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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' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY UNDER RULE 26(C)(1)

Defendant Secretary Jacobsen's motion for protective order to stay discovery should be denied. The Secretary's main argument—that she would like to see whether her motion to dismiss is granted before expending resources complying with discovery requests—would apply equally to every defendant who files a motion to dismiss in any civil case. But Montana courts do not require a plaintiff to wait to prevail against a motion to dismiss to commence discovery, as underscored by the lack of authority supporting the Secretary's argument. Nor can the Secretary plausibly argue that her *partial* motion to dismiss should stay discovery on *all* claims brought by Plaintiffs.

As additional grounds for a protective order, the Secretary also argues that Plaintiffs' discovery requests are unduly burdensome, but that argument should likewise be rejected, not least because the Secretary relies solely on conclusory statements from counsel and makes no effort to explain how or why any of the discovery requests is burdensome, let alone unduly so. Without specific objections or support for her claims of burden, issuance of a protective order would be premature. In any event, a generalized dispute over the scope of discovery does not require the Court to halt discovery altogether. That is particularly so here, in a time-sensitive case with profound constitutional implications. The Secretary's motion should be denied.

I. BACKGROUND

Plaintiffs filed this action in April 2021, alleging that two Montana election laws—enacted in House Bill 176 ("HB 176") and Senate Bill 169 ("SB 169")—infringe upon the fundamental right to vote under the Montana Constitution. After Plaintiffs filed an amended complaint in May adding an additional challenge to a third law—enacted in House Bill 530 ("HB 530")— and detailing new causes of action, the Secretary responded with a partial motion to dismiss. Her motion sought to dismiss only claims relating to HB 176 and SB 169 and did not seek dismissal

of the challenges to HB 530. The motion is fully briefed and awaiting decision.[1] On August 9, Plaintiffs served discovery requests on the Secretary, seeking documents and information related to Plaintiffs' claims. Two days later, counsel for the Secretary advised Plaintiffs that the Secretary would ask the Court to stay discovery pending resolution of her pending partial motion to dismiss. Plaintiffs advised that they opposed the request for a stay. Under the standard timelines set forth in the Montana Rules of Civil Procedure, the Secretary's responses to Plaintiffs' discovery requests are due 30 days after service, on September 8.

II. DISCUSSION

A. The Secretary's motion to stay discovery does not meet Rule 26's "good cause" standard.

The Secretary's motion for protective order to stay discovery should be denied. "The rules of civil procedure are premised upon a policy of liberal and broad discovery." *Patterson v. State, Dep't of Justice, Motor Vehicle Div.*, 2002 MT 97, ¶ 15, 309 Mont. 381, 385, 46 P.3d 642, 645. "The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith." *Richardson v. State*, 331 Mont. 231, ¶ 22, 130 P.3d 634, ¶ 22 (2006). Accordingly, Montana Rule of Civil Procedure 26 provides that discovery can be executed "in any sequence," unless "the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice." MT. R. Civ. P. 26(d). Rule 26 further mandates that protective orders should be granted only for "good cause." MT. R. Civ. P. 26(c)(1).

The Secretary fails to establish good cause here. Neither the parties' convenience nor the interests of justice require the Court to depart from the general "any sequence" rule. The Complaint alleges ongoing violations of the fundamental constitutional rights of Montana voters. These are

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[1] No party requested oral argument.

critical and time-sensitive issues that must be resolved before the next statewide primary election on June 7, 2022. Moreover, discovery in this case is inevitable; the Secretary seeks to dismiss challenges to just two of the three laws challenged in the Complaint. Accordingly, discovery will move forward regardless of the outcome of the motion to dismiss.[2] Many of the requests are overlapping, rather than cleanly bifurcated by claim. Delaying the start of discovery will only require the litigants and the court to speed through later stages of the case at breakneck pace. The parties, the Court, and the people of Montana are better served by allowing discovery to proceed in the usual course on all claims, so that each stage of the case is allowed sufficient time to proceed as thoughtfully as circumstances permit.

The Secretary offers little case law supporting her position that this case presents good cause to depart from typical discovery timelines. She does not point to a single Montana court that has stayed discovery while a motion to dismiss is pending under similar circumstances, nor has Plaintiffs' research revealed any. Although the Secretary cites *Bartlett v. Allstate Insurance Company* for the principle that the Court has discretion to stay discovery generally, that case merely affirmed a court's ability to stay *additional* discovery on a claim that had *already been dismissed* on summary judgment. 280 Mont. 63, 67, 929 P.2d 227, 229 (1996). It lends no support to the Secretary's notion that the Court should stop discovery from beginning altogether when a motion to dismiss is pending. Nor do *Boese v. McKinnon* or *McAtee v. Whitefish Credit Union*, as both decisions turn on grounds not at issue here. *See Boese*, 2010 MT 209N, ¶ 13 (unpublished decision) (affirming stay of discovery while motion for summary judgment was pending and stating that "[i]t is appropriate for courts to delay costly and time-consuming litigation activities

[2] The Secretary does not explain what basis the Court would have to stay discovery on the challenges to HB 530, which are not at issue in the motion to dismiss.

when a motion to dismiss or for summary judgment is pending *on the grounds of immunity*") (emphasis added); *McAtee*, 2015 WL 13776538, *1 (Mont. Dist. 11th, Dec. 10, 2015) (staying depositions scheduled for the following week based on a finding that depositions would subject deponents to "undue burden and expense," noting that a decision on a motion to dismiss that could "eliminate" the need for depositions was "forthcoming," and specifically finding that the plaintiff "would not be prejudiced" by the "slight delay").

