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IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

Montana Democratic Party, Mitch Bohn, Plaintiffs, v. Christi Jacobsen, in her official capacity as Montana Secretary of State, Defendant.	Case No. DV 21-0451 **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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INTRODUCTION

In the wake of the highest voter turnout in nearly fifty years, the Montana Legislature enacted several laws that stripped longstanding and widely used voting rights from Montana voters: the Election Day Registration Ban eliminated the State's turnout-driving tradition of permitting voters to register on election day; the Voter ID Restrictions walked back the decades-long use of student ID cards as proof of identity; and the Renewed Ballot Assistance Ban outlawed organized ballot assistance programs. Plaintiffs the Montana Democratic Party (the "Party") and Mitch Bohn challenge those laws because they make it more difficult for thousands of Montanans to vote and do not meaningfully advance any legitimate or credible government interests.

While not disputing the sufficiency of Plaintiffs' allegations regarding the Renewed Ballot Assistance Ban, the Secretary argues that the claims regarding the Election Day Registration Ban and the Voter ID Restrictions (together, the "Voting Restrictions") should be dismissed outright.[1] But her arguments hinge on the Court's willingness to discard the factual allegations of the Amended Complaint ("Complaint") and to reject longstanding precedent. *First*, the Secretary claims that the Party lacks standing based on her incorrect view that it only asserts claims on behalf of others. She is wrong as a matter of law, but her argument also entirely ignores the Party's allegations of concrete harm to its *own* interests. *Second*, she claims that Plaintiffs have not stated cognizable Equal Protection or right-to-vote claims, but her argument flouts decades of Montana Supreme Court precedent, improperly disputes Plaintiffs' factual allegations (which must be taken as true at this stage in the proceedings), and misreads the Montana Constitution. *Third*, the

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[1] The Secretary does not seek to dismiss Plaintiffs' challenge to the Renewed Ballot Assistance Ban, *see* Am. Compl. ¶¶ 136-160, and does not challenge either the Party's or Plaintiff Bohn's standing to bring those claims.

Secretary attempts to weaponize the Elections Clause of the U.S. Constitution, arguing that it prevents *state* courts from applying *state* constitutions to *state* election laws. That remarkable attempt to eviscerate judicial review has been roundly rejected by every court that has considered it, and this Court should do the same.

At its core, the Secretary's Motion to Dismiss ("Motion") attempts to cast this case as a political dispute in which the courts play no proper role. But Montana courts have an obligation to ensure that laws governing Montanans—particularly those affecting fundamental rights—comport with basic constitutional guarantees, regardless of whether the dispute implicates partisan interests. The Secretary's Motion should be denied.

STANDARD OF REVIEW

Motions to dismiss are construed in the light most favorable to the nonmoving party. *Buckles ex rel. Buckles v. Cont'l Res., Inc. Buckles by & through Buckles v. Cont'l Res., Inc.*, 2017 MT 235, ¶ 9, 388 Mont. 517, 402 P.3d 1213. The complaint is construed broadly and favorably towards the plaintiff, and all well-pled facts are taken as true. *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316. The complaint should not be dismissed unless "it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." *Buckles ex rel. Buckles*, ¶ 9.

ARGUMENT

I. The Party has standing to challenge the Voting Restrictions.

The Party has standing in its own right and on behalf of its affiliated voters. "[T]he threshold for standing is not high . . . ." *Bd. of Trustees, Cut Bank Pub. Sch. v. Cut Bank Pioneer Press*, 2007 MT 115, ¶ 42, 337 Mont. 229, 160 P.3d 482 (James, J., concurring). The complaining party need only allege a past, present, or threatened injury to a property or civil right. *Armstrong*

v. State, 1999 MT 261, ¶ 6, 296 Mont. 361, 989 P.2d 364. And although the harm alleged must affect the individual petitioner particularly, it may be common to the general public. *Id.* ¶¶ 6-7.

