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David M.S. Dewhirst (MT Bar #65934132)
Solicitor General
Kathleen L. Smithgall (MT Bar #67323943)
Office of the Attorney General
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026

Austin Markus James (MT Bar #58422031)
Chief Legal Counsel
Office of the Secretary of State
Montana Capitol Building, Room 260
P.O. Box 202801
Helena, MT 59620-2801
Telephone: (406) 444-6197

Dale Schowengerdt (MT Bar #30342848)
Ian McIntosh (MT Bar #4384)
David F. Knobel (MT Bar #212614)
Clayton Gregersen (MT Bar #36387689)
CROWLEY FLECK PLLP
Helena, MT 59601
P.O. Box 797
Helena, MT 59624-0797
Telephone: (406) 449-4165

Attorneys for Defendant Christi Jacobsen, in her official capacity as Montana Secretary of State

IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Group, Plaintiffs, vs. Christi Jacobsen, in her official capacity as Montana Secretary of State, Defendant.	Cause Nos.: DV 21-0451 DV 21-1097 Judge: Michael Moses Judge: Gregory R. Todd **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE**

Introduction

The Court should deny Montana Youth Action's motion to consolidate this case with *Montana Democratic Party, et al. v. Jacobsen*, No. DV 21-0451 ("MDP") and *Western Native Voice, et al. v. Jacobsen*, No. DV 21-0560 ("WNV"). The Montana Youth Action case involves distinct claims against a statute not challenged by the other cases (HB 506). Consolidating these three cases would unnecessarily complicate the issues, would make fitting trial in the existing schedule impossible, and would prejudice Secretary Jacobsen's defense.

Consolidation can be a valuable tool to enable efficiencies for the court and parties where cases present similar claims under similar facts. But it can also have the opposite effect, adding unnecessary complexity to an already complex case involving voluminous documents, multiple claims, and multiple parties, as here. Montana Youth Action asserts three distinct claims against HB 506, which prohibits distribution of ballots before a voter is eligible to receive them. That challenge is not at issue in the MDP or WNV cases and it involves a unique age discrimination claim under Article II, § 15 filed specifically on behalf of minors. Moreover, the MDP and WNV cases involve a challenge to HB 530 that is not at issue in *Montana Youth Action v. Jacobsen.*

Consolidation is further complicated because a scheduling order has already been entered and a 10-day trial setting has been carefully coordinated by counsel for MDP, WNV, and Secretary Jacobsen. The parties were concerned that even 10 days would not be sufficient, given the number of claims, parties, documents, and lawyers involved. Adding yet another set of unique claims against a separate statute on behalf of new and distinct minor plaintiffs would render it impossible to conduct trial within 10 days, without prejudicing Secretary Jacobsen's defense.

Certainly coordination of discovery makes sense in these cases to the extent possible. But the parties can coordinate discovery without consolidating the cases. The Court should deny Montana Youth Action's motion to consolidate.

I. Consolidation is not appropriate because Montana Youth Action's case involves distinct issues and fitting its claims within an already tight trial schedule is impossible.

Consolidating Montana Youth Action's case with WNV and MDP will further complicate an already complex case and make the existing, carefully crafted trial schedule in those cases impossible to fulfill if Montana Youth Action's unique claims on behalf of minors are added to the mix. In short, consolidating the distinct claims in Montana Youth Action's case would undermine judicial efficiency rather than promote it.

Rule 42(a)(2) provides that if actions involve a common question of law or fact, a district court *may* consolidate the proceedings. "The purpose of consolidation is to expedite the business of the court, economically and with justice to the parties." *Peavey Co. v. Agri-Servs., Inc.*, 163 Mont. 394, 399, 517 P.2d 718, 721 (1973). But "the mere fact that a common question is present, and that consolidation therefore is permissible under Rule 42(a), does not mean that the trial court judge must order consolidation." Wright & Miller, Federal Practice & Procedure § 2383 (3d Ed. 2019).[1] Rather, courts still should weigh "'the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause.'" *Harry v. KCG Americas LLC*, No. 17-CV-02385-HSG, 2018 WL 4075885, at *3 (N.D. Cal. Aug. 27, 2018) (quoting *Huene v. U.S.*, 743 F.2d 703, 704 (9th Cir. 1984)).

[1] Montana's Rule 42(a) is identical to the corresponding federal rule, and the Montana Supreme Court has looked to federal court decisions for guidance when interpreting the Rule. *See Park Cty. Stockgrowers Ass'n Inc. v. Montana Dep't of Livestock*, 2014 MT 64, ¶ 13, 374 Mont. 199, 320 P.3d 467.

