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.,

Respondent.

On Petition for a Writ of Certiorari to the Montana Supreme Court

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutions:

Statutes and Other Authorities:

Rules:

REPLY BRIEF FOR PETITIONER

Nearly two years ago, this Court held that when state courts review state laws implicating the Elections Clause, they "may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Moore* v. *Harper*, 600 U.S. 1, 36 (2023). But this Court declined to adopt a standard to "measure state court interpretations of state law" in those cases. *Id.* at 37.

This petition squarely presents an opportunity adopt that critical standard. The three briefs in opposition throw everything at the wall to undermine that conclusion, but nothing sticks. Instead, they only confirm that the Montana Supreme Court's opinion below presents an ideal vehicle to resolve this "important question" implicating federal law "that has not been, but should be, settled by this Court." S. Ct. R. 10. Now is the time and this is the case to resolve the questions presented.

I. This case squarely presents the question this Court left open in *Moore* v. *Harper*—what are the "ordinary bounds of judicial review"?

The Montana Supreme Court's majority opinion invalidated two state election-integrity provisions based on a state "constitutional analysis" that two of its own members called "significantly flawed." Pet.App.119a (Sandefur, J., concurring in part, dissenting in part). If not reversed, the opinion will result in the "[Montana Supreme] Court in its infinite wisdom—not the Legislature in accordance with its express constitutional authority—decid[ing] whether" changes to

election-integrity laws for federal elections are "wise or 'unwise.'" Pet.App.121a.

This Court is no stranger to the Montana Supreme Court's flouting federal law. *E.g.*, *Espinoza* v. *Mont. Dep't of Revenue*, 591 U.S. 464 (2020) (reversing Montana Supreme Court judgment based on state constitution for violating Free Exercise Clause); *Am. Trad. P'ship, Inc.* v. *Bullock*, 567 U.S. 516 (2012) (per curiam) (summarily reversing Montana Supreme Court judgment for failing to follow *Citizens United* v. *Fed. Elec. Comm'n*, 558 U.S. 310 (2010)). This case is of a piece with those and warrants this Court's review for similar reasons.

But *Moore* didn't resolve which standard applies to this Court's review of state-court decisions interpreting state laws enacted under the Elections Clause. This Court should adopt Chief Justice Rehnquist's "straightforward" standard, *see* Pet.13, and hold that a state court exceeds the ordinary bounds of judicial review when its decision "impermissibly distort[s]" a state election law "beyond what a fair reading required," *see* Pet.13 (quoting *Bush* v. *Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)). This standard will "ensure that state court interpretations of" state law governing federal elections "do not evade federal law." *Moore,* 600 U.S. at 34.

Respondents don't contest—because they can't—that *Moore* declined to adopt a legal standard for measuring the ordinary bounds of judicial review for Elections Clause cases. *Id.* at 36 ("We do not adopt these or any other test by which we can measure state court interpretations of state law in cases implicating the Elections Clause."). Nor do they contest that this

case squarely presents that open question. At most, they argue that the Secretary's first question presented is of no practical consequence because the three formulations proposed in *Moore* all "convey essentially the same point." WNV Br.21-22 (quoting Pet.13). But differences between legal standards, and what standard should govern, are merits questions—not a reason for denying certiorari. Respondents thus offer no persuasive reason for denying the petition as to the first question presented. And their reasons for denying certiorari on the Secretary's second question presented fare no better for the reasons discussed below.

II. The Montana Supreme Court's decision falls outside the ordinary bounds of judicial review.

To safeguard its elections and prevent fraud, Montana's legislature enacted two commonsense election integrity measures: HB176 and HB530. Pet.19. HB176 moved the voter registration deadline from the close of polls on election day to noon the day before.[1] Pet.19. HB530 directed the Secretary to promulgate rules prohibiting paid absentee ballot collection.[2] Pet.19. To invalidate these modest laws, the Montana Supreme Court distorted clear provisions in the

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[1] More than half of the states require voters to register before election day. NRSC.Amicus.Br. 5-6 & nn.2-6; CEC.Amicus.Br. 6-7 & nn.2-7, 9; Texas.Amicus.Br.6-7 & nn.2-3. And *no court* has held that these laws impose an impermissible burden on the right to vote. Texas.Amicus.Br.7.