An organization may establish standing by alleging a direct injury to its own interests (organizational standing) or by pointing to an injury to the interests of its members (associational standing). *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 42, 360 Mont. 207, 255 P.3d 80. Here, the Party has sufficiently alleged facts establishing both. The Secretary's arguments to the contrary disregard the allegations in the Complaint and misconstrue—or ignore outright—Montana Supreme Court precedent.[2]

A. The Party has organizational standing.

The Party has organizational standing because it is directly injured by the Voting Restrictions. An organization "may vindicate whatever rights and immunities the organization itself may enjoy." *Heffernan*, ¶ 43. Montana courts have repeatedly recognized that "[e]conomic harm caused by, or likely to be caused by, an alleged illegality is sufficient to establish standing to assert an otherwise cognizable claim for relief." *Larson v. State ex rel. Stapleton*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241 (collecting cases). As a result, a political party has standing to challenge an alleged illegality that would cause the party to "incur otherwise unnecessary expense and burden." *Id.* ¶ 47.

The Complaint alleges precisely the type of direct, economic injuries to the Party recognized in *Larson*. The Party invests significant resources in voter engagement efforts with the goal of registering and turning out eligible Democratic voters. Am. Compl. ¶ 9. The Voting

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[2] Because organizational and associational standing each provide an independent basis for standing, if the Court finds Plaintiffs have standing under one theory, it need not address the other. *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 2014 MT 69, ¶ 23, 374 Mont. 229, 328 P.3d 586, *overruled on other grounds by Warrington v. Great Falls Clinic, LLP*, 2020 MT 174, ¶ 23, 400 Mont. 360, 467 P.3d 567.

Restrictions will require the Party to "expend additional resources to contact unregistered voters earlier in the election cycle," and "expend significant resources on an information campaign" to help ensure that its members understand the changes in the law, all of which will require the Party to "reallocate resources from other efforts" and "divert more funds from its other critical priorities." *Id.* ¶¶ 11-13. Such allegations "evince[] a direct causal connection in fact between the alleged illegality and definite, specific, and substantial resulting harm to the Democratic Party itself." *Larson*, ¶ 47.

Instead of acknowledging these allegations, let alone *Larson*'s conclusion that such injuries confer standing, the Secretary asserts that the Party cannot sue on its own behalf because it has no right to vote. Mot. at 9. But that argument ignores the direct economic harm to the Party and long-standing court decisions permitting organizations, including political entities, to allege violations of voting rights. *See, e.g.*, *Driscoll v. Stapleton*, 2020 MT 247, ¶ 25, 401 Mont. 405, 473 P.3d 386 ("*Driscoll II*") (permitting the Montana Democratic Party to challenge laws as violating due process and the right to vote); *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 15, 314 Mont. 314, 65 P.3d 576 (permitting municipal plaintiffs to challenge a law as violating equal protection, the right to vote, and due process); *see also Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 829 (D. Mont. 2020) (holding political campaign had organizational standing to challenge voting laws as unconstitutional burdens on the right to vote). Those cases acknowledge that political parties suffer injuries *as organizations* when individuals they serve are deprived of political rights—a cognizable injury for standing purposes. *Larson*, ¶ 47.[3]

[3] Although the Party's standing was not challenged in *Driscoll*, "[q]uestions of standing must be addressed *sua sponte* even if not raised by a litigant." *Schoof v. Nesbit*, 2014 MT 6, ¶ 12, 373 Mont. 226, 316 P.3d 831. The Secretary points out that one dissenting justice questioned the Party's standing in a footnote, Mot. at 6-7 (citing *Driscoll II*, ¶ 45 n.7 (Sandefur, J., concurring and