Even when cases involve common questions of law and fact, a district court may deny a consolidation motion "if other factors convince the court not to consolidate." *In re E. Bench Irr. Dist.*, 2009 MT 135, ¶ 39, 350 Mont. 309, 207 P.3d 1097. Some of the other factors courts consider include:

1) Whether one case contains a unique legal theory not present in the other cases. *See Ass'n of Unit Owners of Deer Lodge Condo. v. Big Sky of Montana, Inc.*, 245 Mont. 64, 86, 798 P.2d 1018, 1031–32 (Mont. 1990); *East Bench Irr. Dist.*, ¶¶ 41–42;

2) Whether consolidation would require parties to engage in issues that did not concern them. *See East Bench Irr. Dist.*, ¶¶ 41–42;

3) Whether discovery needs differed between the parties in the two cases. *See Deer Lodge Condo.*, 245 Mont. at 86, 798 P.2d at 1031–32;

4) Whether consolidation would prejudice one party. *See Solvent Chem. Co. ICC Indus. v. EI Dupont De Nemours & Co.,* 242 F.Supp.2d 196, 221 (W.D. N.Y. 2002).

These factors counsel against consolidation here. First, Montana Youth Action lodges a unique legal theory against HB 506, a statute that is not challenged in the other two cases. HB 506 prohibits ballots from being sent to voters until they are eligible to vote. Montana Youth Action asserts three claims against HB 506, including the right to suffrage (Count Three), Age Discrimination under Article II, § 15 (Count Four), and Equal Protection (Count Five), and it brings those claims on behalf of **minors**. *See* Cmplt., ¶¶ 10-14. Montana Youth Action is the only case that challenges HB 506, the only case that asserts an age discrimination claim under Article II, § 15, and the only case asserting claims on behalf of minors.

Claims on behalf of minors under Article II, § 15 are unique. *Bhumann v. State*, 2008 MT 465, ¶ 157, 348 Mont 205, 201 P.3d 70 (Nelson, J., dissenting). Age discrimination claims under this constitutional provision therefore are subject to a unique analysis. *See In re C.H.*, 210 Mont. 184, 202, 683 P.2d 931 (1984) (recognizing the unique analysis required by Article II, § 15 claims

because "the constitutional rights of children cannot be equated with those of adults" in all contexts). This unique analysis may be complicated by the need for this Court to resolve a potential conflict between Montana Youth Action's contention that Article II, § 15, grants a fundamental right of suffrage to individuals under the age of 18, *see* Complaint, ¶¶ 29, 73, 123–129, and Article IV, § 2, which defines a qualified elector as "[a]ny citizen of the United States 18 years of age or older." This analysis is simply not relevant to claims made by WNV and MDP.

Montana Youth Action anticipates the objection and claims that the other cases also allege claims on behalf of "young voters." Montana Youth Action Brief, 7. But Montana Youth Action's claim that these cases involve essentially the same claims ignores the reality of their complaint. No other case raises claims on behalf of minors under Article II, § 15 and no other case challenges HB 506. MDP and WNV's claims involve voters over the age of 18, not minors. *See, e.g.,* MDP Complt. ¶¶ 7–12 (describing MDP as being focused on eligible voters, rather than minors not yet eligible to vote); WNV Complt. ¶¶ 82–111 (describing the underlying facts of the Complaint by reference to voters, not minors). And those cases challenge amendments to voter ID and late registration. There is no overlap in MDP's voter ID cause of action related to college students, and Montana Youth Action's claims against HB 506 for minors who are not yet eligible to vote. Consolidating Montana Youth Action's case with MDP and WNV would add "a notable layer of complication, claims, and facts to the array of claims and issues" and likely would "cause more trouble than what it is worth." *Pac-W Distrib. v. AFAB Indus. Serv., Inc.*, No CV 19-3584, 2020 WL 4470447, at * 9-10 (E.D. Pa. Aug. 4, 2020) (denying motion to consolidate).

