act of 1789 providing for review via writs of error in case s "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity." Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

[5] In *Smiley v. Holm*, 285 U.S. 355 (1932), the petitioners were relators acting on behalf of the state itself. *See Lance v. Coffman*, 549 U.S. 437, 442 (2007). *Smiley* did not address how the "title, right, or privilege" restriction applies under those circumstances.

Moore, Petitioner is not a state legislative body protecting its own institutional interests under the Elections Clause. The Court therefore lacks jurisdiction because Petitioner claims no "title, right, privilege, or immunity" of her own under federal law. 28 U.S.C. § 1257(a).

B. Petitioner did not "specially set up or claim" the federal-law arguments she now makes.

Petitioner's failure to preserve her federal arguments is yet another jurisdictional bar to this Court's review. For there to be jurisdiction under Section 1257's third category, "it must appear on the record that [the federal] title, right, privilege, or immunity was '*specially set up or claimed*' at the proper time and in the proper way." *Tex. & P. Ry. Co. v. S. Pac. Ry. Co.*, 137 U.S. 48, 53 (1890) (emphasis added); *see also Ex parte Spies*, 123 U.S. 131, 181 (1887) ("If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here in [sic] concerned."). Petitioner did not do so here.

Petitioner failed to present the precise federal arguments she makes in her Petition to the Montana courts. As the Montana Supreme Court emphasized, Petitioner devoted just "one page of [her] nearly 90-page brief" to the Elections Clause argument. App. 25a n.7. And the argument she briefly made was very limited—she argued only that "[d]epriving the Legislature of the ability to regulate elections wholesale—by reflexively applying strict scrutiny to every law that touches the election process, for example"—

would violate the Elections Clause. App. 377a; *see also* App. 386a (arguing only that "concluding that any election regulation implicating the right to vote in any way is subject to strict scrutiny" would violate the Elections Clause).

The Montana Supreme Court then *did not do* the only thing Petitioner argued it could not do—it did not apply strict scrutiny to every election law. Instead, the court applied a two-stage test, which first assesses whether the statute "impermissibly interferes with the right to vote" or merely "minimally burdens it," and then applies strict scrutiny only in the former case and middle-tier analysis in the latter case. App. 32a. And this was no mere fig leaf—the court went on to hold that two of the four challenged statutes were subject only to middle-tier analysis. App. 34a, 65a.

No doubt for that reason, Petitioner advances different arguments in this Court. In her discussion of the merits, she raises no objection to the strict scrutiny standard of review. Pet. 19–22. She argues instead that the Elections Clause was violated because the Montana Constitution's use of the word "may" forecloses a ruling that eliminating election day registration is unconstitutional and that the "free and open" elections clause is too "vague" to override specific statutory procedures. *Id.* Petitioner made neither argument based on the Elections Clause below, so she did not "specially set up or claim[]" in the Montana courts any federal "right, privilege, or immunity" on those grounds. 28 U.S.C. § 1257. Because Petitioner failed to make those arguments "at the proper time and in the proper way" below, this Court is

jurisdictionally barred from considering them on certiorari now. *Tex. & P. Ry. Co.*, 137 U.S. at 53.

III. The Montana Supreme Court's decision did not violate the Elections Clause.

Finally, on the merits, there is no error for this Court to correct because the Montana Supreme Court's straightforward application of the Montana Constitution in this case was an entirely ordinary exercise of judicial review that did not violate the Elections Clause under *Moore*.

Petitioner challenges the Montana Supreme Couret's holding that two Montana statutes violated the Montana Constitution. First is the Montana Supreme Court's holding that HB 176's elimination of same-day registration was unconstitutional. The Montana Supreme Court considered and rejected Petitioner's argument that the Constitution's statement that the legislature "may" provide for election day registration meant that the legislature had unreviewable discretion over that choice. App. 40a–41a. Consistent with Montana precedent, the Montana Supreme Court construed that language in the context of the circumstances under which it was adopted and concluded that it reflected a constitutional desire to promote election day registration if feasible—not one to protect the *elimination* of such registration from ordinary judicial scrutiny under other constitutional provisions. App. 42a.