The Secretary conflates several independent standing doctrines when she asserts that the Party "lacks organizational standing" to pursue claims "on behalf of individuals." Mot. at 9. The Party asserts organizational standing based on direct injuries to its *own* interests, irrespective of the injuries that its individual voters also suffer. The Secretary's assertion relies on a single case, Mot. at 9 (citing *Baxter Homeowners Association v. Angel* 2013 MT 83, ¶ 16, 369 Mont. 398, 298 P.3d 1145), *which is not about organizational standing at all.* In *Baxter*, the Court addressed an *individual* administrative complainant whose only basis for claiming standing before the Human Rights Bureau was through third parties; as the Court expressly noted, the plaintiff was "not an organization" and did not claim a direct "personal" injury. *Id.* ¶ 18. As a result, *Baxter*'s holding is limited to whether an *individual* can file an *administrative* complaint asserting discrimination claims on behalf of unidentified third parties and is irrelevant to the Party's organizational standing to assert its own injury.[4]

B. The Party has associational standing.

Although the Court need not look beyond organizational standing, discussed *supra* I.A, the Party also has associational standing. "[E]ven without a showing of injury to the association itself," it is "well established" that an association may have standing to bring suit on behalf of its members. *Heffernan*, ¶ 43. To do so, the organizational plaintiff must show "(a) at least one of its members would have standing to sue in his or her own right, (b) the interests the association seeks to protect are germane to its purpose, and (c) neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit." *Id.*

dissenting)), but that merely shows that standing was addressed, and that the dissenter's lone view failed to persuade a majority of the court.

[4] The Secretary also mistakenly asserts the test by which the court determines whether the Party has standing to assert harms to individual voters. Mot. at 9-10. That question is answered by looking to the associational standing doctrine—under which the Party has an independent basis for standing based on the harms to its members—not third-party standing. *See infra* I.B.

The Party satisfies all three prongs. *First*, the Complaint demonstrates that the Party's members would have standing to sue in their own right. Am. Compl. ¶ 14 (describing the burdens the Voting Restrictions impose on the Party's members and constituents). *Second*, the Complaint is replete with allegations that, by making it more difficult for its members to vote, the Voting Restrictions strike at the very heart of the Party's purpose. For example, the Restrictions "limit the effectiveness of the Party's GOTV program, making it harder for Montanans who would vote for Democratic candidates to successfully register to vote or return their ballots, and thereby making it more difficult for the Party to accomplish its mission of electing members of the Democratic Party in Montana." *Id.* ¶ 13. *Third*, adjudication of claims seeking statewide declaratory and injunctive relief from an unconstitutional law does not require the individual participation of each allegedly injured voter, and there is no reason to believe that there are individualized sets of facts individuals could offer that would streamline (rather than complicate) adjudication of Plaintiffs' claims. *Heffernan*, ¶ 46 ("[A] request for declaratory and injunctive relief does not require participation by individual association members.").

The Secretary's contrary arguments lack merit. First, her claim that individual voters must participate because the Party possesses no individual right to vote, Mot. at 9, ignores the entire point of the associational standing doctrine: an organization can vindicate the rights of its members. *See Heffernan*, ¶ 43 ("The doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.") (cleaned up). The Secretary's citation to *Heffernan* only undermines her position. *Id.* ¶ 44 (explaining that organizations are in a better position "to vindicate the interests of its members" because, in additional to "financial resources," organizations "often have specialized expertise and research resources relating to the subject matter of the lawsuit that

individual plaintiffs lack"). Moreover, the Secretary's contention that Plaintiffs must name an individual member ignores clear contrary language in *Heffernan* and instead relies on *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 556 (1996), Mot. at 8, but that court's holding was premised on the plaintiffs' request for monetary damages, which is not at issue here. *See Heffernan*, ¶ 46 (contrasting declaratory and injunctive relief with the monetary relief sought in *Union Foods* because there is "no risk the requested relief would fail to inure to the benefit of the members on whose behalf injury is claimed").

