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IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

Montana Democratic Party and Mitch Bohn, Plaintiffs, vs. Christi Jacobsen, in her official capacity as Montana Secretary of State, Defendant.	Cause No.: DV 21-0451 Judge: Michael Moses **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS**

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Introduction

An overarching problem with MDP's case is that every allegation is based on hypothetical harm to parties not in the case. Courts are jurisdictionally bound to decide cases based on concrete harm alleged by actual parties, and therefore strictly construe third-party standing exceptions. This case is a great example of why.

In its effort to manufacture injury to hypothetical voters, it gets the law wrong on both voter ID and voter registration. For example, it claims that a student cannot use the combination of a student ID and a voter registration card, but that simply misreads the law. It also claims that voters can no longer correct mistakes in voter registration on election day. That is also wrong.

The requirements of both laws are minor and neither draws any distinction between voters. There is no reasonable argument that the laws are subject to strict scrutiny, which would cripple the Legislature's constitutional authority to enact "evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181, 189-90 (2008) (quotation omitted).

The ease of complying with these neutral laws explains why no voters are making MDP's claims. MDP alone has challenged the voter ID and registration law. But MDP is a political party not a voter. It lacks organizational and associational standing to press claims voters have declined to make. MDP cannot transform its generalized policy grievance into a constitutional challenge to laws that only apply to voters. *See Driscoll v. Stapleton*, 2020 MT 247, ¶ 45, n.7, 401 Mont. 405, 373 P.3d 386 ("it is difficult to understand how the Democratic Party . . . can possibly have standing to assert an alleged infringement of the constitutional rights of persons *other than themselves.*") (Sandefur, J., concurring and dissenting).

I. MDP lacks standing because all its claims are on behalf of unidentified or hypothetical voters.

A. MDP fails to establish associational standing because it fails to identify a single voter with standing to present the claims in his or her own right.

MDP's failure to identify a single voter with concrete harms dooms its claim to associational standing. MDP ignores the controlling test, which is unambiguous and well-established:

> An organizational litigant also may have 'associational standing' to bring suit as a representative of its members under certain circumstances, **one of which is that the organization must 'include at least one member with standing to present, in his or her own right, the claim (or type of claim) pleaded by the association.**

Baxter Homeowner's Assoc., Inc. v. Angel, 2013 MT 83, ¶17, 369 Mont. 398, 298 P.3d 1145 (emphasis added) (quoting *United Food & Commer. Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555 (1996)).

Instead of identifying a member with standing, MDP claims that *Hefferman v. Missoula City Council*, 2011 MT 91, 360 Mont. 207, 255 P.3d 80, supports its position that it doesn't really have to. MDP Brief in Opposition ("BIO"), 8-9. *Hefferman* held just the opposite; identifying a member with standing was the first element the Court required. *Id.*, ¶43. There, the Court noted that the plaintiff organization met the requirement because three of the plaintiffs were "members of the Association, and . . . they have standing to sue in their own right." *Hefferman*, ¶ 46. There is no "contrary language in *Hefferman*" that undermines the requirement that MDP present one member who can allege the injury that the association is claiming. That irreducible minimum is consistent with an unbroken line of state and federal cases requiring the same thing. *See, e.g., Baxter*, ¶ 17 (citing cases); *United Food & Commer. Workers Union Local 751*, 57 U.S. at 555.

MDP makes the unremarkable observation that associational standing does not require "participation of each allegedly injured voter." MDP BIO, 8. Secretary Jacobsen never said it did—

only that MDP must identify at least one voter for each of the claims it is making on behalf of members.[1]

That MDP cannot find a single voter to substantiate its broad claims to voter harm should not be surprising. Complying with either law is not difficult. Qualifying ID is readily available. And local elections across the state have already carried out several elections under the new registration timelines. MDP's claim that moving the late registration deadline back by one day is a substantial burden on voting is difficult to even understand, especially given how easy Montana makes both registration and no-excuse absentee voting.

MDP's failure to identify even one such voter—even after Secretary Jacobsen challenged it to—speaks volumes about the legitimacy of its claims that the laws will severely impact "thousands" of voters. (Am. Compl, ¶ 35 (claiming "tens of thousands" of voters will be burdened without election day registration); *id.* ¶¶ 42, 45 (same); *id.*, ¶ 72 ("Eliminating the ability to rely on previously-accepted and widely-held forms of ID will burden thousands of Montana voters. . . ." and claiming that students lack sufficient ID to comply with SB 169).