The Montana Supreme Court therefore applied what Petitioner herself called its "well-established" state-law framework for assessing violations of the

right to vote, App. 386a, noted "voluminous record evidence that" tens of thousands of Montanans "will in fact be disenfranchised" by the elimination of election day registration, and held that the trial record showed no compelling state interest justified that elimination. App. 42a–51a. These fact-based, state-law conclusions weighing burdens against state interests are the ordinary stuff of judicial review. Nothing about them suggests an effort by the Montana Supreme Court to "evade federal law" or "circumvent federal constitutional prohibitions." *Moore*, 600 U.S. at 34–35.

Petitioner objects that the Montana Supreme Court overturned the legislature's policy determination to eliminate election day registration, Pet. 21, but such overturning, based on the Montana Constitution's express protections of "free and open elections," is the very essence of judicial review—not an aberration. This Court similarly overturns specific statutes based on vague constitutional prohibitions almost every term. *See, e.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 762–75 (2018) (holding that a very detailed California statutory notice requirement for pregnancy clinics likely violated the First Amendment's protection for "freedom of speech" because less-restrictive means were available to serve the state's interest); *303 Creative LLC v. Elenis*, 600 U.S. 570, 581–96 (2023) (similar as to Colorado public accommodations law); *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 805 (2011) (similar as to over- and underinclusive California law banning the sale of violent video games to minors). The Montana Supreme Court's decision in this case was no more aberrational than this Court's decisions in those cases were. Overturning specific statutes is what judicial review is.

The same is true of the Montana Supreme Court's second challenged holding, that HB 530's elimination of paid absentee ballot collection violates the Montana Constitution. On that question, too, the Montana Supreme Court's exercise of judicial review was as ordinary as it gets. The court held "[b]ased on the extensive record" from trial that Native Americans in Montana disproportionately rely on paid ballot collection to vote, because many live far from polling places and post offices, and do not have mail service at their homes. App. 55a. The court considered this Court's decision in a Voting Rights Act challenge to a similar law in *Brnovich v. Democratic National Committee*, 594 U.S. 647 (2021), but distinguished that decision based on the different legal claim and much stronger factual record here, which included direct evidence that limiting paid collection substantially and disproportionately harmed on-reservation Native American voters. App. 57a.

The Montana Supreme Court therefore applied strict scrutiny and held that HB 530 failed narrow tailoring because the state interest could be equally served by a prohibition on per-ballot payments. App. 58a. Petitioner disagrees with this outcome, but this type of narrow tailoring analysis is again entirely commonplace in judicial review by this Court and others.

This Court need not take Respondents' word for it. In her briefing to the Montana Supreme Court, Petitioner herself outlined what "ordinary judicial review" should look like in this case:

> This Court's exercise of judicial review over constitutional challenges to statutes is well established: (1) determine whether a constitutional right is interfered with, (2) if so, determine the extent of interference, and (3) apply the corresponding level of scrutiny.

App. 385a; *see also* App. 385a–386a (arguing that if the court were "to cut out the first two steps" it would "suspend[] the ordinary exercise of judicial review"). This is precisely the review the Montana Supreme Court undertook: (1) it determined that "the Montana Constitution strongly protects the fundamental right to vote," App. 24a (citing Mont. Const. art. II, 13); (2) it determined, based on the record evidence, that both HB 176 and HB 530 "impermissibly interfere[] with the right to vote," App. 38a–39a,42a–43a, 55a, 57a; and (3) it applied the corresponding level of scrutiny, App. 45a–46a, 51a, 57a, 60a; *see also id.* 23a–24a ("[W]hen a law impermissibly interferes with the right to vote, we will apply strict scrutiny.").

Petitioner does not—and cannot—dispute that the Montana Supreme Court's analysis followed the precise framework Petitioner herself defined as the ordinary exercise of judicial review. Accordingly, Petitioner's abstract curiosity as to "*how* to determine whether a state court has transgressed that boundary and impermissibly interfered with a state legislature's authority," Pet. 4–5, is of no moment in *this* case, where that boundary is not subject to any meaningful dispute.