The Secretary's second argument, that protecting the interests of young, elderly, indigent, and indigenous voters is not germane to the Party's purpose because those voters are not necessarily Democratic voters, Mot. at 8, requires the Court to disregard the factual allegations of the Complaint, including that these categories of voters *do* include Democratic voters, Am. Compl. ¶ 14, and that a key part of the Party's mission is "ensuring that *all* voters have a meaningful opportunity to cast ballots in Montana," *id.* ¶ 8 (emphasis added). The Court is required not only to accept all allegations in the Complaint as true at this stage, *Plouffe*, ¶ 8, but also construe all reasonable inferences in the Party's favor, *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692. The Secretary would turn that doctrinal rule on its head, instead urging this Court to accept the Secretary's unbelievable inference that the constituencies impacted by the challenged laws do not include Democrats. The allegations in the Complaint are more than sufficient to establish standing at this stage. *See Donald J. Trump for President*, 491 F. Supp. 3d at 827 ("[T]he interest at stake—ensuring that Republican voters can exercise their franchise—is germane to the Organizational Plaintiffs' respective purposes.").

Relatedly, the Secretary suggests that the Party cannot demonstrate associational standing because it does not allege that the Voting Restrictions "target" Democratic voters. Mot. at 8. But

the Secretary fails to cite any authority supporting her argument that intentional discrimination is "the only claim that [the Party] would even arguably have standing to pursue," Mot. 8-9, nor are Plaintiffs aware of even a single case suggesting that political parties have standing to challenge election laws only if they allege intentional, partisan discrimination. Montana case law instead confirms that the Party has associational standing to assert the rights of its members. *Heffernan*, ¶ 43.

II. Plaintiffs have stated plausible claims for relief.

The Secretary moves for dismissal of three of Plaintiffs' eight causes of action: Count I, which alleges that the Voting Restrictions violate the Equal Protection Clause, and Counts II and III, which allege that the Voting Restrictions each independently violate the right to vote. The Secretary does not even attempt to argue that any of the Voting Restrictions can survive strict scrutiny, instead arguing that this Court should adopt novel standards that would insulate unconstitutional laws from judicial review altogether.

A. Legal Standard

Article II, § 13 of the Montana Constitution provides that "[a]ll 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." This right to vote is a fundamental right under the Montana Constitution. *See State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 113 P.3d 281 ("A right is 'fundamental' under Montana's Constitution if the right . . . is found in the Declaration of Rights."); *accord Oberg v. Billings*, 207 Mont. 277, 674 P.2d 494 (1983) ("Examples of fundamental rights include privacy, freedom of speech, freedom of religion, right to vote and right to interstate travel."). Any law that "implicates" Montanans' fundamental rights, including the right to vote, "must be strictly scrutinized" and can survive scrutiny only "if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be

taken to achieve the State's objective." *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236.

B. Plaintiffs have sufficiently pled that the Voting Restrictions violate the Equal Protection Clause (Count I).

Plaintiffs adequately allege that the Voting Restrictions violate the Montana Constitution's Equal Protection Clause by disproportionately and disparately abridging the right to vote of young Montana voters. Montana courts evaluate equal protection violations by following a three-step process: (1) identifying the classes involved and determining if they are similarly situated; (2) determining the appropriate level of scrutiny to apply to the challenged statue; and (3) applying that level of scrutiny to the statute. *Hensley v. Montana State Fund*, 2020 MT 317, ¶ 18, 402 Mont. 277, 477 P.3d 1065. A class is similarly situated if, after isolating the quality that is the target of the discrimination, the discriminated-against class is equal in other respects to the other class. *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 21, 314 Mont. 314, 65 P.3d 576. If the alleged differential treatment implicates a fundamental right, strict scrutiny applies and the challenged provision can only survive if the state can show that the law is "narrowly tailored to serve a compelling interest." *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445.

The Complaint pleads facts that, accepted as true, establish that the Voting Restrictions treat similarly-situated voters differently and that they cannot survive strict scrutiny. *First*, the Complaint alleges that the Voting Restrictions treat young Montanans differently from other voters because the Restrictions constrict identification and voting methods disproportionately used by them. Am. Compl. ¶¶ 119-20; *id.* ¶¶ 122-123 (alleging that the restrictions were designed to place "heightened burdens on Montana's youngest voters"). *Second*, Plaintiffs allege that the differential treatment implicates the fundamental right to vote, thus triggering strict scrutiny under