MDP cannot rest its claims on hyperbole and hypotheticals. The requirement that an organization identify a member with standing for each of its claims protects courts from being forced to decide constitutional questions in the abstract. As the Montana Supreme Court has reiterated, "our courts do not resolve abstract differences of opinion or advise what the law would be upon a hypothetical state of facts." *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 22, 365 Mont. 92, 101, 278 P.3d 455, 462. It also protects a defendant's right to test a plaintiff's claims, and from having to litigate a case by swatting down every improbable hypothetical injury a plaintiff can

[1] Plaintiff Mitch Bohn does not qualify, and MDP correctly does not suggest otherwise. Bohn, the only individual plaintiff, makes allegations directed solely against HB 530, the ballot collection statute, but makes no allegations directed at HB 176 or SB 169. Am. Compl. ¶ 15.

conjure. The requirement has even more force when the plaintiff is asking the Court to strike statutes passed by large majorities in the Legislature as unconstitutional: "Very significant is the incontrovertible proposition that it would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. The delicate power of pronouncing an [legislation] unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *Roosevelt v. Montana Dep't of Revenue*, 1999 MT 30, ¶ 49, 293 Mont. 240, 254, 975 P.2d 295, 304 (quoting *United States v. Raines*, 362 U.S. 17, 19, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524 (1960)).

Because MDP cannot get over the first hurdle of the associational standing test, the Court need not even address the others. Nevertheless, MDP also fails to meet those. MDP has not shown that it "seeks to protect" an interest "germane to its purpose," in which the interests of the organization and the allegedly injured voters is "in every practical sense identical." *Hefferman*, ¶¶ 43, 46. The crux of MDP's problem is that it cites only the most general purpose to "ensur[e] that all voters have a meaningful opportunity to cast ballots in Montana." Am. Cmpl., ¶ 14. But a broad interest shared by the public generally is not specific enough for associational standing. *Hefferman*, ¶45.

MDP's purpose is to elect Democrats. There is nothing in MDP's purpose germane to litigating on behalf of large and broad categories of Montana voters. MDP cites no organizational purpose to press claims on behalf of the vague, non-affiliated groups of voters allegedly impacted by SB 169 and HB 176, including students, the young, the elderly, the indigent, and indigenous Montanans. *See Id.*, at 8. In short, MDP cannot reasonably suggest that its interest is "in every practical sense identical" to the large swaths of unidentified voters in Montana, many of whom are

undoubtedly not Democrats. *Heffernan*, ¶ 42 (quoting *United Food and Com. Workers v. Brown Group, Inc.*, 517 U.S. 544, 552 (1996).[2]

And while MDP need not present every impacted voter, it must present at least one. Sec. Jacobsen MTD Br., 9. Because this Court lacks jurisdiction to adjudicate hypothetical harm and MDP has failed to identify one actual member with a plausible claim to concrete injury, MDP lacks associational standing.

B. MDP ignores the test for organizational standing to assert its third-party claims on behalf of voters.

MDP wrongly asserts all it must do to meet the standard for organizational standing is make a vague allegation about how HB 176 (voter registration) and SB 169 (voter ID) will require it to spend money on voter education. MDP BIO, 5-6. But that is not the test when an organization brings claims on behalf of its third-party members, as here. An organization "may bring claims on its own behalf ('organizational standing'), premised on alleged discrimination against [members of the organization], only where the organization meets the *Kowalski* standards for third party standing." *Baxter*, ¶ 17.

Secretary Jacobsen outlined the *Kowalski/Baxter* factors in her opening brief, which MDP ignores entirely. Under that test, MDP has the burden to show:

> The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute . . . ; the litigant must have a close relation to the third party . . . ; and there must exist some hindrance to the third party's ability to protect his or her own interests.

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[2] Indeed, regardless of the national trends, neither youth, advanced age, nor indigency appears to be tied to Democratic political affiliation in Montana in recent years. *See* Pew Research Center, Religious Landscape Study: Party Affiliation among Adults in Montana, https://www.pewforum.org/religious-landscape-study/state/montana/ party-affiliation/ (In 2014, 24% of Republican and Republican-leaning Montanans were younger than 30 and 24% older than 65, in contrast to 14% and 16%, respectively, of Democrat and Democrat-leaning Montanans. Similarly, 27% of Republican and Republican-leaning Montanans had household incomes of less than $30,000, compared to 23% of Democrat and Democrat-leaning voters). *See also* Exit Poll Results and Analysis from Montana, Washington Post, https://www.washingtonpost.com/elections/interactive/2020/exit-polls/montana-exit-polls/ (Nov. 19, 2020) (showing 30 point advantage to Donald Trump among Montana voters aged 18 to 29 and 11 point advantage among voters 65 and older).

