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 WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF OF RESTORING INTEGRITY AND TRUST IN ELECTIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

Restoring Integrity and Trust in Elections, Inc. (RITE), is a 501(c)(4) non-profit organization. Its mission includes ensuring that our "[e]lectoral systems" are "designed, safeguarded, and implemented in a manner that reflects the will of our citizens so that electoral results enjoy the public's full faith and confidence." *Our Mission*, Restoring Integrity and Trust in Elections, https://riteusa.org/our-mission/ (as last visited Sept. 20, 2024).

This case implicates that mission. State courts around the country have invalidated election-integrity provisions—the sorts of laws RITE supports and defends—based on flawed interpretations of state constitutional provisions.

In *Moore v. Harper*, this Court said that some such interpretations so "exceed the bounds of ordinary judicial review" that they "unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution." 600 U.S. 1, 37 (2023). But the Court has yet to consider a case presenting the question whether a state court exceeded those bounds.

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[*] No counsel for any party authored this brief in whole or in part. Nor did any such counsel or party make a monetary contribution intended to fund the preparation or submission of the brief; no one other than the *amicus curiae*, its members, or its counsel made such contributions. Pursuant to Rule 37.2, counsel for all parties were provided notice of RITE's intent to file this brief more than ten days in advance of the due date.

This case presents an ideal vehicle for doing so. By providing guidance on this point, the Court would help elucidate, and deter violations of, the governing standard.

SUMMARY OF ARGUMENT

The Elections Clause of the U.S. Constitution empowers state legislatures to enact legislation governing the times, places, and manner of federal elections. *See* U.S. Const., art. I, §4, cl.1. In *Moore v. Harper*, 600 U.S. 1 (2023), this Court held that state legislatures are bound by their state constitutions when they wield this federally conferred power. Still, the Elections Clause vests state *legislatures*, not state *courts*, with the power to regulate the rules governing federal elections. State courts thus violate the Elections Clause when they "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at 36. Said differently, state courts violate the U.S. Constitution when they invalidate state election laws based on "impermissibly distorted" interpretations of state constitutional provisions. *Id.* at 38 (Kavanaugh, J., concurring) (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)).

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This Court has yet to take a case presenting the question whether a state court's interpretation of a state constitutional provision violates the Elections Clause. Until it takes such a case, litigants and courts will lack answers to constitutionally significant questions. "What *are* 'the bounds of ordinary judicial review'? What methods of

constitutional interpretation do they allow? Do those methods vary from State to State? And what about *stare decisis*—are federal courts to review state courts' treatment of their own precedents for some sort of abuse of discretion?" *Id.* at 65 (Thomas, J., dissenting).

This is a good case to begin defining the bounds of ordinary judicial review.

First, this case presents none of the vehicle flaws that are common to cases presenting Elections Clause questions. *See* Pet.22–23.

Second, the Montana Supreme Court's badly flawed decision presents numerous grounds for reversal, and thus numerous chances to refine the governing standard. That court held that two state laws—one moving the registration deadline back a day, the other banning paid ballot harvesting—violated the right to vote recognized by article II, §13 of Montana's constitution. But the court reached this conclusion only by adopting an open-ended framework that empowers Montana courts to invalidate *any* election law that is not, in a court's view, justified as a matter of policy. *See below* 9–12. What is more, the court struck down a law that another provision of Montana's constitution expressly allows. And it cabined the legislature's federally conferred authority over elections by holding that Montana's right to vote operates as a one-way ratchet. Specifically, the court held that, when the legislature adopts permissive voting rules, it may adopt less-permissive rules—even rules it could permissibly have adopted initially—*only* if the change satisfies heightened scrutiny. *See* Pet.App.

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45a. This means the legislature can somehow lose some of its constitutionally conferred legislative authority just by enacting an ordinary statute.

All told, the court adopted an open-ended, judge-empowering framework that gives state courts a discretionary veto over election laws; it held that the Montana Constitution forbids a law the same constitution expressly permits; and it held that the Montana legislature can cede its authority to legislate under the Elections Clause by wielding that authority. Every aspect of this "so exceed[s] the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by" the Elections Clause. *Moore*, 600 U.S. at 37. This Court should grant *certiorari* and say so.

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ARGUMENT

I. The Court should grant this case to help develop the framework that *Moore v. Harper* envisioned.

The Montana Supreme Court affirmed a lower-court decision enjoining two election-integrity provisions relevant here. Pet.App.2a. The "Registration Law" moved the cutoff for registering to vote by one day, from the close of polls on election day to noon the day before. Pet.App.388a (H.B. 176, §2, amending Mont. Code Ann. §13-2-304). The "Ballot Harvesting Law," upon the issuance of regulations, prohibits both providing and accepting payment for the collection of absentee ballots. Pet.App.418a (H.B. 530, §2). Both provisions apply to all elections, including federal elections for representatives and senators.