In short, when *Moore* authorized "ordinary judicial review," it necessarily authorized ordinary cases like this. 600 U.S. at 37.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 23, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — EXCERPTS FROM THE APPELLANT'S OPENING BRIEF IN THE 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

On Appeal from the Montana Thirteenth Judicial
District, Yellowstone County, Cause No. DV-21-0451
Honorable Judge Michael G. Moses

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[15]**1. HB 176 does not impermissibly interfere with, or severely restrict, the right to vote.**

The first step in evaluating a constitutional challenge is to determine the extent to which the law interferes with the asserted right. *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173 (Mont. 1996). Here, the District Court erred in concluding that ending EDR impermissibly interfered with the right to vote. The minimal burden imposed by HB 176—if any—is alleviated by how easy Montana makes it to register and vote. Appellees' witnesses agree. Dkt. 219.1, Defendant's Deposition Designations at 24 (Registering to vote in Montana is "very easy."); *see also* App. 29, 44. During regular registration, voters can register in person, by mail, email, or fax. App. 76. And if a voter lacks a physical address, he or she may register using geographic location. App. 85. And voters may register and vote simultaneously during that late registration period. App. 115. Counties can also offer extended hours for registering/voting on the Saturday and Sunday before election day. App. 88.

Appendix A

[17]**2. HB 176 does not severely restrict the right to vote.**

Under federal law and the test widely adopted by states, *Anderson-Burdick*'s balancing test applies when the election regulation curtails the right to vote. *Tully v. Okeson*, 977 F.3d 608, 616 (7th Cir. 2020). Like this Court's traditional test, applying this tailored standard requires this Court to first evaluate the magnitude of the asserted injury. *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018).

For the reasons above, HB 176 imposes at most a minimal burden on the right to vote. What is more, state and federal courts have uniformly found that reasonable registration deadlines—including deadlines far more restrictive than [18]Montana's—impose no more than a minimal burden. These deadlines are "'classic' examples of permissible regulation." *Buckley v. American Const. Law Foundation, Inc.*, 525 U.S. 182, 196 n.17 (1999).[1] And as the United States Supreme Court noted, there is no constitutional right "to walk up to a voting place on election day and demand a ballot." *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (approving 50-day deadline).

1. *See e.g. Diaz v. Cobb*, 541 F.Supp.2d 1319, 1333 (S.D. Fla. 2008) (summarizing unanimous view of courts upholding registration deadlines).

3. Because HB 176 does not impermissibly interfere with, or severely restrict, the right to vote, rational basis review is appropriate.

This Court's test for determining which level of scrutiny applies to a law challenged as unconstitutional is well established. If a law impermissibly interferes with a fundamental right, strict scrutiny is warranted. *Driscoll*, ¶ 18. And if a law affects a non-Article II right conferred by the Constitution, middle tier scrutiny is appropriate. *Id.* But if neither strict scrutiny nor middle tier scrutiny applies, the law is subject to rational basis review. *Stand Up Montana v. Missoula Cnty. Pub. Sch.*, 2022 MT 153, ¶ 10, 409 Mont. 330, 514 P.3d 1062. Thus, even if the right is fundamental, the reviewing court must first determine whether the law [19]"impermissibly interferes" with the exercise of that right. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174.

[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 A

1. HB 176's reasonable voter registration deadline is narrowly tailored to advance the State's compelling interest in reducing administrative burdens on election workers.

Montana Constitution's obligates the Legislature to "provide by law the requirements for . . . [the] administration of elections." Mont. Const. art. IV, § 3. The State has a compelling interest in carrying out this duty. And the State's duty includes a compelling interest in reducing administrative burdens on election workers. *See Arizona Democratic Party v. Hobbs*, 18 F.4th 1179, 1181 (9th Cir. 2021); *Ohio Democratic Party*, 834 F.3d at 634–635; *see also Diaz v. Cobb*, 541 F.Supp. 1319, 1339–1340 (S.D. Fla. 2008) (noting the State has a compelling interest in easing burdens that "disproportionately" fall on election officials "in small counties"). Further, the State has a compelling interest in "imposing reasonable procedural requirements tailored to ensure the . . . fairness of its election processes." *Larson v. State*, 2019 MT 28, ¶ 40, 394 Mont. 167, 434 P.3d 241.