Baxter Homeowners, ¶ 15 (quoting *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991), and citing *Kowalski v. Tesmer*, 543 U.S. 125, 130-31 (2004)). MDP has not even identified a third-party voter, much less shown that it can meet the *Kowalski/Baxter* test to bring claims on behalf of those unidentified voters. And for good reason. The test is impossible to meet when an organization asserts claims on behalf of "hypothetical" plaintiffs, as here. *Baxter*, ¶ 15 (quoting *Kowalski*, 543 U.S. at 131) (establishing a "close relationship" with the third party cannot "exist with respect to hypothetical clients.").

Rather than attempt to meet the test (likely because it knows it cannot), MDP argues that its claims are brought on behalf of MDP itself, not voters. *See* MTD BIO, fn 4. That assertion cannot be squared with its amended complaint. All MDP's claims against the voter ID and voter registration amendments allege harm to voters, not MDP. *See* Am. Cmpl., Count I, ¶ 119 (alleging voter ID amendment will "disparately abridge the right to vote of young Montana voters"); *id.*, ¶ 120 (alleging voter registration amendment will "disproportionately abridge the right to vote of young Montana voters"); *id.* Count II, ¶ 130 ("eliminating election day voter registration . . . severely burdens the right to vote of Montana voters"); *id.* Count III, ¶ 133 (alleging voter ID amendment "burdens the right to vote, particularly among students and indigent Montanans"). In no uncertain terms, not one allegation in Counts I-III alleges an injury to anything other than to voters. MDP is not a voter and has no right to suffrage or equal protection itself. In other words, if the allegations on behalf of supposedly injured voters were removed, there would be nothing left of MDP's claims.

The *Kowalski/Baxter* test follows the well-established principle that "the plaintiff generally must assert her own legal rights and interests." *Heffernan*, ¶ 32. As the Montana Supreme Court noted, simply claiming that a law will require an organization to spend money is not enough to establish organizational standing to assert claims based on alleged harm to third-parties. *See*

Baxter, ¶ 17 citing *Equal Rights Center v. Abercrombie & Fitch Co.*, 767 F.Supp.2d 510, 523 (D. Md. 2010) (finding that although organization had to spend resources on challenged law, it did not have standing to make third-party claim without meeting *Kowalski* third-party standing test).[3]

MDP instead claims that *Baxter* does not apply because there are factual differences and the plaintiff ultimately was determined to be an individual. The factual differences in *Baxter* are beside the point. There, the plaintiff claimed organizational standing and the Court addressed that doctrine, applying the well-established test for organizational standing to bring third party claims. *Baxter*, ¶ 15. The Court held that plaintiff lacked third party organizational standing for the same reason MDP lacks it here—it could not meet the *Kowalski* elements. *Baxter*, ¶ 17. *Baxter* is on point and controlling.

The *Kowalski/Baxter* rule is important because "if the claim is brought by someone other than one at whom the constitutional protection is aimed" courts may be "called upon to decide abstract questions of wide public significance." *Kowalski*, 543 U.S. at 130. That is precisely the problem here—MDP cannot claim interference with a right it cannot exercise so it raises a broad range of abstract constitutional claims based on hypothetical constitutional injury to hypothetical voters. See, e.g., Sec. Jacobsen MTD Br., p. 9. No party in this case alleges the concrete personal interest necessary for standing. That requirement is especially strong where "a statutory or constitutional violation is claimed to have occurred" so that the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Olson v. Department of Revenue*, 223 Mont. 464, 469, 726 P.2d 1162 (1986) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Otherwise a defendant would be forced to defend every hypothetical that a plaintiff can muster, no matter how far-fetched, and the Court

[3] The *Kowalski/Baxter* factors are an exception to the prudential standing requirements. *Baxter*, ¶ 15; *see also Larson*, ¶¶ 33,34.

would be forced to decide the case in that counterfactual vacuum. That is one reason courts "have not looked favorably upon third-party standing," and have required strict adherence to the *Kowalski/Baxter* framework. *Kowalski*, 543 U.S. at 130.