The Montana Supreme Court held that both provisions violate the right to vote as set forth in article II, §13 of Montana's constitution. *See* Pet. App.38a–60a. This case presents the question whether, in so holding, the Montana Supreme Court violated the Elections Clause. The answer is "yes."

The Montana Supreme Court's violation of the Elections Clause would be especially clear if the clause were understood as written. That clause vests "the Legislature" of each State with the power to "prescribe[]" rules governing the "Times, Places and Manner of holding elections for Senators and Representatives[.]" U.S. Const., art. I, §4, cl.1. Because the Supremacy Clause bars States from limiting the exercise of federally conferred authority, U.S. Const., art. VI, cl.2, state constitutional provisions purporting to limit the legislature's federally conferred power to regulate the time, place, and manner of elections are unenforceable. It follows that the Elections Clause forbids courts from denying effect to state laws governing federal elections on the ground that they violate state constitutional provisions. *See Moore*, 600 U.S. at 57–58 (Thomas, J., dissenting).

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The Court's precedent forecloses this easy path to summary reversal—though in a way that heightens the need for review in this case.

In *Moore v. Harper*, the Court held that "[s]tate courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause." 600 U.S. at 37. Put differently, *Moore* held

that the Elections Clause does not preempt state constitutional provisions limiting state legislatures' authority to create rules governing federal elections.

This does not mean, however, that state courts have "free rein" when reviewing election laws for compliance with state constitutions. *Moore*, 600 U.S. at 34. "As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law," this Court has "an obligation to ensure that state court interpretations of that law do not evade federal law." *Id.* And state courts evade the Elections Clause when, through indefensible interpretations of state law, they "arrogate" to themselves the federally conferred power to regulate elections. *Id.* at 36. One way they might arrogate such power is by striking down state legislation based on interpretations of state law that "so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by" the Elections Clause. *Id.* at 37. Thus, when state courts cabin state legislatures' federally conferred authority based on indefensible interpretations of state constitutions, they violate the Elections Clause.

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The majority in *Moore* declined to elaborate on what it means to "exceed the bounds of ordinary judicial review." 600 U.S. at 37. Understandably so, as the petitioners had waived the issue. *Id.* at 36. But Justice Kavanaugh wrote separately to endorse a test Chief Justice Rehnquist applied in his *Bush v. Gore* concurrence. *Id.* at 39 (Kavanaugh, J., concurring) (discussing *Bush*, 531 U.S. at 114–

15). Even the majority gave the Rehnquist concurrence some support, citing it to illustrate this Court's role in policing state court rulings for decisions that "transgress the ordinary bounds of judicial review." *Id.* at 36 (majority). Under the proposed test, state courts exceed the bounds of ordinary judicial review when they adopt an interpretation of state law that "impermissibly distort[s]" state law "beyond what a fair reading require[s]." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *accord Moore*, 600 U.S. at 39–40 (Kavanaugh, J., concurring).

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This test falls far to the "standard" side of the rule-standard continuum. *See Moore*, 600 U.S. at 40 (Kavanaugh, J., concurring). As such, it will have teeth only once it is applied to concrete situations—situations that are, as *Moore* recognized, "complex and context specific." *Id.* at 36 (majority). Each such application will contribute to a body of precedent. Using that body of precedent, this and other courts will draw analogies and "distill" more specific principles. *Id.* at 40 (Kavanaugh, J., concurring). As the amount of on-point caselaw grows over time, it will provide greater clarity regarding what state courts may and may not do. The standard will be elucidated through what amounts to the common-law method.

This common-law method can work only if *this Court* grants review of state court decisions enjoining election laws under state constitutions. If it declines to do so, state courts and litigants will be left to guess what it means to transgress the ordinary bounds of judicial review or to impermissibly distort state law beyond what a fair reading requires.

True, perhaps some litigants will *occasionally* find ways to raise Elections Clause issues in federal litigation. (For example, a federal court might avoid the question whether a state law violates the First Amendment by holding that only the state court's egregious rewriting of the law creates First Amendment concerns.) But this is the only federal court that can consider the issue with any regularity. And it is the only federal court that can take direct review of state supreme court decisions. If it fails to do so, there is no realistic prospect that other courts will do so instead.