The record shows the administrative burden faced by election workers on election day is severe. One election administrator testified to feeling like she "had been run over by a train" by the end of election day. App. 208. The record reflects election day, at times, required election administrators to work for up to 23 hours [23]straight, arriving at work as early as 5 a.m., and not leaving until 4 a.m. the next day, App. 96, 181, 225, 229–230, 244–245, 249, and that the Monday before election day is busy as

well, App. 232 (noting that election staff in Broadwater County would work from 8 a.m. to 10 p.m. the day before an election). Even Appellees' witness, Amara Reese-Hansell, testified that, based on her personal experience, county election officials are overburdened, overworked, and at capacity on election day. Dkt. 224, *Plaintiffs' Consolidated Deposition Designations* at 101–102.

In light of these circumstances, the Legislature reasonably may require registration the day before election day to provide order and void election chaos. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) ("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.") Whether under this Court's precedent (i.e. whether HB 176 is tailored to the State's interests) or *Anderson-Burdick* (i.e. whether there is a means-end fit between HB 176 and the asserted interests), HB 176 survives even the most stringent application of either test.

APPENDIX B — EXCERPTS FROM THE APPELLANT'S REPLY BRIEF IN THE 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

On Appeal from the Montana Thirteenth Judicial District, Yellowstone County, Cause No. DV-21-0451
Honorable Judge Michael G. Moses

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

Appellees are also wrong that the Montana Constitution or this Court's precedent require strict scrutiny whenever a fundamental right is involved. That has never been the law in Montana and it makes no constitutional sense. This Court has always balanced competing constitutional interests, weighing the State's important, constitutionally compelled regulatory interests against fundamental right claims. "The extent to which the Court's scrutiny is heightened depends both on the nature of the interest **and the degree to which it is infringed**." *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173 (Mont. 1996) (emphasis added); *see* Sec. Op. Br., 15, 17–19; RITE Amicus Br., 5–8. Under this Court's precedent, strict scrutiny is required only when a "classification *impermissibly* interferes with the exercise of a fundamental right." *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1173 (emphasis added); *Clark Fork Coal.*, ¶ 48, (only when a statute "substantially interferes with a fundamental right . . . does strict scrutiny apply").

[8] Refusing Appellees' invitation to reflexively apply strict scrutiny to all election regulations is especially important because the Montana Constitution delegates the power to regulate elections to the Legislature. Mont. Const. art. IV, §§ 2–3. The Constitution cannot obligate the Legislature to establish requirements for registration and election administration, and "insure the purity of elections and guard against abuses of the electoral process," Mont. Const. art. IV, § 3, while—in every case—subjecting the Legislature's exercise of those duties to strict scrutiny, which is "seldom satisfied." *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 431, 712 P.2d 1309, 1312 (Mont. 1986). "The Constitution must be considered as a whole." *Jones v. Judge*, 176 Mont. 251, 255, 577 P.2d 846, 849 (Mont. 1978). Subjecting election regulations (which necessarily implicate voting rights) to strict scrutiny, despite the burden imposed, does not fulfill that duty. *See In re Request for Advisory Op.*, 479 Mich. 1, 34–35, 740 N.W.2d 444 (Mich. 2007) (analyzing very similar constitutional language as Montana's article IV § 3, and upholding voter ID law based on balancing test because "the appropriate standard by which to evaluate election laws must be compatible with our entire Constitution").