The Montana Supreme Court's decision in *Larson v. State*, 2019 MT 28, 394 Mont. 167, 434 P.3d 241, is not to the contrary and does not support MDP's standing as it suggests. *Larson* involved a challenge to the sufficiency of a political party ballot qualification. There, MDP, a competing political party, alleged arguably concrete harms to its own interests in competing against the Green Party if its candidates were certified. *Id.*, ¶ 47. In short, it was a first-party standing case, not third-party, and the Court held that the party had alleged sufficient injury to challenge a competing party's ballot certification. *Id.* (citing concrete alleged campaign harms specific to the organization caused by "introduction of an additional political party and candidates into a fast-approaching election"). That explains why Justice Sandefur, the same justice who wrote *Larson* and held the MDP had standing there, disputed MDP's standing in *Driscoll* to "assert an alleged infringement of the constitutional rights of persons *other than themselves*" in *Driscoll* ¶ 45, n.7 (emphasis original).

The only case MDP cites that analyzes the issue of organizational standing is *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814. That case makes clear that the Secretary's framework is correct. "The test of whether an organizational plaintiff has standing is identical to the three-part test outlined above normally applied in the context of an individual plaintiff." *Donald J. Trump for Pres., Inc. v. Bullock*, 491 F. Supp. 3d 814, 828 (D. Mont. 2020) (under heading of "organizational standing").

Without meeting (or even addressing) the *Kowalski/Baxter* factors, MDP cannot meet its burden to establish organizational third-party standing.

II. MDP does not state a plausible equal protection claim.

MDP's Equal Protection claim suffers several fatal defects, which MDP largely ignores. MDP's equal protection argument, boiled down to its essence, is that 1) the law discriminates against young voters as a class; and (2) because it "implicates" the fundamental right to vote the State must meet strict scrutiny to amend its voter registration and ID laws. MDP's argument is incorrect. As Secretary Jacobsen pointed out, neither SB 169 or HB 176 classifies voters based on age, or any other basis, and MDP alleges no facts to support its bare legal allegation that the Legislature intended to discriminate against young voters. But even if it could, MDP is wrong that the laws could plausibly be subject to strict scrutiny.

A. MDP's equal protection claim fails because it has not identified a class or alleged facts to support its heavy burden to show purposeful discrimination.

As MDP recognizes, the first step of an equal protection challenge is to identify and define the classes involved, and then determine if they are similarly situated. *Hensley v. Mont. State Fund*, 2020 MT 317, P18, 402 Mont. 277, 290-291, 477 P.3d 1065, 1073. It is necessary for the plaintiff to identify a similarly situated class against which the plaintiff's class can be compared because "[d]iscrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Comp. Goble v. Mont. State Fund*, 2014 MT 99, ¶ 29 (quotation omitted).

MDP does not attempt to counter Secretary Jacobsen's argument that the law imposes no requirement on young voters that is not equally faced by all voters. All eligible voters—regardless of age—are subject to the same secondary identification requirements. Under prior law, voters could satisfy the identification requirement by solely presenting an AARP card, Montana Bar membership card, municipal golf course or ski area season pass, car registration, student card, or a piece of mail, among numerous others. All voters under the new law must present qualifying proof

of address. Similarly, all new voters must register before noon the day before the election. In both instances, all voters are treated the same.[4] *Cf. Caldwell v. MACo Workers' Compensation Trust*, 2011 MT 162, ¶ 19, 361 Mont. 140, 256 P.3d 923 (finding discrimination based on age where statute clearly classified based on-defined social security benefits).

MDP's entire equal protection argument is instead based on a disparate impact theory, which Montana does not recognize absent discriminatory intent. *Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002, 1010 (1981); Sec. Jacobsen MTD Br., 11-12. MDP attempts to meet its burden by restating its bald assertion that the Legislature enacted the laws with a discriminatory intent because it knew they would place heightened burdens on young voters. MDP BIO, 12, 14; Am. Compl. ¶¶ 122-23). This utterly unsupported allegation, as a matter of law, is insufficient to plead the necessary discriminatory "intent" and does not save MDP's claim from dismissal. The laws treat voters the same, and MDP cites no facts whatsoever to support that legal conclusion, which is insufficient to survive a motion to dismiss. *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6 ("the court is under no duty to take as true legal conclusions or allegations that have no factual basis"); *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247 ("complaint must state something more than facts which, at the most, would breed only a suspicion that plaintiffs have a right to relief.").