[2] Ballot collection laws are just as commonplace, NRSC.Amicus.Br.6-7 & nn.7-9, and state courts have taken a dim view of challenges to these laws, *id.* at 8-9 (reviewing Kansas Supreme Court decision rejecting challenge to state ballot-harvesting law).

Montana Constitution and leaned on ambiguous ones. Pet.19-22. In doing so, it claimed for itself "the power vested in state legislatures to regulate federal elections." *Moore,* 600 U.S. at 36.

Respondents characterize the court's decision as "anodyne," "entirely ordinary," and "commonplace," *see* MYA.BIO.16; MDP.BIO.24, 26, yet it was anything but. *See* NRSC.Amicus.Br.10 ("This is about as clear a case of judicial usurpation as this Court will see."). In its decision below, the Montana Supreme Court majority "impermissibly distort[ed]" state law "beyond what a fair reading required" at every turn. *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

Start with the majority's construction of the state constitution's facially ambiguous "free and open" clause. It found that art. II, §13 of the Montana Constitution secured a "strong protection of the right to vote," Pet.App.12a, but it failed to explain how it reached that conclusion. The majority filled that vacuum with an amorphous framework that was a "barely disguised theft of the legislature's federally conferred authority to regulate elections" RITE.Amicus.Br. 10; *see id.* at 10-11 (framework "necessarily devolves into naked policymaking" because it "empowers courts to categorize almost any law as impermissible"); NRSC.Amicus.Br.13-14 ("If the Montana Supreme Court can get away with [this], then other state courts dissatisfied with how their legislatures have exercised their Elections Clause powers will be tempted to do the same"). Yet other states with similar "free and open" provisions in their state constitutions have construed them to safeguard against voter intimidation

and interference—not the anodyne measures here. Texas.Amicus.Br.11-12.

Turn to the majority's construction of Montana Constitution, art. IV, §3. The majority recognized that art. IV, §3 provides that the legislature "*may* provide for a system of [election day registration]," but it contorted this clear text and the state constitutional convention record to conclude that the legislature must provide same-day voter registration if feasible. Pet.20-21; RITE.Br.14-15 (§3's drafters abandoned an early draft that required same-day registration but the majority held that the drafters still intended to require it if it turned out to be feasible).

The majority's position is all the more curious because Montana had at least a 30-day voter registration deadline from its 1972 constitutional convention until 2005, when the legislature enacted same-day registration. NRSC.Amicus.Br.10. Even worse, the majority concluded that while the legislature was free to establish a system of same-day registration, it couldn't "backtrack" unless it satisfied strict scrutiny. Pet.App.45a. But this "one-way-ratchet reasoning threatens the proper functioning of the Elections Clause." NRSC.Amicus.Br.14-15; RITE.Amicus.Br.16 (on this theory every election law is a constitutional amendment because "[w]hat the legislature may give on its own, it may take away only with court approval").

The majority's decision to invalidate these commonplace measures fails to respect the Framers' "deliberate choice" to vest authority to regulate federal elections in state legislatures. *Moore*, 600 U.S. at 34; Pet.App.148a (Sandefur, J., concurring in part and

dissenting in part) (criticizing the majority opinion's "unprecedented exercise of unrestrained judicial power" to "override" the legislature's policy choices "on the most dubiously transparent of constitutional grounds"). This Court's review is urgently needed to confirm whether the Montana Supreme Court has exceeded the bounds of ordinary judicial review.

III. This Court has jurisdiction over the petition.

WNV and MYA argue that this Court lacks jurisdiction because the petition is untimely, *see* WNV.BIO.16-20; MYA.BIO.9-10, and MYA and MDP argue that the petition fails to meet 28 U.S.C. §1257's jurisdictional requirements. Both arguments fail.

A. Under 28 U.S.C. §2101(c), a petition for writ of certiorari must be filed "within ninety days" of the entry of judgment and a justice may "for good cause shown" extend that deadline "for a period not exceeding sixty days." This Court has said that this deadline is "mandatory and jurisdictional." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990).

In computing "the period of time prescribed … by applicable statute," the last day is included "*unless it is a Saturday, Sunday, or federal legal holiday*." S. Ct. R. 30.1 (emphasis added). If the deadline falls on a Saturday, as it did here, Rule 30.1 does not count Saturday or Sunday as part of the statutory period and begins counting on the next day that is not a Saturday, Sunday, or federal holiday.[3] *Union Nat'l Bank of Wichita* v. *Lamb*, 337 U.S. 38, 40 (1949) (petition filed day

[3] The petition mistakenly referred to Rule 13.5, not Rule 30.1, as the rule that extended the deadline to file. Pet.2.

after end of §2101(c)'s ninety-day period was timely because the federal civil rules extended the deadline from Sunday to the next business day).