Appellees are wrong that this Court's decisions in *Johnson v. Killingsworth*, 271 Mont. 1, 894 P.2d 272 (Mont. 1995) and *Finke v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576, require strict scrutiny in voting rights cases. WNV [9] Br., 18–19. Both cases analyzed whether the State may explicitly limit the franchise to certain groups. And because neither case involved a time, place, and manner regulation, like the statutes here, the

Court's traditional balancing test did not apply. That is why in *Johnson* the Court did not even cite *Anderson-Burdick*, even though the plaintiffs only raised a federal claim. *Johnson*, 271 Mont. at 3, 894 P.2d at 273; *see also Kramer v. Unition Free School Dist.*, 395 U.S. 621, 626–627 (1969) (granting right to vote to some and denying it to others subject to strict scrutiny). And even in franchise limitation cases, the Court recognized that while strict scrutiny is sometimes appropriate, rational basis scrutiny applied to voting rights cases that limited the franchise in "special interest" elections. *Johnson*, 271 Mont. at 4, 8 (surveying opinions applying rational basis).

State courts and federal courts apply *Anderson-Burdick* to time, place, and manner election regulations because "common sense, as well as constitutional law," compels some deference to the Legislature's duty to regulate elections—even in the absence of Montana's constitutional delegation of exactly that authority to the Legislature. RITE Amicus Br., App A (cataloguing cases adopting *Anderson-Burdick*). All "[e]lection laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). As a result, across the board application of strict scrutiny improperly interferes with state legislatures' ability to [10] exercise this authority—that is why the flexible *Anderson-Burdick* test was adopted. *See Burdick*, 504 U.S. at 433–35 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Strict scrutiny is reserved for laws that severely burden the right to vote, while lesser burdens trigger less exacting scrutiny; "the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434. As this Court has held, *Larson v. State*

by and Through Stapleton, 2019 MT 28, ¶ 40, 394 Mont. 167, 434 P.3d 241, the government plays a necessary role in structuring and administering elections, *Burdick*, 504 U.S. at 433; *see also* U.S. Const. art. 1, § 4, cl.1; Mont. Const. art. IV, § 3.

As a result, no state or federal court has mandated strict scrutiny in all voting rights cases, even though the right to vote is fundamental. *See Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) ("voting regulations are rarely subject to strict scrutiny."). Montana's constitution does not compel a different test. It grants broad power to the Montana Legislature—even broader than the U.S. Constitution gives to States. Mont. Const. art. IV, § 3; Mont. Const. Con. Tr., p. 450 (granting Legislature "very broad" authority to "pass whatever statutes it deems necessary" to keep Montana elections "free of fraud").

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.

For example, *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000), addressed a statute that infringed on the "very basic right of a voter to express support for a candidate within the sanctity of the voting booth" by giving the state's imprimatur to favored candidates. *Id.* As the Idaho Supreme Court noted, the *Anderson-Burdick* test was not appropriate because, "unlike the statute in *Burdick*, [the *Van Valkenburg* statute] is not simply a time, place or manner voting restriction to which a more deferential standard of review might be applied." *Id.*

Appellees also cite the Illinois Supreme Court's decision in *Tully v. Edgar*, 664 N.E.2d 43 (Ill. 1996). But that case addressed a statute that created a "*total* disregard for *all* votes cast by citizens in a particular election" by converting [12] elected positions into appointed positions shortly after a vote—far different from the effect of the regulations here. *Id.* at 49 (emphasis original). And the remaining cases cited by Appellees have nothing to do with time, place, and manner election regulations, either. *See, e.g., Harper v. Hall*, 380 N.C. 317, ¶¶ 150, 181, 868 S.E.2d 499, 544, 553 (N.C. 2022) (addressing partisan gerrymandering); *Madison v. State*, 163 P.3d 757, 765–766 (Wash. 2007) (addressing a felon's right to vote under the state constitution); *Moore v. Shanahan*, 486 P.2d 506 (Kan. 1971) (evaluating ability to vote on constitutional amendments).

The thrust of these cases is that other state supreme courts have had no problem distinguishing time, place, and manner election regulations (e.g., defining the close of

voter registration) from statutes that deprive individuals of their voice at the ballot box based on the plain language of the challenged statute itself. *See, e.g., Finke*, ¶¶ 5, 21 (applying strict scrutiny to a law that removed certain individuals right to vote altogether). Establishing the close of voter registration, the content of acceptable voter ID, and rules governing ballot delivery and collection have never been in the latter category.

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.

* * *