In applying the identical standard under federal equal protection claims, the law makes clear that discriminatory intent requires more than "mere awareness of consequences." *Rack*

[4] As discussed more fully below, MDP even gets its legal allegations wrong. In support of its claim that the laws treat young voters differently, MDP misreads the voter ID amendment as prohibiting use of a student ID and a notice of voter registration confirmation. Am. Cmpl., ¶ 119. That is wrong; a student ID contains a name and photo, and a voter registration card contains a name and address. The combination of those documents is sufficient identification under the new law, which further undermines MDP's claim that the law even impacts young voters disproportionately. *See, infra,* section IV. As MDP impliedly concedes, student voters readily have access to those two forms of ID.

Room Shoes v. United States, 718 F.3d 1370, 1376 (Fed. Cir. 2013) (upholding a motion to dismiss an equal protection claim based on the failure to allege sufficient facts to show discriminatory intent when the plaintiff relied on circumstantial evidence from which it argued intent could be inferred). Rather, alleging discriminatory intent requires facts that show specific and purposeful action "because of, not merely in spite of, [the] adverse effects upon an identifiable group." *Id.* (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979)); *see also Azam v. D.C. Taxicab Comm'n*, 46 F.Supp.3d 38, 49-50 (D.D.C. 2014), and dismissing an equal protection claim for failing to allege facts showing a discriminatory intent). MDP has alleged no facts suggesting that the Legislature intended to impact voter turnout. At best, MDP depends on its vague allegations of "mere awareness" that are insufficient to allege discriminatory intent, and dismissal is appropriate.

Because MDP has failed to allege any facts that, if proven, would show discriminatory intent against an identifiable class, its equal protection claim fails from the start.

B. MDP's argument that strict scrutiny applies to all election laws, including SB 169 and HB 176, cannot be squared with case law or the Montana Constitution.

Even if MDP could meet the first prong for its equal protection claim, it wrongly asserts the laws would be subject to strict scrutiny. Strict scrutiny is not triggered with every claim that a voting regulation imposes any burden. "After all, every voting rule imposes a burden of some sort." *Brnovich v. DNC*, 141 S.Ct. 2321, 2338 (2021). Because voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is "equally open" and that furnishes an equal "opportunity" to cast a ballot must tolerate the "usual burdens of voting." *Crawford v. Marion County Election Bd.*, 553 U. S. 181, 198 (2008); *see also Brnovich*, 241 S.Ct. at 2348 (states have authority regulate voting to prevent fraud).

The Montana Supreme Court has rejected the argument that state regulatory statutes are subject to strict scrutiny simply because they impact a fundamental right. The Court reaffirmed that in *Montana Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶¶ 19-21, 24, 32, 366 Mont. 224, 286 P.3d 1161, where the Court applied rational basis scrutiny to an equal protection challenge implicating the fundamental rights of employment, health, and privacy. The Court recognized that those rights are subject to reasonable state regulation. "Although individuals have a fundamental right to pursue employment, they do not have a fundamental right to pursue a particular employment or employment free of state regulation." *Id.*, ¶ 20; *id.*, ¶ 22 (right to health); *id.* ¶¶ 27-28 (right to privacy). The same principle applies here. Simply because voters have a fundamental right to vote does not mean they have the right to vote in any manner they wish, especially when the Legislature is constitutionally commanded to ensure elections are fair. And for the same reasons as in *Montana Cannabis*, strict scrutiny does not apply to every law that impacts voting.

MDP attempts to distinguish *Montana Cannabis* by noting that it did not implicate the right to vote. But that misses the point. MDP's argument is that *any* law allegedly impacting a fundamental right is subject to strict scrutiny. That has never been the law, and the Court's analysis in *Montana Cannabis* controls. Not only is MDP's contrary view inconsistent with Montana Supreme Court precedent, but the constitution also specifically commands the Legislature to regulate elections and ensure the fairness of the process. *See* Mont. Const. art. IV, § 3. "[T]o subject every voting regulation to strict scrutiny . . . as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

MDP argues that *Finke v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576, establishes that equal protection claims implicating the right to vote must always be subject to strict scrutiny. But *Finke* merely illustrates when a regulation *is* subject to strict scrutiny, which

clearly distinguishes this case. The *Finke* plaintiffs challenged a statute allowing only "record owners of real property" to vote to establish a county building code jurisdiction, excluding all other citizens impacted by the law from being able to vote at all. *Id.* ¶¶ 5, 21-22. "Taking its lead from the U.S. Supreme Court," the Montana Supreme Court held that "statutes which selectively distribute the franchise" are subject to strict scrutiny. *Id.* ¶¶ 18-19 (quoting *Kramer v. Union Free School District*, 395 U.S. 621, 626-27 (1969). A law that, *on its face*, completely disenfranchises entire classes is a far cry from a facially neutral laws like SB 169 and HB 172 that update time, place, and manner regulations for *all voters*.