The Montana Supreme Court entered judgment on March 27, 2024. Pet.App.1a. The Secretary sought (and received) a sixty-day extension of time to file her petition; her extended deadline was Saturday, August 24, 2024. Order Granting Appl. Extension of Time, No.23A1136 (U.S. June 24, 2024). The Secretary timely filed her petition on Monday, August 26, 2024. 28 U.S.C. §2101(c); S. Ct. R. 30.1; *Lamb*, 337 U.S. at 40.

WNV's attempt to distinguish *Lamb* misses the mark. WNV.BIO.20. It argues that because the petition in *Lamb* was filed within the broader 150-day statutory period, the Court found no "contrary policy … express in the statute" that prevented accepting the petition as timely. WNV.BIO.19-20 (citation omitted). But *Lamb* said nothing about the 150-day period and the petitioner hadn't sought an extension. So if §2101(c) works as WNV and MYA argue, the Court should have dismissed the petition as untimely. Instead, *Lamb* explained that Rule 6(a) of the federal civil rules provided the mechanism for computing the time prescribed for "any applicable statute"—as Rule 30.1 does here—and held that Rule 6(a) applied to §2101(c). *See* 337 U.S. at 40. So too here—Rule 30.1 applies to §2101(c).

WNV's reliance on *Bowles* v. *Russell*, 551 U.S. 205 (2007), is misplaced. *Bowles* held that a notice of appeal filed after the statutory deadline but within a longer, non-statutory period authorized by a district court's order was untimely because the statutory

deadline was jurisdictional. *Id.* at 209-10. But this Court just said that *Bowles* only "governs statutory deadlines to appeal 'from one Article III court to another.'" *Harrow* v. *Dep't of Def.*, 601 U.S. 480, 489 (2024) (citation omitted). Otherwise, this Court demands a clear statement that Congress intended a statute to have jurisdictional consequences. *Id.* Under that approach, "most time bars are nonjurisdictional"—even if "the bar is framed in mandatory terms." *Id.* at 484 (citation omitted). Because petitioner appeals from a state supreme court (not an Article III court) to this (an Article III court), *Bowles* doesn't apply and the petition was timely.

B. Some Respondents also argue that 28 U.S.C. §1257(a) does not give this Court jurisdiction over the Secretary's questions presented. MYA.BIO.10-13; MDP.BIO.18-22. In those Respondents' view, jurisdiction fails under §1257(a) because the Secretary "claims no federal right for herself" and "the Elections Clause grants rights only to 'the Legislature' of each state." MDP.BIO.19-20; *see* MYA.BIO.10 ("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 elections[.]").

Respondents fundamentally misunderstand this issue. Exercising its Elections Clause power, Montana's legislature designated the Secretary as "the chief election officer of this state" and made it her "responsibility to obtain and maintain uniformity in the application, operation, and interpretation of the election laws." Mont. Code Ann. §13-1-201. It charged the Secretary to "advise and assist election

administrators" on "the application, operation, and interpretation of" the Montana Election Code. *Id.* §13-1-203(a). The Secretary adopts rules that govern the accuracy and sufficiency of a voter's application for voter registration, *see id.* §13-2-109, and maintains active and inactive voter registration lists, *see id.* §13-2-220.

Because Montana's legislature, exercising its Elections Clause authority, vested those powers over federal elections in the Secretary—and the Secretary's questions presented seek to vindicate those vested powers—the petition necessarily implicates a "right" or "privilege … specially set up or claimed under the Constitution." 28 U.S.C. §1257(a).