longstanding Montana precedent. Am. Compl. ¶¶ 124-125, 129. *Finally*, the Complaint sufficiently pleads that the Voting Restrictions cannot survive strict scrutiny because they are neither narrowly tailored nor serve a compelling state interest. *See, e.g.*, Am. Compl ¶¶ 49-50 (alleging the Registration Ban does not enhance integrity of the voter rolls); *id.* ¶ 51 (alleging the Registration Ban will not prevent voter fraud or administrative problems because election day registration has not led to either); *id.* ¶ 75 (alleging the Voter ID restrictions will not prevent voter fraud because there is no evidence that use of Student IDs or registration confirmations has led to fraud); *see also id.* ¶¶ 124-125, 129. These allegations state an Equal Protection claim.

The Secretary's contrary contention largely hinges on her argument that the Court should depart from decades of precedent and apply the lowest level of constitutional review. *Compare* Mot. at 12-14 (arguing that rational basis scrutiny applies), *with Finke*, ¶ 23 (applying strict scrutiny to law violating equal protection in voting). The Secretary never grapples with the binding precedent establishing that strict scrutiny is appropriate where, as here, the differential treatment implicates a fundamental right. *See, e.g., Snetsinger*, ¶ 17 ("Strict scrutiny applies [to an Equal Protection challenge] if a . . . fundamental right is affected."); *Finke*, ¶ 23; *Driscoll v. Stapleton*, No. DV 20 408, 2020 WL 5441604 at *6 (Mont. Dist. May 22, 2020) ("*Driscoll I*") (applying strict scrutiny to claims alleging violation of the right to vote).[5]

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[5] The Secretary argues that applying strict scrutiny would render unconstitutional even laws that make voting *easier*. Mot. at 13-14. But that slippery slope argument has been repeatedly rejected. *See, e.g., Donald J. Trump for President*, 491 F. Supp. 3d at 836-37 (dismissing the plaintiff's equal protection claim because a system "designed to ensure that all eligible Montanans can vote in the upcoming election" did not "condone or facilitate any disparate treatment of Montana voters"); *Short v. Brown*, 893 F.3d 671, 677-78 (9th Cir. 2018) (holding a law that "makes it easier for some voters to cast their ballots by mail" does not burden the right to vote). The Secretary wrongly implies that the court in *Donald J. Trump for President* refused to apply strict scrutiny, Mot. at 14, when in reality the court merely noted that finding an equal protection violation in "the use of a mail ballot system in some counties and not others" would make hash of electoral systems. *Donald J. Trump for President*, 491 F. Supp. at 837. No similar challenge is at issue here.

Instead, the Secretary unwisely centers her argument on *Lesage v. Twentieth Judicial District Court*, 2021 MT 72, ¶ 10, 483 P.3d 490, and *Montana Cannabis Industry Ass'n v. State*, 2012 MT 201, ¶ 21, 366 Mont. 224, 286 P.3d 1161. But *Lesage* makes clear that equal protection challenges are subject to rational basis review only "*absent* demonstration that the alleged discrimination implicates a fundamental constitutional right." *Lesage*, ¶ 10 (emphasis added). And *Montana Cannabis* did not involve equal protection claims at all, premising its application of rational basis review on the finding—at the merits stage—that the proof did not establish that a fundamental right was implicated by the challenged law. *Id.*, ¶¶ 21, 23, 32. Moreover, the Secretary's uncontroversial but uninformative claim that the right of suffrage is not the "right of *unregulated* suffrage," Mot. at 13 (citing *Montana Cannabis*, ¶ 20), skips ahead to the merits: whether the Voting Restrictions impose burdens that are unjustified under the circumstances is, of course, precisely what this Court must ultimately decide. At this stage, it's enough that Plaintiffs have plausibly alleged as much.