As the remainder of this brief shows, RITE urges the Court to grant *certiorari* and reverse. But regardless of whether the Court affirms or reverses, it should grant review and create precedent. Doing so will help put meat on the governing standard's bones.

II. The Montana Supreme Court's decision impermissibly distorts state law beyond what a fair reading requires.

Whatever are the limits on the ordinary bounds of judicial review, the decision below exceeds them.

A. The lower court's interpretation of article II, §13 of the Montana Constitution is incoherent.

The decision below rests on an indefensible and incoherent understanding of article II, §13 of the Montana Constitution. That provision states: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." On its

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face, this provision confers a right to vote by protecting the "right of suffrage." But what is the scope of that right?

After the decision below, the scope of this right is entirely unclear. The majority first held that article II, §13 protects a right to vote that is broader than its federal analogue. Pet.App.11a. The court did not identify what, exactly, this right to vote consists of. Instead, it adopted the following, two-tier framework for detecting violations. *First*, laws that "impermissibly interfere[]" with the right to vote—a right the Court never bothers to define—are subject to strict scrutiny. Pet.App.24a. *Second*, all other laws—those imposing "minimal[]" burdens on the right to vote—are subject to something called "middle-tier analysis," which requires balancing the burdens the law imposes on the (undefined) right to vote against the interests the law serves. Pet.App.25a–26a. What makes interference with the right to vote "impermissible"? According to the Montana Supreme Court, it depends on "the degree to which the law infringes upon" the right to vote. Pet.App.24a. The court provided no further detail.

The first sign of trouble with this framework is the test's linguistic incoherence. One would think that "impermissible" inference is "impermissible," full stop. Not so. In Montana, under this ruling, laws that "impermissibly" interfere with voting rights may be permissible in the (admittedly unlikely) event they survive strict scrutiny. It is hard to believe that the charter of Montana's liberties recognizes a category of "permissible impermissible interference" on voting rights. Yet that is what

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the Montana Supreme Court held. That the court adopted so incoherent a framework is strong evidence that its ruling has no basis in law.

More relevant here, this framework is a barely disguised theft of the legislature's federally conferred power to regulate elections. To see why, start with tier two. Under the state court's framework, even laws imposing minimal burdens on voting rights are subjected to a balancing test in which those burdens are weighed against the interests the challenged laws serve. This sort of balancing necessarily devolves into naked policymaking. After all, there is no objective means of balancing the degree to which a law interferes with voting rights against the state interest the law serves; trying to do so would be "like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). Rather than attempting such a comparison, courts will ask whether a burden is *justified* in light of the interest it serves. And *that* question is quintessentially legislative in nature—it amounts to asking whether the law is a good idea.

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With respect to laws that "impermissibly" interfere with voting rights, strict scrutiny applies. But the Montana Supreme Court's test for identifying laws that impose an impermissible burden is entirely open-ended. Again, the court held that whether a law imposes an impermissible burden turns on "the degree to which the law infringes upon" the right to vote. Pet.App.24a. But that offers no clarity at all; one is left to wonder at what

point the "degree" of infringement constitutes an impermissible burden. And because all laws that impose a more-than-minimal burden will be deemed to have "impermissibly" interfered with voting rights, the announced framework empowers courts to categorize most any law as impermissible. In the rare case where they cannot do so, the balancing test applicable under middle-tier scrutiny gives every competent lawyer (and so every competent judge) ample flexibility to justify striking down almost any law at all.

The point here is not that the Montana Supreme Court erred—by itself, that would create no federal question worthy of this Court's attention. Instead, the problem is that the Montana Supreme Court erred in a way that violates the U.S. Constitution. The court adopted an open-ended test that "arrogate[d] to" Montana's courts "the power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36. By interpreting article II, §13 of the Montana Constitution to confer practically unlimited power to invalidate election legislation that contravenes a court's policy preferences, the Montana Supreme Court "impermissibly distorted" the Montana Constitution "beyond what a fair reading required." *Id.* at 36 (quoting *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring)). In so doing, it violated the federal constitution. This Court's review is the only means to correct that violation.

At the risk of gilding the lily, the Montana Supreme Court drove home its seizure of legislative power when it described this Court's *Anderson-*

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Burdick test as giving "undue deference to state legislatures." Pet.App.9a.