Although the Secretary correctly points out that federal courts occasionally stay discovery while motions to dismiss are pending, she does not even argue that this case meets the standards federal courts use to evaluate such stay requests. For instance, courts in the Ninth Circuit "require more than an apparently meritorious 12(b)(6) claim" to stay discovery and instead "have insisted on a particular and specific demonstration of fact, as distinguished from conclusory statements, in order to establish good cause." *Twin City Fire Ins. Co. v. Employers Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989). The Secretary makes no attempt to meet this standard beyond offering conclusory statements by counsel, nor does she demonstrate the type of "extraordinary justification" required to satisfy the "good cause" requirement. If defendants could avoid discovery simply by filing a motion to dismiss, civil litigation would be needlessly delayed statewide. "Justice delayed is justice denied." *McGrath Delivers His 1st "State of Judiciary" Address to Legislature*, Mont. Law., April 2009, at 7, 8.

The remainder of the Secretary's argument relies on an oft-rejected interpretation of an Eleventh Circuit case, *Chudasama v. Mazda Motor Corporation*, 123 F.3d 1353, 1367 (11th Cir. 1997). In *Chudasama*, the Eleventh Circuit held that the district court abused its discretion when it refused to stay discovery while waiting a year and a half to rule on a motion to dismiss, despite the presence of an obviously unmeritorious claim that "dramatically enlarged the scope" of the

case and directly fostered abusive discovery tactics. *Id.* at 1369. In the Secretary's view, *Chudasama* requires a court to stay discovery any time a motion to dismiss facially challenges the legal sufficiency of a claim. Mot. at 5. But identical arguments have been repeatedly rejected by courts in the Eleventh Circuit itself, in opinions that have emphasized that *Chudasama* "does not stand for the proposition that all discovery should be stayed pending a decision on a motion to dismiss," but instead, "stand[s] for the much narrower proposition that courts should not delay ruling on a likely meritorious motion to dismiss while undue discovery costs mount." *Schreiber v. Kite King's Lake, LLC*, No. 2:10-CV-391, 2010 WL 3909717, at *1 (M.D. Fla. Oct. 1, 2010) (citing *Koock v. Sugar & Felsenthal, LLP*, 2009 WL 2579307 * 2 (M.D. Fla. Aug. 19, 2009)). In rejecting a similar *Chudasama*-based argument, another court explained that motions to stay discovery "are not favored because when discovery is delayed or prolonged [as] it can create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997) (citations omitted).[3] So too, here. As explained above, pausing discovery here is impracticable and would only result in needlessly compressed timelines, additional unnecessary discovery disputes, and highly expedited briefing schedules later on, which prejudices the parties and the Court alike by requiring them to hurry through the profoundly important constitutional issues implicated in this case.

B. The Secretary's objections to the scope of discovery are premature and do not provide a basis to stay discovery altogether.

The Secretary additionally complains that she should not have to comply with Plaintiffs' initial discovery requests because they are "impermissibly broad," Mot. at 4, but the Secretary

[3] No Montana state court or the federal district court for Montana has cited, let alone adopted the reasoning of, *Chudasama*.

offers no support for that assertion; she doesn't even attempt to explain why any particular request or requests or problematic. The only discovery request she mentions—"the very first interrogatory," Defendants' Brief at 3—asks her to identify the number of Montanans who registered to vote on each election day since 2006, data that the official charged with overseeing elections should have at her fingertips (and of the sort that is routinely and regularly produced without issues in election law cases). Even then, the Secretary makes no argument of undue burden. Instead, she claims only that she "will argue"—at some unidentified future date, and on entirely unspecified grounds—that the discovery requests are too burdensome. *Id.* at 3. Of course, the mere possibility of a future argument about burden cannot justify a present protective order. If the Secretary had any colorable argument for undue burden, she could have made it in support of her motion.

In any event, Plaintiffs' requests are well within the proper scope of discovery. Generally, litigating parties "may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." MT. R. Civ. P. 26(b)(1) The amended complaint alleges facts demonstrating that three Montana election laws infringe upon Montanans' right to vote, right to equal protection under the law, and right to speak and associate. Plaintiffs' discovery requests seek disclosure of routine public records and other information directly related to these allegations. Despite the Secretary's protests, state election officials regularly maintain precisely the type of voter lists and documentation that Plaintiffs seek.

Without specifically describing the burdens of locating these public records (for instance, through a client declaration or fact-based testimony), the Court and other parties have nothing more than attorney speculation by which to conclude that the burdens of discovery are undue (and that the Secretary will explain how or why, at some unspecified point in the future). If, after

conferring with Plaintiffs about the scope of specific requests, the Secretary continues to feel that they are overbroad, she can use the exact same procedure that she (and every other civil litigant) uses in every other case: she can object. But asking the Court to intervene at this stage, on the basis of generic and unsupported contentions about the scope of discovery and a potential future argument about burden, is improper and does not provide a justifiable basis for granting the Secretary's motion.

For these reasons, the Secretary's motion should be denied.

Dated: August 20, 2021

Respectfully submitted,

By: */s/ Peter Michael Meloy*

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CERTIFICATE OF SERVICE

I hereby certify that on the **th day of August, 2021, I served a true and correct copy of this document via email, to the following:

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