In any event, the Secretary's argument about the standard of review is academic: the Complaint is sufficient even under a more relaxed standard. Plaintiffs allege that the Voting Restrictions are unnecessary to achieve even any *legitimate* state interest because they target a non-existent problem. *See, e.g.*, Am. Compl. ¶¶ 64, 73, 75, 76, 115, 119, 124-26 (alleging that voter fraud is virtually non-existent in Montana). In her Motion, the Secretary pulls several alleged state interests from her hat without support: ensuring that only qualified electors participate in the democratic process, promoting public confidence in elections, and counting and reporting votes quickly. Mot. at 15. The Secretary is certainly free to present evidence of those interests at the merits stage for the Court's evaluation, but those bare assertions are inappropriate at the pleading

stage. *See State v. Nichols*, 1998 MT 271, ¶ 10, 291 Mont. 367, 970 P.2d 79 (affirming denial of motion to dismiss that contained merits arguments).

Setting aside the standard of review, the Secretary also argues that "the Equal Protection Clause is not implicated" here because the Voting Restrictions do not facially classify voters by age, but that argument likewise fails. Mot. at 11-12. The Secretary cites *State v. Spina* for support, but *Spina* explains that an apparently neutral law may nonetheless violate equal protection if "in reality it constitutes a device designed to impose different burdens on different classes of persons." 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421. This conclusion is confirmed by the Secretary's other cited authority, *Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002 (1981), which similarly observes that facially neutral laws can be unconstitutional if there is discriminatory intent. *Fitzpatrick*, at 323. Plaintiffs have alleged just that: that the Legislature "knew that the [Voting Restrictions] would place heightened burdens on Montana's youngest voters" and passed the bills "with the intent and effect of placing increased barriers on young Montanans who wish to exercise their fundamental right to vote." Am. Compl. ¶¶ 122-23; *compare with Fitzpatrick*, at 323 (noting that "petitioner makes no allegations that the law has a discriminatory intent"). Because Plaintiffs allege that the Restrictions treat young voters differently because they are young, the Equal Protection clause is implicated. *Spina*, ¶ 85.

C. Plaintiffs have sufficiently pled that the Election Day Registration Ban unconstitutionally violates the right to vote (Count II).

Plaintiffs adequately allege that the Election Day Registration Ban violates Montanans' fundamental right of suffrage by burdening the right to vote without any corresponding closely tailored, compelling state interest. Ending election day registration would burden the suffrage rights of Montana voters, particularly students, the elderly, the disabled, and indigenous communities. More than 60,000 Montana voters—many who otherwise might not have voted—

have registered on election day, at least in part because, in the preceding days, voter registration is typically available only during working hours, and because many voters cannot register without amenities like time off from work and organized transportation that are available only on election day. Am. Compl. ¶¶ 32-35, 40, 130. Eliminating election day registration will make it harder for those citizens to vote. Moreover, previously registered voters who discover errors in their voter registration information on election day—as tens of thousands of voters have over the last 15 years—will no longer be able to update their registration information and cast a ballot at their polling location. *Id.* ¶ 130. Without election day registration, many Montanans will discover the problem with their voter registration only after it is too late to correct. *Id.*

No legitimate, let alone compelling, state interests justify these burdens. Am. Compl. ¶¶ 46-58. The Election Day Registration Ban does not enhance election integrity because the verification process applied to late registration applications includes even more security measures than those applied to regular registration applications. *Id.* ¶¶ 49-50. And election day registration has not led to a single known instance of voter fraud nor caused any serious administrative problems on election day. *Id.* ¶ 51; *see also Driscoll I*, No. DV 20-408, at *5 (finding the Secretary failed to present evidence sufficient to uphold her purported interest in preventing voter fraud; *Western Native Voice v. Stapleton*, No. DV 20-0377, 2020 WL 8970685, at *27 (Mont. Dist. Sep. 25, 2020) (same).

Instead of addressing these allegations, the Secretary argues that the Election Day Registration Ban cannot possibly burden the right to vote because Article IV, § 3 of the Montana Constitution authorized, but did not require, the Legislature to "provide for a system of poll booth registration," and eliminating election day registration is thus squarely within the Legislature's discretion. Mot. at 8. The Secretary's argument is a red herring. While the Legislature has enacted

and may enact laws related to voter registration, those laws cannot *restrict* fundamental voting rights unless they are closely tailored to serve a compelling state interest. To put it more succinctly: the Legislature can legislate in this area, but not unconstitutionally. *See Driscoll II*, ¶ 11 n.3 (rejecting similar argument and emphasizing that "[o]nce the legislative branch has exercised its authority to enact a statute"...courts are "duty-bound to decide whether [the] statute impermissibly curtails rights the constitution guarantees").