By way of background, *Anderson-Burdick* governs alleged infringements of the right to vote conferred by the U.S. Constitution. It requires balancing the burdens an election law imposes on voting rights with the state interests it serves. Over time, this Court has crafted *Anderson-Burdick* into "something resembling an administrable rule." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in the judgment). This framework "calls for application of a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote." *Id.* at 204 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

This framework, while far from deferential, eschews the sort of freeform balancing the Montana Supreme Court endorsed. Intentionally so. The restraints that *Anderson-Burdick* imposes are intended to respect the fact that the Constitution vests state legislatures and Congress—not the courts—with the power to regulate elections. *Burdick*, 504 U.S. at 433 (citing U.S. Const., art. I, §4, cl.1). By rejecting *Anderson-Burdick* as unduly deferential to legislative judgment, Pet.App.9a, the Montana Supreme Court left little doubt that it would be arrogating to itself the legislature's federally conferred authority to regulate elections.

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B. The Montana Supreme Court violated the Elections Clause.

Moving from the general to the specific, the Montana Supreme Court "impermissibly distorted state law beyond what a fair reading required," *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) (internal quotation omitted), when it held that the Registration Law and the Ballot Harvesting Law violated article II, §13 of the Montana Constitution.

Registration Law. H.B. 176, the "Registration Law," did nothing more radical than move back the deadline to register to vote. Whereas Montana previously allowed voters to register until the close of polls on election day, the Registration Law requires voters to register by noon the day before election day. In other words, the legislature moved an ordinary deadline back by a single day. It is difficult to imagine a more ordinary exercise of legislative authority.

The Montana Constitution specifically empowered the State's legislature to enact this law. Article IV, §3 provides that the legislature "*may* provide for a system of poll booth registration, and *shall* insure the purity of elections and guard against abuses of the electoral process." (emphases added). The word "may" is permissive. *Lopez v. Davis*, 531 U.S. 230, 241 (2001). That is especially clear in contexts, like this one, where the word is juxtaposed with the mandatory "shall." *Id.* This juxtaposition shows that the drafters knew how to impose mandatory duties when that is what they wanted to do. Thus, §3 can only be read as

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allowing, but not requiring, same-day ("poll-booth") registrations. The legislature may provide for such a system (as it has in the past) or not (as it did with the Registration Law).

Further, "provisions of the Constitution bearing upon the same subject matter are to … be construed together." *Bd. of Regents of Higher Ed. v. Judge*, 168 Mont. 433, 444 (Mont. 1975) (citation and internal quotation marks omitted). Accordingly, §3 of article IV and §13 of article II "should be interpreted in a way that renders them compatible, not contradictory." Antonin Scalia & Bryan A. Garner, *Reading Law* §27, p.180 (2012). Reading the two in harmony means reading the right-to-vote provision *not* to command laws (like poll-booth registration) that article IV, §3 makes discretionary.

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Notwithstanding all this, the Montana Supreme Court held that its state constitution requires election-day registration. The court's reasoning astonishes. It conceded that article IV, §3, speaks in permissive terms of the legislature's power to allow election-day registration. Pet.App. 40a. The court further admitted that §3's drafters intentionally abandoned an early draft of §3 that *required* the legislature to permit poll-booth registration. Pet.App.40a–41a. But it concluded that the Framers were motivated to abandon that mandatory language by concerns that now *support* mandating election-day registration. Specifically, the court reviewed the drafters' debate concerning §3 and divined that they abandoned the mandatory language only because they feared poll-booth registration might be administratively infeasible.

Pet.App.41a. Thus, the court concluded, the drafters really intended to require poll-booth registration *if* poll-booth registration turned out to be "workable," as a majority of the Montana Supreme Court believes it is. *Id.* According to the Montana Supreme Court, that unenacted intent is binding and forecloses reading "may" as vesting the legislature with full discretion to allow, or not, election-day registration. Pet.App.41a–42a.

To describe the reasoning is to refute it. RITE will not belabor this absurdity any further, which is ably addressed by Secretary Jacobsen's *certiorari* petition and the dissent below. *See* Pet.20–21; Pet.App.79a–83a (Sanderfur, J., concurring in part and dissenting in part).

RITE will, however, address an additional justification on which the Montana Supreme Court's decision rests: its conclusion that Montana's legislature, by enacting an ordinary statute permitting election-day registration, irrevocably limited its constitutional authority to enact an earlier deadline through similarly ordinary legislation.

The state court held that Montana's legislature, when it expands the opportunity to vote or register, may "backtrack" *only if* its "new law meets the correct level of scrutiny." Pet.App.45a. Under this adverse-possession theory of voting rights, any rollback deemed "impermissibly" burdensome—an undefined term that the court can seemingly apply to any non-*de minimis* burden, *see above* 10–11—will be upheld only if it survives strict scrutiny. Even rollbacks that impose a "minimal" burden will be upheld only if they pass medium-tier

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scrutiny, which entails an *ad hoc* balancing of the burden on voting rights and the state interest promoted. *See above* 10. The court determined that the Registration Law's day-before-election deadline "impermissibly interfere[d]" with voting rights relative to the pre-existing election-day deadline. Pet. App.38a. As a result, the court applied strict scrutiny and held the Registration Law unconstitutional. Pet.App.51a.

