No. 24-220

In the Supreme Court of the United States

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State,
Petitioner,

v.

MONTANA DEMOCRATIC PARTY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed under the Constitution. America First Legal has a substantial interest in this case because state judiciaries have been repeatedly flouting the Elections Clause not only in cases like the below—involving commonsense election integrity measures—but also in congressional redistricting disputes. This case presents an ideal vehicle for the Court to set bounds on the authority of state judiciaries over federal election regulations.*

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* Under Rule 37.2, *amicus* provided timely notice of its intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

No matter how the Court answers the specific question of whether the decision below transgressed the ordinary bounds of judicial review, it is time for the Court to confirm how to ask that question under the federal Constitution. The Constitution says that the "Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. So too the "Manner" of appointing presidential electors. *Id.* art. II, § 1, cl. 2. This was "a deliberate choice" by the founding generation "that this Court must respect." *Moore* v. *Harper*, 600 U.S. 1, 34 (2023).

Declining to adopt a standard to decide when state courts have gone too far in overriding the state legislature on election matters—by denying certiorari in cases raising this issue—is functionally the same as excising this "deliberate choice" from the Constitution. *Ibid.* Both courses give state courts the "free rein" that the Constitution forbids. *Ibid.* Only this Court can rein these courts in. It should do so, at minimum by adopting an appropriate standard that will put state courts on notice that they cannot transgress the bounds of ordinary review.

This brief makes two points in support of certiorari.

First, the Constitution requires a standard to review state court departures from ordinary review, even if that standard requires federal courts sometimes to make difficult legal determinations. Adopting an appropriate standard to consider departures from the laws enacted by state legislatures would not mean that those legislatures have no

oversight. In the mine-run case, state courts would continue to exercise ordinary review of legislative enactments. Any concern that legislatures might adopt extreme measures under a new standard is belied not only by history—which shows that States like Montana are responsibly policing elections—but also by the backstop provided by the federal Constitution itself. The Elections Clause bestows on Congress power to "make or alter" state regulations of the "Manner" of congressional elections. U.S. Const. art. I, § 4, cl. 1. Plus, state legislative choices would remain subject to other federal constitutional provisions and appropriate state procedures.

Second, this case shows the importance of adopting a standard that will limit state court excesses. Many states have generalized free-and-open election constitutional provisions like Montana's. Many states also have ballot harvesting and voter registration deadline laws like Montana's. These laws are important, serving a significant state interest in ensuring election integrity. Declining to adopt a standard would leave these important interests under-protected, thereby undermining States' efforts to protect the elections that are at the core of our constitutional order.

Thus, the Court should vindicate the Constitution's command by granting certiorari and reminding state courts that their power to override legislative enactments about federal elections is constrained.

REASONS FOR GRANTING THE WRIT

I. The Constitution gives state legislatures broad authority to regulate federal elections—with constraints.

The Elections and Electors Clauses confer on state "Legislature[s]" the power to regulate the "Manner" of federal elections. U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. For instance, the Elections Clause "grants to the States broad power to prescribe the procedural mechanisms for holding congressional elections." *Cook* v. *Gralike*, 531 U.S. 510, 523 (2001) (cleaned up). When a state legislature enacts laws about these elections, it "is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under" the Constitution. *Bush* v. *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam). Still, how a state legislature chooses to exercise this power is subject to several constraints.

First, this power extends as far as the Constitution's text provides: to the "Times, Places and Manner of holding Elections for Senators and Representatives," along with the "Manner" of appointing electors, which cannot include any "Senator or Representative, or Person holding an Office of Trust or Profit under the United States." U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2; see, *e.g.*, *Cook*, 531 U.S. at 523–24.

Second, states' power to regulate federal elections is subject to federal constitutional constraints, mainly in the First and Fourteenth Amendments. See, *e.g.*, *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992);

Anderson v. *Celebrezze*, 460 U.S. 780, 789 (1983); *Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968).

Third, states' power is subject to federal *statutory* constraints, including "the Voting Rights Act" "and other federal laws." *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 811 n.20 (2015). The Elections Clause expressly says that "the Congress may at any time by Law make or alter [state] Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Congress has used "this authority" to enact statutes pertaining to, for instance, redistricting. *Branch* v. *Smith*, 538 U.S. 254, 266 (2003) (discussing 2 U.S.C. § 2a).

Fourth, state legislatures' power is constrained by state constitutional and statutory provisions, including provisions that may be interpreted and applied by the state courts.

But this fourth set of constraints is subject to its own constraint, which stems from the Constitution's allocation of power to state *legislatures* to set the rules for federal elections. Because of this constitutional requirement, "the text of the election law itself" "takes on independent significance" as a matter of federal law, beyond any review or "interpretation by the courts of the States." *Bush* v. *Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). State legislatures' "authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct

of a fair election." *Republican Party of Pennsylvania* v. *Boockvar*, 141 S. Ct. 1, 2 (2020) (statement of Alito, J.).