The Secretary also misses the mark in arguing that the framers of the Montana Constitution could not have intended the right to vote to protect election day registration because election day registration did not exist at the time Article IV, § 3 was ratified. Mot. at 17. Laws that exist at the time of constitutional ratification do not permanently ossify the minimum rights that are afford to its citizens. *See, e.g.*, *Brown v. Board of Education*, 347 US 483 (1954) (holding the Fourteenth Amendment does not permit separate but equal segregation in schools despite the fact that the ratifiers of the Fourteenth Amendment indisputably understood racial segregation to be constitutionally permitted). Even if Montana may have had a legitimate interest in a month-long registration runway in the pre-digital age—when election officials likely needed time to prepare and distribute physical copies of registration lists throughout the state—intervening technological advancements like digital registration tools have eliminated such need. And the Montana Supreme Court has made it clear that laws may not burden voting rights unless the state can sufficiently justify them. *Finke*, ¶ 15.

D. Plaintiffs have sufficiently pled that the Voter ID Restrictions unconstitutionally violate the right to vote (Count III).

Plaintiffs have also adequately pled that the Voter ID Restrictions burden the right to vote while serving no compelling state interest. As alleged, the Voter ID Restrictions burden younger voters by relegating IDs issued by Montana colleges and universities, as well as voter registration

confirmation forms, to a lower tier of identification that can be used only if the voter *also* produces additional identifying documentation (which young voters are far less likely to have). Am. Compl. ¶ 68. Beyond the burden of having to locate and produce additional materials in the first place, some young voters lack such documentation entirely—e.g., those living in a university dorm or with their parents who are highly unlikely to be able to produce a utility bill in their name. *Id.* ¶ 72. No state interest, let alone a compelling one, justifies those burdens: Montana has allowed students to use their college and university IDs at the polls for nearly twenty years without encountering any voter fraud. *Id.* ¶ 75.

The Secretary does not challenge the sufficiency of these allegations as much as she mischaracterizes them—and then questions Plaintiffs' ability to prove them at the merits stage. The Secretary claims that Plaintiffs allege "thousands of students do not possess either a driver's license or other qualifying ID." Mot. at 19. But the Complaint explicitly alleges that "some young voters lack such documentation entirely," Am. Compl. ¶ 72, an entirely plausible allegation that must be taken as true at this stage. Plaintiffs also allege that thousands of students will be affected by the Voter ID Restrictions, which the Secretary characterizes as "wildly conjectural and unsupported by any concrete facts." Mot. at 19. While the Court need not wade into such factual issues at this stage, if the Court chooses to consider this now, the Court may take judicial notice of "concrete facts" showing that many thousands of out-of-state students attend Montana colleges, as those data are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." *In re Marriage of Carter-Scanlon & Scanlon*, 2014 MT 97, ¶ 17, 374 Mont. 434, 322 P.3d 1033 (citing M.R. Evid. 201). At Montana State University alone, there are 5,857 out-of-state students. Montana State University Office of Planning & Analysis, Quick Facts: 2019-2020, https://www.montana.edu/opa/facts/quick.html (last visited June 28,

2021). It is reasonable to infer that many such student do not have a Montana driver's license or state ID card, military ID card, tribal photo ID card, United States passport, or Montana concealed carry permit.