On this novel theory of the law, no election-related statute is an act of legislative grace. There is no such thing as "ordinary" legislation. Every such enactment is, in reality, a constitutional amendment, because every such law becomes part of the "right to vote." What the legislature may give on its own, it may take away only with court approval.

The adverse-possession theory turns article II, §13 into a "one-way ratchet," under which a legislature is always free to *relax* voting regulations but almost always "prohibited … from later modifying" those relaxed rules "in response to changing circumstances." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016) (rejecting theory as incompatible with the legislative power over elections). This one-way ratchet means the Montana legislature is now constitutionally barred from rolling back at least some laws, like the Registration Law, it had no constitutional obligation to adopt. For example, even if Montana's legislature never had to adopt a close-of-polls deadline, the legislature lost the freedom to alter that deadline upon adopting it. Similarly, laws that would have been permissible if enacted on a blank slate may be impermissible if enacted to amend a more

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generous law. Thus, even if the Registration Law's noon deadline would have been permissible if adopted at the State's founding and retained ever since, the day-before-election-day deadline is *unconstitutional* in light of the close-of-polls deadline it replaced.

The Montana Supreme Court's reasoning is not "bad constitutional law"; rather, "it is *not* constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 947 (1973). The effect of this theory, under which the legislature can lose legislative authority by legislating, is to transfer authority over election regulation to the courts. Montana's judicial branch, applying the malleable two-tier framework discussed above, now has free rein to veto election laws that it considers "impermissibly" burdensome (an undefined term that almost any law could seemingly satisfy) or that imposes "minimal" burdens on voting that the court thinks unjustified based on the interests the law promotes (a naked policy determination). *See* Pet.App.9a (criticizing *Anderson-Burdick*, which is itself a balancing test, on the ground that it permits too much deference to legislative judgment). Put in *Moore*'s terms, the Montana Supreme Court "arrogate[d] to [itself] the power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36. This Court should say so.

Ballot Harvesting Law. The decision below additionally held that Montana's legislature violated article II, §13 when it adopted the Ballot Harvesting Law. *See* Pet.App.51a–60a. That law

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requires the Secretary of State to promulgate rules prohibiting anyone from offering or accepting "a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots." Pet.App.418a. States around the country ban ballot harvesting, and for good reason. *See Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 685–86 (2021). The Ballot Harvesting Law does not do even that. It simply prohibits people from being *paid* to harvest ballots. Yet the Montana Supreme Court concluded that this infringed the right to suffrage.

The Montana Supreme Court's analysis shows just how open-ended its right-to-vote framework is. The court determined that the law "impermissibly interferes" with the right to vote. It reached this conclusion based solely on the burden the law supposedly imposes on a subset of "Native Americans," namely, those who live on reservations. Pet.App. 55a. These individuals, the court said, "disproportionately rely on ballot collection to vote, in part due to a history of discrimination around voting ..., and also the unique circumstances in Indian country that make it much more difficult to access polling places or post offices." *Id.* (footnote omitted). For proof, the court noted expert testimony that on-reservation turnout dropped between one election (in 2016) predating the Ballot Harvesting Law and another (in 2020) *mostly* postdating it. Pet.App.56a. (The qualifier "mostly" is needed because the Ballot Harvesting Law was enjoined in the days preceding the 2020 election. *Id.*) But the expert found just a 3.5% drop in turnout among this single group of voters, *id.*, and the court

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failed adequately to account for the ways that people might adapt to keep voting absentee in a world without *paid* ballot harvesting.

So, what makes this law impermissibly burdensome? Nothing but the court's gestalt, it seems. Since this same gestalt could have been used to invalidate the law under the *ad hoc* test applicable under middle-tier scrutiny, the law stood no chance of ever being upheld. The same will be (or at least could be) true of any other law that contravenes the Montana Supreme Court's views on voting policy.

All told, the Montana Supreme Court's handling of the Ballot Harvesting Law is further proof that the right-to-vote framework gives Montana's judiciary the power to regulate the times, places, and manner of elections. The decision below "arrogate[s]" to courts authority that the Elections Clause vests in state legislatures. *Moore*, 600 U.S. at 36. According to *Moore*, that violates the Elections Clause.

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CONCLUSION

This Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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