Indeed, just as *Finke* took its lead from the United States Supreme Court, so should the Court here. As Secretary Jacobsen noted, the United States Supreme Court has repeatedly recognized that "common sense, as well as constitutional law" compels deference to a State's authority to regulate elections, even though "[e]lection laws will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433; *Storer v. Brown*, 415 U.S. 724, 730 (1974) (states have authority to substantially regulate elections to ensure they are fair, honest, and orderly).

The Court applied that same principle in *Crawford*, which involved an equal protection challenge to Indiana's voter ID law that made arguments nearly identical to those MDP makes here. *Crawford*, 553 U.S. at 187, 198. The Supreme Court easily upheld the law under rational basis review, concluding that Indiana's voter photo ID law "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of votes." *Id.* at 198, 202. The same is true of the modest requirements imposed by SB 169 and HB 172. MDP's claims are nothing more than the latest, attempted end-run around *Crawford*.

Courts in other jurisdictions have likewise rejected the same argument advanced by MDP here. For example, in *Nashville Student Organizing Committee v. Hargett*, 155 F. Supp. 3d 749 (M.D. Tenn. 2015), the court granted the Tennessee Secretary of State's motion to dismiss an

equal protection claim against Tennessee's voter ID law, which was more restrictive than Montana's. The plaintiffs argued that law was unconstitutional because it excluded students' university-issued ID cards as a primary voter ID (the same claim MDP makes here), but allowed faculty/staff identification cards issued by universities to be used for voting purposes (which are subject to the same identification requirements as student cards under SB 169). The Court held, at the pleading stage, that the voter identification bill was *rationally related* to state's legitimate interest in preventing voter fraud, and thus, the provision did not violate equal protection. *Id.* at 756 (emphasis added); *see, also, Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (voter ID law did not violate equal); *Common Cause v. Billups*, 554 F.3d 1340 (11th Cir. 2009) (same). The Supreme Court recently upheld an Arizona election law for similar reasons. *Brnovich*, 241 S.Ct. at 2348 ("It should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.")[5]

The State's regulatory interests in ensuring fair elections, promoting public confidence in the election system, and providing for efficient and accurate voting and vote count reporting easily pass rational basis review. Sec. Jacobsen MTD Br., 15; *Crawford*, 533 U.S. at 191.

III. MDP ignores that the Montana Constitution grants the Legislature explicit discretion over late registration and incorrectly asserts that every change to voter registration is subject to strict scrutiny.

MDP's right to suffrage claim against the change to election day registration (HB 176) is premised on the impossible proposition that the Montana Constitution can violate itself. The Constitution explicitly provides that the Legislature "may provide for a system of poll booth registration." Article IV, § 3 (emphasis added); MTD Br., 16. As Secretary Jacobsen noted, the Delegates made clear that they intended to "leave it all to the legislature" because they were "not

[5] As the Seventh Circuit noted, a voter ID requirement has additional benefits: "it deters fraud (so that a low frequency stays low); it promotes accurate record keeping (so that people who have moved after the date of registration do not vote in the wrong precinct); it promotes voter confidence." *Frank*, 768 F.3d at 750.

trying to constitutionalize it." Montana Constitutional Convention, Verbatim Transcript, February 17, 1972, Vol. III, p. 402. MDP's Count II rests on convincing the Court that the Legislature's precise exercise of that constitutional discretion violates the same constitution under the right to vote in Article II, § 13.

That is a constitutional non-sequitur, not a red herring. MDP's only answer is that while the Legislature "may enact laws related to voter registration, those laws cannot *restrict* voting rights unless they are closely tailored to serve a compelling state interest." MDP BIO, 16. Leaving aside for the moment that the laws are not possibly subject to strict scrutiny, the argument makes no constitutional sense. This is not a case where MDP is claiming a state constitutional provision violates the federal constitution. Because it filed its claims solely under the Montana Constitution, the constitutional provisions must be read in coordination with other sections, so they form a consistent whole. *Howell v. State*, 263 Mont. 275, 286-87, 868 P.2d 568, 575 (1994).