Second, and related, consolidation would undoubtedly require the parties to engage in multiple issues that do not concern them, exposing them to unnecessary delay and expense and,

ultimately, making consolidation inappropriate. *East Bench Irr. Dist.*, ¶¶ 41– 42; *see also Curry v. Am. Standard*, No. 7:07-CV-4771, 2010 WL 6501559, at *1–2 (S.D.N.Y. Dec. 13, 2010) (denying motion to consolidate because "key differences between the two cases, and the likely complications at trial resulting from these dissimilarities, caution against consolidation"). Not only does Montana Youth Action challenge HB 506, which is not at issue in the other cases, but MDP and WNV challenge HB 530, which prohibits paid ballot collection in certain contexts and is not challenged by Montana Youth Action. *See* MDP Complaint, Count IV to VIII. Only Montana Youth Action's case challenges statutes on behalf of minors who are not yet eligible to vote. *See, e.g.,* Montana Youth Action Complt. ¶¶ 10-15. The MDP and WNV cases will focus on parties and issues not relevant to Montana Youth Action, and Montana Youth Action will focus on minors, which are not relevant to the MDP and WNV cases. Resolving those disparate claims in one docket does not streamline this litigation; it unnecessarily complicates it. *See In re Viatron Computer Sys. Corp. Litig.*, 86 F.R.D. 431, 435 (D. Mass. 1980) (denying motion when consolidation would make "already complicated litigation too complex for effective judicial administration").

Third, the differences in those claims will also make discovery needs different between the parties, which is another reason to deny consolidation. *Deer Lodge Condo.*, 245 Mont. at 86, 798 P.2d at 1031–32. Because Montana Youth Action's claims on behalf of minors are unique, discovery on behalf of minors challenging HB 506 will be unique. Likewise, discovery and legal analysis on claims against HB 530 related to free speech, due process, and legislative delegation are not at issue in the Montana Youth Action case.

Fourth, the result of combining these disparate claims and challenges by parties with differing interests and distinct legal analysis will prejudice Secretary Jacobsen's defense of the case and potentially confuse the issues. Most notably, the parties in MDP and WNV took painstaking, early efforts to reserve a 10-day trial setting in this case that would accommodate the multiple claims, parties, and lawyers in both cases. Although the cases were not yet consolidated, counsel for MDP and WNV coordinated with counsel for Secretary Jacobsen to develop a scheduling order that would accommodate the various claims and parties to what was anticipated would be a consolidated trial. Montana Youth Action did not participate in that coordination.

To add an entirely new case (including three additional parties), challenging 1) a statute not challenged in the other cases (HB 506), 2) under legal theories not raised in the other cases, and 3) on behalf of minors, rather than already-registered voters, makes the 10-day trial setting impossible. There would be no way to try a case against four statutes, based on over a dozen causes of action in the 10 days currently set for trial, without severely prejudicing Secretary Jacobsen's ability to lodge a full defense of the independent statutes. *See Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir. 1990) ("Considerations of convenience and economy must yield to a paramount concern for a fair . . . trial."); *Cont'l Bank & Tr. Co. v. Ols. E.D. Platzer*, 304 F.Supp. 228, 229-30 (S.D. Tex. 1969) (recognizing that even when there are common issues of law and fact, "it is not believed that there would be sufficient saving of judicial time and effort to warrant a joint trial when balanced against the inconvenience, delay and confusion that might result from requiring each party to attend trial of some issues in which it is not involved.").

Montana Youth Action cites two primary reasons for consolidation: 1) coordination of discovery; and 2) avoiding inconsistent district court decisions involving challenges to the same

statutes. Those points do not justify consolidation. First, the parties can, and should, coordinate discovery even if the cases are not consolidated.[2] Second, Montana Youth Action's argument that consolidation will avoid inconsistent decisions is overstated. Each of these cases must stand on its own merit, and the Court must decide each of the claims of each plaintiff distinctly, rather than lumping them together. *See Park Cty Stockgrowers's Ass'n v. Montana Dep't of Livestock*, 2014 MT 64, ¶13, 374 Mont. 199. 320 P.3d 467 (even if consolidated, "the parties' rights still turn on the pleadings, proof, and proceedings in their respective cases."). And, in any event, avoiding potentially inconsistent decisions from district courts cannot be avoided because a separate case has been filed in the Eight Judicial District challenging HB 176, as Montana Youth Action acknowledges. Montana Youth Action Brief, n. 2; *see MFPE et al. v. Jacobsen*, Cause No. DV 21-0500 (8th Jud. Dist. Ct.). Cases in separate judicial districts cannot be consolidated. *Yellowstone Cty. v. Drew*, 2007 MT 130, ¶¶ 14-16, 337 Mont. 346, 160 P.3d 557.

Secretary Jacobsen's concerns about consolidating Montana Youth Action's case may be lessened if these cases were resolved on motions for summary judgment, rather than trial. Resolving all issues on cross-motions for summary judgment would alleviate the concern about fitting all these issue within a 10-day trial setting and would make consolidation less prejudicial to Secretary Jacobsen. Consolidation may make sense under that scenario. And because these are constitutional challenges to statutes, there do not appear to be disputed issues of material fact that would preclude summary judgment. The plaintiffs in MDP and WNV, however, have so far not agreed that the cases can be resolved on summary judgment.