Respondents' contrary reading would let plaintiffs foreclose Elections Clause review by this Court through artful pleading. If Respondents are correct, plaintiffs could challenge election-integrity laws (enacted under the Elections Clause and governing federal elections) in state court and name as defendants only state executive branch officers. If the state supreme court eventually sided with plaintiffs, this Court could not review that judgment as *Moore* contemplates unless (1) the state legislature separately moved to intervene, (2) the state court granted that motion, and (3) the cost to taxpayers of defending plaintiffs' suit had multiplied because two state political branches litigated the case in parallel just to preserve the possibility of this Court's review. Nothing in *Moore* requires those wasteful impositions on judicial resources or the public fisc—particularly where (as here) the state legislature has exercised its Elections Clause power to vest responsibility for executing the

challenged election-integrity laws in the named executive branch petitioner.[4]

IV. This case is an ideal vehicle for resolving these exceptionally important questions.

Respondents do nothing to disprove that this case is an ideal vehicle for answering the questions presented for at least four reasons. Pet.22-24. First, this petition isn't complicated by a looming election. Pet.22. Second, the issue preservation problems in *Moore* aren't present here. Pet.22-23. Third, this Court has the benefit of a dissenting opinion from two Montana Supreme Court Justices explaining how the majority "read state law … to circumvent federal constitutional provisions." Pet.23 (citation omitted). Fourth, this case provides an ideal opportunity to address the questions presented in time to prevent a litany of petitions seeking clarity on how to apply *Moore*, which is especially important given the increased focus nationwide election integrity laws. Pet.24.

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[4] MYA and MDP argue that the Secretary failed to preserve her Election Clause claim. MDP.BIO.22-24; MYA.BIO.11-13. Not so. Before *Moore*, the Secretary made the argument that the Elections Clause requires that the legislature be permitted to enact reasonable election regulations. Pet.App.377a. After *Moore*, MDP and MYA argued that the Secretary's Election Clause claim was foreclosed by *Moore*. Pet.App.379a, 383a n.7. Rather than abandoning the argument, the Secretary responded that if the Court adopted Respondents' arguments to apply strict scrutiny to every election regulation (as it did for HB176 and HB530), it would exceed the ordinary bounds of judicial review. Pet.App.385a-386a. The Montana Supreme Court "wholly reject[ed]" the Secretary's argument in a footnote. Pet.App.25a-26a n.7.

Respondents argue that the petition is a poor vehicle because it fails to raise an issue of nationwide significance for essentially three reasons. WNV.BIO.33-34; MYA.BIO.15-16; MDP.BIO.13-15. Each argument fails.

First, MDP and WNV argue that the petition raises concerns unique to the Montana Constitution and Montana state law. MDP.BIO.13; WNV.BIO.33-34. But this misses *Moore*'s point. It's no doubt true that states may experiment with their own laws, *see Kansas* v. *Carr*, 577 U.S. 108, 118 (2016) ("state courts may experiment all they want with their own constitutions"), but they may not do this to "circumvent federal constitutional provisions," *see Moore*, 600 U.S. at 35. And the Montana Supreme Court's haphazard construction of its own constitution raises the question whether its decision exceeded the "ordinary bounds of judicial review." *Id.* at 36. The standard that applies to answer *that* question, which this Court left unresolved, *see id.*, isn't an issue peculiar to Montana—it's an issue of undisputed nationwide importance.

Second, MYA and WNV argue that there is no issue of nationwide significance because the Montana Supreme Court's decision followed *Moore*. MYA.BIO.15-16; WNV.BIO.28-32. But it was anything but consistent with *Moore*. *Supra* §II; *see* RITE.Amicus.Br.8, 10-12 (characterizing the Montana Supreme Court's analysis as "indefensible and incoherent," "freeform balancing," "an open-ended test," and as "a barely disguised theft of the legislature's federally conferred power"); NRSC.Amicus.Br.15 (calling this "an excellent vehicle" to address the question left open in *Moore* given the "egregious display of the usurpation

phenomenon"). Beyond the decision's "flimsy reasoning," this Court's review is necessary because the court below "effectively *admitted* its intent to substitute its policy views for that of the Legislature in clear violation of *Moore*." Texas.Amicus.Br.4, 16. How? By rejecting the *Anderson-Burdick* standard *because* it gives undue deference to state legislatures. Texas.Amicus.Br.17.

Third, WNV argues that because *Moore* was just decided, it's too early to address the question. *See* WNV.BIO.34-36. Not so. "Opponents of traditional time, place, and manner election regulations are [already] stretching state constitutional theories to nullify" election regulations across the country. CEC.Amicus.Br.14; *id.* at 15-22 (cataloging recent cases challenging such measures in Pennsylvania and Wisconsin). That some courts have indulged these radical theories despite *Moore*'s relative youth only underscores the importance of granting the petition. CEC.Amicus.Br.15; Texas.Amicus.Br.2-3.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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