There is no plausible argument that the same Delegates that drafted Article IV, § 3 granting the Legislature discretion to decide whether to have election day registration at the same time drafted Article II, § 13's right to suffrage to require it. MDP never seriously contends with Article IV, § 3.

Even if the two provisions were in tension (they are not), the specific provision allowing election day registration in Article IV, § 3 would control over the general right to vote in Article II, § 13. Mot. to Dismiss Br., 16-17. There is no way to credit MDP's claims without holding that Article IV, § 3 violates another provision of the constitution. Because the constitution—the source of MDP's supposed claim—explicitly allows what MDP says it prohibits, the claim fails as a matter of law (and logic) and must be dismissed.

That resolves the issue. But even leaving that explicit constitutional discretion under Article IV, § 3 aside, MDP still would have no plausible claim that changing the late registration deadline

by 12 hours violates the right to vote. MDP's right to vote claim is that once the Legislature enacts election day registration, it becomes a matter of constitutional dogma that cannot be changed without meeting strict scrutiny. MDP BIO, 15-16. That is wrong, as courts have repeatedly acknowledged. See, *supra*, section II.B. The right to vote does not encompass the right to vote whenever and however a voter wants. As the United States Supreme Court recently recognized, legislatures retain broad authority to regulate the time, place, and manner of elections. *Burdick*, 504 U.S. at 433 (recognizing that subjecting every election regulation to strict scrutiny would tie the State's hand to ensure equitable and efficient elections).

While severely burdensome restrictions may be subject to strict scrutiny in certain contexts, the mill run of election laws are not. *Id.* There is no reasonable argument that the modest change to late registration creates a severe burden on the right to vote. And even MDP's attempt to drum up a burden gets the law wrong. It claims that voters who discover errors in their registration on election day "will no longer be able to update their registration information and cast a ballot." MDP BIO, 15. That is flatly incorrect. The law applies to only late *registration*, not corrections to prior registration. A voter may update or correct registration errors, even on election day, and still vote. MDP cites nothing suggesting otherwise. At the risk of belaboring the point, this is yet another reason MDP's hypothetical claims are not justiciable because they are based on incorrect legal assumptions and manufactured harm.

MDP's claim that there are large swaths of voters who are unable to register at any other time but election day suffers the same defect. Montana makes voter registration exceedingly easy. Voters have the option to register when they get or renew their drivers' licenses. Or if they prefer (or don't have a driver's license or state ID) they can register by mail or at their county elections

office, whichever they chose.[6] Indeed, in Montana voters may register and vote by mail, without ever stepping foot in the county elections office. That resolves any burden if, as MDP suggests, voters are unable to complete the process in person during normal business hours.

In sum, MDP's factual claims about the burdens imposed are simply implausible—the modest change in voter registration to the day before the election cannot result in the harms it alleges, which, as noted above, is likely why MDP cannot identify a single actual voter to make the claim. Regardless, incidental and minimal inconvenience imposed by the law does not state a proper claim for relief when the Montana Constitution provides the Legislature discretion over whether to allow late registration. Sec. Jacobsen MTD Br., 16-18.

IV. MDP's claim that SB 169's change to the State voter ID law will impact students relies on unsupported hypotheticals and misunderstands how the voter ID law operates.

MDP's argument that the voter ID amendment (SB 169) will burden student voters once again highlights the problem with bringing hypothetical claims for hypothetical plaintiffs. MDP imagines an injury to student voters based on a fundamental misunderstanding of how the new voter ID law works.

The gravamen of MDP's claim is that SB 169 burdens students because it "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." MDP BIO, 18. That is simply not so. The voter ID law still allows the voter's registration card to serve as secondary ID, along with a student ID or other qualifying document. That is because a notice of voter registration *is* a "government document that shows the elector's name and current address," and thus qualifies as valid form of identification under § 13-13-114, MCA.

[6] See "How To Register To Vote", Secretary of State, available at https://sosmt.gov/elections/vote/ , which provides and application and the address for county election offices.

SB 169 did eliminate specific reference to a notice of confirmation of voter registration in the statute, but that was simply to eliminate a redundancy. There was no need to reference both a voter registration card *and* government document that shows a voter's name and address because the former qualifies as the latter. Rather than explicitly reference a "notice of confirmation of voter registration," the law clarifies that any government document that shows the voter's name and address qualifies. That plain reading of the statute requires no interpretation. But even if it were ambiguous, that is how Secretary Jacobsen interprets and will apply the law, which is entitled to deference. *Upper Missouri Waterkeeper v. Montana Department of Environmental Quality*, 2019 MT 81, ¶ 13, 395 Mont. 263, 438 P.3d 792.