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[2] Secretary Jacobsen notes that the MDP and WNV have already served lengthy and largely overlapping discovery requests.

As a result, consolidation of these cases, especially for trial, is not warranted and would greatly complicate an already complex set of cases with multiple parties. The Court should deny the motion.

II. If the Court grants the motion to consolidate, it should bifurcate trial and require that the parties coordinate discovery and briefing to ensure that consolidation is actually efficient.

If the Court grants Montana Youth Action's motion to consolidate, it should only consolidate the issues in common, including only challenges to HB 176 and SB 169. Rule 42(a)(1) (the court may "join for hearing or trial any or all matters at issue"). In the alternative, the Court should bifurcate trial of Montana Youth Action's challenge to HB 506. *See* Rule 42(b) ("For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims"). "A court may bifurcate claims in order to avoid the danger of prejudice or for court convenience." *Henricksen v. State*, 2004 MT 20, ¶ 29, 319 Mont. 307, 84 P.3d 38.

Because the challenge to HB 506 involves distinct legal claims (e.g., age discrimination) on behalf of distinct parties (minors), the Court should not consolidate that distinct challenge, or at least require a separate trial on the HB 506 challenge. That is especially important since, as noted, it would not be possible to fit the HB 506 challenge within the current 10-day trial setting contemplated by the scheduling order. *See Solvent Chem. Co. ICC Indus.,* 242 F.Supp.2d at 221 ("The court must balance the efficiency concerns against the potential for confusion or prejudice which may result from [consolidation].") (quotation omitted).

If the Court orders consolidation, Secretary Jacobsen also requests that the Court make it explicit how consolidation will advance efficiency by ordering the following:

1) The parties should make an effort to resolve claims on cross-motions for summary judgment;

2) For pre-trial motions and trial briefs, Plaintiffs should file one, coordinated brief on all overlapping issues, including all parties' challenges to HB 176 (voter registration) and SB 169 (voter ID), and WNV and MDP's challenge to SB 530 (paid ballot collection);

3) To ensure the cases proceed efficiently, that: (a) Plaintiffs, jointly, are limited to fifty interrogatories; and (b) Plaintiffs shall jointly depose individuals and each deposition will be limited to seven hours in length.

Absent these limitations on the plaintiffs to these actions, there would be very little utility to consolidation.

Conclusion

For the foregoing reasons, the Court should deny Montana Youth Action's motion for consolidation. If the Court grants the consolidation motion, it should only consolidate Montana Youth Action's claims related to HB 176 and SB 169, which are the only claims in common with the MDP and WNV actions. It should also make it clear that the plaintiffs must engage in joint discovery and file consolidated briefs on all common issues.

Dated November 24, 2021.

Dale Schowengerdt
Ian McIntosh
David F. Knobel
Clayton Gregersen
CROWLEY FLECK PLLP
Helena, MT 59601
P.O. Box 797
Helena, MT 59624-0797

Counsel for Defendant Secretary of State Christi Jacobsen

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2021, I mailed a true and correct copy of the foregoing document, by the means designated below, to the following:

[X] U.S. Mail [X] Electronic mail [ ] Facsimile [ ] Hand delivery [ ] Certified mail, return receipt	Rylee Sommers-Flanagan Upper Seven Law P.O. Box 31 Helena, MT 59624 Email: rylee@uppersevenlaw.com
[X] U.S. Mail [X] Electronic mail [ ] Facsimile [ ] Hand delivery [ ] Certified mail, return receipt	Alex Rate ACLU of Montana P.O. Box 1968 Missoula, MT 59806 ratea@aclumontana.org
[X] U.S. Mail [X] Electronic mail [ ] Facsimile [ ] Hand delivery [ ] Certified mail, return receipt	Peter Michael Meloy Meloy Law Firm P.O. Box 1241 Helena, MT 59624 Email: mike@meloylawfirm.com
[X] U.S. Mail [X] Electronic mail [ ] Facsimile [ ] Hand delivery [ ] Certified mail, return receipt	John Heenan Heenan & Cook PLLC 1631 Zimmerman Trail Billings, MT 59102 Email: john@lawmontana.com
[X] U.S. Mail [X] Electronic mail [ ] Facsimile [ ] Hand delivery [ ] Certified mail, return receipt	Matthew Gordon Perkins Coie LLP 1202 Third Avenue, Ste 4900 Seattle, WA 98101-3099 mgordon@perkinscoie.com

By Courtney Ulda