Several implications arise about the consequences of adopting an appropriate standard to review state court decisions in this area, all of which point to the need for this Court to grant certiorari and provide an appropriate constitutional standard.

First, some have expressed a fear of out-of-control state legislatures freed from the shackles of state judicial review. But there is little reason to fear that ultimate federal review—particularly the deferential review proposed by Chief Justice Rehnquist and echoed by *Moore* and Petitioner here—would lead to any such crisis. There is no evidence that state legislatures are seeking to overregulate election procedures. And even if there were, all the other constraints identified above, including the final backstop of superseding congressional action, would still exist.

Second, others have expressed concern about the difficulties of federal judicial interpretation of state constitutional provisions, including possible disagreements over the standard of review, interpretive methodology, and *stare decisis*. See, *e.g.*, *Moore*, 600 U.S. at 64–65 (Thomas, J., dissenting, joined by Gorsuch, J.). No doubt, hard questions will follow, and judges will disagree about their answers. But that is no reason to decline to apply the Constitution. "[A]ny time this Court turns" "back toward the Constitution's original public meaning, challenging questions may arise across a large field of cases and controversies." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 627 (2021) (Gorsuch, J.,

concurring in judgment, joined by Thomas and Alito, JJ.) "But that's no excuse for refusing to apply the original public meaning in the dispute actually before" the Court. *Ibid.*

Initially, the Elections Clause is violated when a state court unreasonably substitutes its own judgment for that of the state legislature, regardless of whether the basis for that substitution is bad statutory interpretation or bad constitutional interpretation. Either way, the "Legislature" has been deprived of its (federal) constitutional authority. So here, as in other "areas," "the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law." *Bush*, 531 U.S. at 114–15 & n.1 (Rehnquist, C.J., concurring); see also *Democratic Nat'l Comm.* v. *Wisconsin State Legislature*, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J.) ("[T]he text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws.").

That state constitutional standards might be "fewer and less definite" than statutory ones, *Moore*, 600 U.S. at 64 (Thomas, J., dissenting), may mean that the deference due to state judicial interpretation of vague provisions is greater. Of course, this Court routinely interprets broad federal constitutional provisions and applies them to specific cases, so it cannot be said that it lacks this competence. For issues like partisan gerrymandering, see *ibid.*, the primary question might be whether the state constitutional provision applies to that topic at all. If the Court is "not equipped" to answer any follow-up question about whether forbidden gerrymandering occurred in a

particular case, *ibid.*, so be it. That is no reason to avoid the inquiry entirely.

Likewise, there may be variations across States in "methods of constitutional interpretation" and "*stare decisis*," *id.* at 65, though it is unclear how much variation exists. See A. Gluck, *The States As Laboratories of Statutory Interpretation*, 119 Yale L.J. 1750, 1812 (2010) (finding that state courts studied have "reach[ed] a relatively stable methodological consensus").

Of course, these matters occasion disagreement on this Court even when it comes to federal law. Still, it is hard to imagine that whatever state variations might exist on these issues would be outcome-determinative on a deferential standard of review. In any event, as Chief Justice Rehnquist noted in *Bush*, the Court has delved into these topics too in other areas of law. 531 U.S. at 114 (concurring op.); see *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 456 (1958) (explaining that the Court was "unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings"); see also, *e.g.*, *Walker* v. *Martin*, 562 U.S. 307, 317 (2011). So potential difficulties and disagreements about methodology and *stare decisis* are no reason to avoid the Constitution's text.

That leaves the biggest question: "What *are* 'the bounds of ordinary judicial review'?" *Moore*, 600 U.S. at 65 (Thomas, J., dissenting). This case would let the Court answer that question. Again, the answer may not be easy or obvious, though the various articulations of an appropriate rule seem similar. See

Moore, 600 U.S. at 38–39 (Kavanaugh, J., concurring); *Republican Party of Pennsylvania* v. *Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting) (emphasizing Chief Justice Rehnquist's reference to "overriding 'the clearly expressed intent of the legislature'" (quoting *Bush*, 531 U.S. at 120 (concurring op.))).

At any rate, there is no neutral choice. If this Court continues to decline to set a standard, it will avoid some difficult questions, some of which will arise in time-sensitive cases. The cost? Under-protection of a right that the Founders thought important enough to make express in the Constitution: that the people in each State through their *Legislature* could set the parameters of federal elections. "To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from" the legislature's lawful pronouncements, "would be to abdicate [this Court's] responsibility to enforce the explicit requirements of Article II." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring). Enforcing those requirements would not give federal courts free rein to interfere in state proceedings, nor would it give state legislatures free rein to regulate. It would simply restore the Constitution's balance of powers.

