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IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

<p>Montana Democratic Party and Mitch Bohn, Plaintiffs, vs. Christi Jacobsen, in her official capacity as Montana Secretary of State, Defendant.</p>	<p>Cause No.: DV 21-0451 Judge: Michael Moses DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY UNDER RULE 26(C)(1)</p>
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INTRODUCTION

There are two irrefutable facts MDP ignores in its argument against Secretary Jacobsen's motion to stay discovery pending the resolution of its motion to dismiss. First, the scope of discovery is expressly tied to the claims and defenses asserted in the litigation. M.R.Civ.P.

(20)

26(b)(1). Second, if granted, the motion to dismiss would eliminate two of the three recently enacted laws challenged by Plaintiffs, thereby significantly limiting the scope of this litigation. *See Def's Motion to Dismiss*. Given that the need to respond to much of Plaintiff's recent discovery requests may be eliminated based upon the outcome of Jacobsen's motion to dismiss, a stay of discovery is necessary to avoid the risk of expending unnecessary and unrecoverable time and resources, and from forcing Jacobsen to respond to discovery requests before the scope of this litigation is known. It is this protection against "undue burden or expense" that is at the heart of Rule 26(c) and the Court's ability to enter protective orders. That is especially the case here, where Secretary Jacobsen's motion to dismiss involves fundamental jurisdictional issues concerning MDP's standing to assert claims for unidentified and hypothetical voters.

MDP has failed to show that a temporary stay of discovery is not the appropriate course of action. MDP's response relies on unsupported and facially illogical claims of prejudice, contains a dearth of authority supporting its position while denigrating and ignoring Montana precedent directly supporting a stay. And what little argument and authority it does present only supports Jacobsen's request for a stay.

The Montana Rule of Civil Procedure affords this Court wide discretion to grant a protective order staying discovery pending the outcome of Secretary Jacobsen's motion to dismiss. That motion is fully briefed and does not require any factual development from discovery, and Jacobsen should not be required to undertake potentially needless and undue burden and expense in responding to MDP's discovery requests before that motion is resolved. Finally, a stay will impose no prejudice on Plaintiff. The parties have jointly moved the Court for

a hearing on the motion to dismiss and other pending motions, and the Court has ordered a scheduling conference for September 22, 2021. The pending motions should be resolved before discovery commences in this case.

ARGUMENT

I. **There is good cause to stay discovery pending resolution of the fundamental jurisdictional questions involved in Secretary Jacobsen's motion to dismiss.**

MDP offers little authority to oppose Secretary Jacobsen's motion to stay, choosing instead to attempt to denigrate the authority relied on by Jacobsen and assert conclusory allegations of prejudice. Both points fail.

First, MDP attempts to pigeon hole the facts of this case by arguing that Secretary Jacobsen "does not point to a single Montana court that has stayed discovery while a motion to dismiss is pending under similar circumstances," and then distinguishing the cases cited by Jacobsen due to trivial factual differences. *Plf's Resp.*, pp. 4-5. Somewhat surprisingly given this argument, Plaintiff itself does not point to any Montana authority or precedent to support the denial of a stay, whether under similar circumstances or at all. Nevertheless, and despite Plaintiff's attempts to distinguish the cases, the precedent Secretary Jacobsen cites shows that Montana courts prefer caution and will stay discovery when preliminary issues may render the costly and time-consuming discovery efforts unnecessary. See *McAtee v. Whitefish Credit Union*, 2015 WL 13776538, *1 (Mont. Dist. 11th, Dec. 10, 2015); *Boese v. McKinnon*, 2010 MT 209N, ¶ 13 (unpublished decision).

MDP next attempts to establish its own standard for when the Court should stay discovery pending a motion to dismiss by citing the single federal case *Twin City Fire Ins. Co. v. Employers Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989). MDP's argument misses the point

for at least three reasons. First, on a careful reading, *Twin City Fire* actually supports Secretary Jacobsen's motion for a stay in this case. After noting that "a pending Motion to Dismiss is not ordinarily a situation that in and of itself would warrant a stay of discovery" the Court went on to state that this position *does not* apply when the pending motion pertains to preliminary issues such as "jurisdiction, venue, or immunity[.]" *Twin City Fire Ins.*, 124 F.R.D. at 653. Of course, one of the arguments asserted in Jacobsen's motion to dismiss is standing, exactly the kind of preliminary issue that "in and of itself would warrant a stay of discovery." *Id.*; see also *Ballas v. Missoula City Bd. Of Adjustment*, 2007 MT 299, ¶ 15, 172 P.3d 1232, 1235 ("the term 'jurisdiction,' when referred to generally, encompasses subject matter jurisdiction, personal jurisdiction, issue jurisdiction, and constitutional requirements, such as ripeness and standing").