In criticizing Plaintiffs' allegations regarding the burdens imposed by the Voter ID Restrictions, the Secretary confuses the actual provisions of the law. She claims that a student ID and a notice of confirmation of voter registration can be used together for the purpose of voting, Mot. at 19, but, because the Legislature expressly removed notice of confirmation of voter registration from the list of documents that may be used in combination with a college or university ID, they cannot:

> **provisional voting.** (1) (a) ~~Before~~ Except as provided in subsection (2), before an elector is permitted to receive a ballot or vote, the elector shall present to an election judge ~~a~~ one of the following forms of ~~current photo~~ identification showing the elector's name~~. If the elector does not present photo identification, including but not limited to~~:
>
> (i) a ~~valid~~ Montana driver's license, Montana state identification card issued pursuant to 61-12-501, military identification card, tribal photo identification card~~,~~, United States passport, or Montana concealed carry permit; or
>
> (ii) (A) ~~a school district or postsecondary education photo identification, or a tribal photo identification, the elector shall present a~~ current utility bill, bank statement, paycheck, ~~notice of confirmation of voter registration issued pursuant to 13-2-207,~~ government check, or other government document that shows the elector's name and current address; and
>
> (B) photo identification that shows the elector's name, including but not limited to a school district or postsecondary education photo identification.

13-13-114, MCA (available at https://leg.mt.gov/bills/2021/billpdf/SB0169.pdf) (highlighting added).

The Secretary's mistake illustrates just one of the burdens the Voting Restrictions impose on voters: if Montana's chief elections officer is confused about what forms of ID suffice, it is reasonable to infer that student voters may very well make the same mistake.

Even setting aside the Secretary's confusion about the Voting Restrictions, her attempt to skip directly to the merits is plainly inappropriate at the pleading stage. *Plouffe*, ¶ 8. Plaintiffs' allegations are sufficient.

III. The Elections Clause does not provide a basis for dismissal.

The Secretary's final argument—that the Elections Clause of the U.S. Constitution bars Montana courts from adjudicating challenges to Montana election laws under the Montana Constitution, Mot. at 19—has been rejected by every court to have considered it. For good reason: it would impose a sweeping jurisdictional shift on how voting rights cases have been adjudicated for decades, effectively eviscerating essential protections for Americans in the exercise of their most fundamental right. The Secretary invites the Court to go where no other court has gone and eclipse an entire genre of constitutional caselaw to immunize all state election laws from review by the state's judicial branch. The Court should decline that invitation.

To justify this breathtaking federal intrusion into state court jurisdiction, the Secretary argues that the Elections Clause "does not authorize state courts to regulate election procedure." Mot. at 20. Tellingly, the Secretary cites only *dissenting* opinions in support. *Id.* She does not (and cannot) cite any precedent holding that the Elections Clause requires state courts to dismiss complaints alleging that election laws violate state constitutional rights. Montana courts—like other state courts across the land—regularly adjudicate disputes over the constitutionality of their state's election laws. *See, e.g.*, *Driscoll II*, 2020 MT 247; *Willems v. State*, 2014 MT 82, 374 Mont. 343, 325 P.3d 1204; *Finke*, 2003 MT 48. The Secretary identifies no reason why this Court should be the first to conclude that the Elections Clause bars state court jurisdiction here.[6]

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[6] Notably, by not moving to dismiss Plaintiffs' claims regarding the Renewed Ballot Assistance Ban, the Secretary implicitly concedes that strict scrutiny applies, that equal protection violations do not hinge on facial classifications, and that the Elections Clause does not bar state courts from

CONCLUSION

Plaintiffs request that the Court deny the Secretary's Motion to Dismiss.

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Respectfully submitted,

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adjudicating state election laws. The Secretary offers no distinguishing principle that would justify her inconsistent approach despite substantively similar allegations.

Robyn Schierholt

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Sent: Monday, June 28, 2021 4:09 PM
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Cc: mike@meloylawfirm.com
Subject: Filing in Bohn v. Jacobsen,
Attachments: 2021-06-28 Bohn - Brief in Opp. to Mot. to Dismiss FINAL_FINAL.pdf

Please find attached for filing Plaintiffs' Opposition to Defendant's Motion to Dismiss. Please revert a file-stamped copy.

My co-counsel Mike Meloy will make arrangements for payment.

Please let me know if you need anything else from me.

Thank you,
Matt

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