II. This case epitomizes the need for an appropriate standard.

This case also presents a good opportunity for the Court to adopt an appropriate constitutional standard because it epitomizes the potential problems that may otherwise arise. Election integrity is critical to our constitutional structure. Ballot harvesting laws and

voter registration deadlines like Montana's serve a vital purpose in preserving that integrity, which is why similar laws are found nationwide. At the same time, broad state free-and-open-election constitutional provisions like Montana's are also commonplace. These provisions present special opportunities for local mischief. By setting an appropriate standard for federal courts to ensure compliance with the federal Constitution's conferral of authority on state *legislatures*, the Court would ensure that state election integrity laws are not improperly discarded.

Elections are "of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979). Thus, states "indisputably [have] a compelling interest in preserving the integrity of [their] election process." *Purcell* v. *Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); see *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992) ("[A] State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process."). Laws designed to protect the integrity of the election, at any stage in the process, fulfill a critical policy goal: instilling public confidence in the electoral process, which "encourages citizen participation in the democratic process." *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (plurality op.); see also *Purcell*, 549 U.S. at 4 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."). And, of course, a "State may take action to prevent election fraud without waiting for it to occur and be detected

within its own borders." *Brnovich* v. *Democratic Nat'l Committee*, 594 U.S. 647, 686 (2021).

Election laws about ballot harvesting and voter registration timing serve this compelling interest in election integrity.

Start with ballot harvesting rules. As the Carter-Baker Commission on Federal Election Reform explained, "[a]bsentee ballots remain the largest source of potential voter fraud," and "[v]ote buying schemes are far more difficult to detect when citizens vote by mail." *Report of the Commission on Federal Election Reform* 46 (Sept. 2005), https://perma.cc/H6KN-Y5PR. The Commission thus recommended that States "reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Ibid.*; see also *Carter Center Statement on Voting by Mail for 2020 U.S. Elections* (May 6, 2020), https://perma.cc/6D3B-B2M4 (similar); *Four People Plead Guilty in North Carolina Ballot Probe of 2016 and 2018 Elections*, Associated Press, https://perma.cc/5TU4-R5LV (Sept. 26, 2022) (noting a ballet harvesting operation that led to an election do-over); cf. *Alabama State Conf. of the NAACP* v. *Marshall*, No. 2:24-CV-00420-RDP, 2024 WL 3893426, at *22 (ND Ala. Aug. 21, 2024) ("[T]he argument that combatting voter fraud is an insufficient reason to enact absentee voter security measures is wholly groundless.").

Many states have done just that, restricting who may return absentee ballots to guard against improper influences on voting by a paid harvester. See, *e.g.*, Ala. Code § 17-11-9 (only the voter may

return); Ariz. Rev. Stat. § 16-1005 (a family member, household member or caregiver); Conn. Gen. Stat. Ann. § 9-140b (immediate family member or designated caregiver); Ken. Rev. Stat. § 117.0863 (a family member, household member or caregiver); Mass. Gen. Laws Ann. ch. 54, § 92 (family member); Mich. Comp. Laws Ann. § 168.764a (immediate family member or household member); N.M. Stat. Ann. § 1-6-10.1 (immediate family member, household member or caregiver).

Likewise, Election Day voter registration carries significant risks of duplicate voting, voting by ineligible voters, and burdening poll workers. See *ACORN* v. *Bysiewicz*, 413 F. Supp. 2d 119, 123 (D Conn. 2005) (holding that a "pre-election registration requirement is amply justified by several important and legitimate state interests, including the State's interest in minimizing voter fraud (as well as the perception of a vulnerability to fraud) and in avoiding confusion and chaos on election day itself"); see generally A. Pingel, *The Pitfalls of Same-Day Registration*, America First Policy Institute (Feb. 26, 2024), https://perma.cc/82BM-NF9Z. So most States do *not* permit Election Day voter registration. See *Same-Day Voter Registration*, NCSL (Sept. 10, 2024), https://perma.cc/3DBL-7X9R; cf. *Marston* v. *Lewis*, 410 U.S. 679, 680 (1973) ("[A] person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot.").

Many of the same States that have adopted commonsense regulations to preserve election integrity also have a state constitutional provision like Montana's generally guaranteeing "free and equal"

elections. Many say little more than "All elections shall be free and equal." See Del. Const. art. I, § 3; Ill. Const. art. III, § 3; Ind. Const. art. 2, § 1; Ky. Const. § 6; Or. Const. art. II, § 1; see also *Free and Equal Election Clauses in State Constitutions*, NCSL (Nov. 4, 2019), https://perma.cc/WX8L-7KBJ ("30 states have some form of constitutional requirement that elections be 'free.'").

This Court has encountered such provisions before, and several Justices have emphasized the danger that they have sometimes been used by state courts "to override even very specific and unambiguous rules adopted by the legislature for the conduct of federal elections." *Degraffenreid*, 141 S. Ct. at 739 (Alito, J., dissenting). An ambitious deployment of a broad constitutional provision to transfer power over election mechanisms from state legislatures to state courts threatens the federal constitutional scheme. And because these state constitutional provisions are widespread, significant mischief to routine election integrity measures is possible—a problem exacerbated if this Court fails to provide a federal backstop.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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