Second, even if MDP's reading of *Twin City Fire* were correct, that view does not reflect the position of the Ninth Circuit generally. In fact, as already noted by Secretary Jacobsen and just shortly before the *Twin City Fire* decision, the Ninth Circuit expressly stated that "[t]he purpose of F.R.Civ.P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery." *Rutman Wine Co. v. E.& J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987); see also *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (affirming a district court's stay of discovery pending a motion to dismiss because "[d]iscovery is only appropriate where there are factual issues raised by a Rule 12(b) motion").

Third, and relatedly, Montana Courts also do not apply the same rule that MDP derives from *Twin City Fire*. To the contrary, decisions like *McAtee* and *Boese* cited above clearly demonstrate that Montana courts take a different approach, placing a higher value on protecting against undue burden or expense in the face of potentially needless discovery.

MDP would also have this court disregard the Eleventh Circuit's decision and rationale in *Chudasama v. Mazda Motor Corporation*, 123 F.3d 1353, 1367 (11th Cir. 1997), because it has not yet been uniformly adopted. But regardless of decisions distinguishing *Chudasama* under some circumstances, nothing in MDP's response changes the facts that the Eleventh Circuit's decision and analysis remains convincing, directly applicable to this case and, most importantly, consistent with the decisions of Montana courts on similar issues.

Given that MDP has provided no legal authority establishing that the Court should refuse to exercise its discretion to grant a stay pending the resolution of Jacobsen's motion to dismiss, it must rely on allegations of prejudice. It asserts a stay will cause it prejudice due to a resulting "breakneck pace" for discovery and impacts to case management, such as unnecessary discovery disputes, compressed timelines, and highly expedited briefing schedules. *Plf's Resp.*, pp. 3, 6. But MDP fails to articulate any convincing argument or justification to support either claim, and both allegations make little sense given that this case is in its infancy and no scheduling order issued (and thus no case management to disrupt). Nor does MDP offer any justification as to why a discovery stay would result in "unnecessary discovery disputes" and the only reason Plaintiff gives for its fear of a "breakneck" discovery pace is the purported need to resolve this litigation before the June 7, 2022 primary election. *Plf's Resp.*, p. 3. Rather, resolving the fundamental jurisdictional issues in Secretary Jacobsen's motion to dismiss first is the most efficient course in this case, because it will guide the future course of the case and avoid needless time spent on discovery of issues that ultimately may not be relevant to the litigation.

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II. MDP's improperly burdensome discovery requests are not at issue.

MDP's remaining arguments against a temporary stay of discovery pertain to whether its discovery requests are impermissibly broad and burdensome. MDP misunderstands Secretary Jacobsen's argument. The motion to stay is not challenging the scope of MDP's discovery requests at this juncture. Instead, Secretary Jacobsen is simply pointing out that the discovery requests are very broad and will involve considerable burden and expense, much of which may be unnecessary if Secretary Jacobsen's motion to dismiss is successful.

MDP also latches on to Secretary Jacobsen's indication that if a stay is not granted, and MDP does not agree to limit its overly broad discovery requests, the Court will likely be asked to resolve the permissible scope of MDP's discovery through additional motions practice. This point, however, only underscores the importance and practicality of Secretary Jacobsen's request for a stay. The scope of discovery is based on the claims and defenses asserted. *See* Rule 26(b)(1). It makes little sense to engage in disputes about the scope of MDP's discovery before the Court decides the motion to dismiss, which may limit the scope of the case, and, thus, the permissible scope of discovery. It is exactly for that reason (among others) that courts find that it is appropriate to stay discovery pending resolution of a motion to dismiss like Secretary Jacobsen's that involves fundamental jurisdictional questions about a party's standing. With this case in its infancy, there is simply no good reason to force Jacobsen to incur the risk of unnecessarily expending time and resources responding to needless discovery, or to engage in discovery disputes the resolution of which will similarly depend on the scope of the litigation and thus the pending motion to dismiss.

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CONCLUSION

For these reasons and for the reasons set forth in Jacobsen's brief in support of its motion, Jacobsen respectfully requests the Court to enter a protective order temporarily staying discovery until the Court resolves the pending motion to dismiss.

DATED this 7th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2021, I mailed a true and correct copy of the foregoing document, by the means designated below, to the following:

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