MDP's allegation to the contrary simply gets the law wrong and is therefore not entitled to any presumption that it is true. The Court is required only to take "well-pled" facts as true, but incorrect legal interpretations, and alleged hypothetical facts that flow from the same, are not entitled that that presumption. *Cowan v. Cowan*, 2004 MT 97, ¶14, 321 Mont. 13, 89 P.3d 6 ("[T]he court is under no duty to take as true legal conclusions or allegations that have no factual basis.").

MDP's misreading of the statute forms the basis of its claim, and its alleged harm to student voters is thus illusory and fails to state a cognizable legal theory. *In re Estate of Swanberg*, 2020 MT 153, ¶ 6. Secretary Jacobsen is not asking this Court to delve into the merits, as MDP suggests. If MDP's interpretation of the law that forms the basis of its claim to relief is incorrect, it cannot maintain the action. In other words, even assuming Plaintiffs' factual allegations are correct that students do not possess a form of ID other than a student ID (improbable as that is), it still cannot show that it is entitled to relief because it is simply incorrect that the student ID combined with a voter registration card would not suffice. And without that legal basis for its alleged harm, the

complaint does not state a cognizable claim, even assuming it could raise hypothetical claims for hypothetical student voters.

As Secretary Jacobsen noted in her opening brief–and as MDP concedes–students have ready access to a student ID and voter registration confirmation. That combination of documents is all a student needs to comply with SB 169. Even if MDP could raise manufactured claims for hypothetical voters, it misses the mark at even that goal because it overreads SB 169.

V. MDP does not address the plain language of the federal Elections Clause, which delegates authority over *federal elections* to state legislatures, not state courts.

The Federal Elections Clause gives state legislatures, not state courts, the authority to regulate the time, place, and manner of elections. U.S. Const. art. I, § 4, cl. 2. "The Supreme Court interprets the words 'the Legislature thereof,' as used in [the Elections] [C]lause, to mean the lawmaking processes of a state." *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (citing *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 135 S. Ct. 2652 (2015)).

MDP asserts that every court to address Secretary Jacobsen's argument has rejected it, without citing a single case–strong evidence that its assertion is overstated. While the United States Supreme Court has not directly addressed the question, four Justices have recognized a "strong likelihood" that Secretary Jacobsen's argument is correct. *See Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1, 2 (2020) ("The provisions of the Federal Constitution conferring on state legislatures, not state courts, the 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.") (statement of Alito, J, joined by Thomas and Gorsuch, JJ.); *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020)

("The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules.") (Gorsuch, J., concurring, joined by Kavanaugh, J.).

Though the State is heartened by MDP's concern for federalism, it is not a "breathtaking federal intrusion into state court jurisdiction" to argue that state courts lack authority to override a direct constitutional delegation of authority to the legislature for *federal elections*. Federal supremacy is a basic constitutional premise. U.S. Const. art. VI, cl. 2. When the federal constitution delegates authority specifically to the state legislature for federal elections, under the Elections Clause in Article I, § 4 "there must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts." *Colo Gen Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, CJ., dissenting from denial of certiorari).

MDP evidently misreads Secretary Jacobsen's argument, suggesting that the Elections Clause prohibits the state courts from adjudicating all election law cases. That is of course not the argument Secretary Jacobsen advances. Rather, the authority of state courts to modify the time, place, and manner of *federal elections* is what the Elections Clause constrains. It is hardly "breathtaking" that the federal constitution would limit authority over federal elections. Because the relief MDP seeks would intrude on the Legislature's exclusive province to regulate federal elections under the Elections Clause, MDP's complaint should be dismissed.[7]

[7] MDP asserts that simply because Secretary Jacobsen has not yet filed a dispositive motion against HB 530 (Paid Ballot Collection Restrictions), which prohibits paid ballot gathering, she somehow concedes strict scrutiny applies, the equal protection allegations "do not hinge on facial classifications", and that the Elections clause does not apply. MDP BIO, fn 6. Nothing about that statement that is correct. The United States Supreme Court recently rejected claims very similar to MDP's against a more restrictive ballot collection law. *See Brnovich*, 141 S.Ct. at 2347–49. MDP's claims should likewise be rejected, but those issues are reserved for a future dispositive motion.

DATED this 26th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2021, I mailed a true and correct copy of the foregoing document, by the means designated below, to the following:

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