

RYLEE SOMMERS-FLANAGAN
Upper Seven Law
P.O. Box 31
Helena, MT 59624
Phone: (406) 396-3373
Email: rylee@uppersevenlaw.com

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Attorney for Plaintiffs

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

Montana Youth Action; Forward
Montana Foundation; and
Montana Public Interest
Research Group,

Plaintiffs,

vs.

CHRISTI JACOBSEN, in her
official capacity as Montana
Secretary of State,

Defendant.

Cause Nos. DV 21-0451
DV 21-1097

Hon. Michael Moses
Hon. Gregory R. Todd

**Plaintiffs' Reply Brief in
Support of Motion for
Consolidation**

Youth Plaintiffs ask this Court to grant their motion for consolidation with *Montana Democratic Party et al. v. Jacobsen*, Cause No. DV 21-0451 (13th Jud. Dist. Ct., Hon. Michael Moses) (hereinafter MDP) and *Western Native Voice et al. v. Jacobsen*, Cause No. DV 21-0560 (13th Jud. Dist. Ct., Hon. Ashley Harada). Despite Defendant

Secretary of State's protestations to the contrary, trying these cases together will promote judicial economy, prevent delay, and reduce or eliminate duplicative discovery. Defendant sets out four factors, characterizing these as counseling against consolidation. Not only do these factors and the cited case law support consolidation, Defendant fails to account for the subset of nearly identical issues (legal and factual) present in Youth Plaintiffs' and MDP's cases.

While Defendant suggests Youth Plaintiffs' case presents an inconvenience to the existing trial schedule, in reality, Youth Plaintiffs' case must proceed apace with the MDP and Western Native Voice cases because all claims must be resolved before the 2022 election cycle to prevent confusing voters and elections officials. The Court should consolidate these cases to accomplish their efficient resolution.

ARGUMENT

I. Consolidation is warranted; no factors weigh against it.

Defendant argues that four factors counsel against consolidation. Not so.

As to the first factor—whether a case contains a unique legal theory—Defendant relies on two cases that bear little resemblance to the

case at issue here. In *Association of Unit Owners of Deer Lodge Condominium v. Big Sky of Montana, Inc.*, the court denied a motion for consolidation not because the cases to consolidate presented distinct legal theories but because the defendants between the two cases were different and presented different discovery issues. 245 Mont. 64, 86, 789 P.2d 1018 (1990). Here Defendant is the same across all cases and the discovery issues are hugely similar. In the second case, *In re East Bench Irrigation District*, the district court “determined that [plaintiff] had not established a nexus between the two cases and that there was no danger of conflicting or duplicative judgments.” 2009 MT 135, ¶ 40, 350 Mont. 309, 207, P.3d 1097. Moreover, the court observed that the cases plaintiff sought to consolidate were simply different in kind: one related to a boundary extension, while the other was about a contract confirmation. *Id.* Again, the case is simply inapposite. Youth Plaintiffs seek to consolidate their case with two others that challenge the constitutionality of two of the same laws that Youth Plaintiffs challenge. All three cases rely on the same nucleus of facts and every legal claim at issue is premised on violations of fundamental rights set forth in Article II of the Montana Constitution.

Regarding the second factor, Defendant argues consolidation will “require the parties to engage in multiple issues that do not concern them.” Def’s Opp. to Ps’ Mot. to Consolidate, at 4. An odd argument. MDP and Western Native Voice do not oppose Youth Plaintiffs’ Motion for Consolidation. Defendant must engage with each issue that the parties have raised regardless of where it is presented. Presumably if consolidation were likely to expose Youth Plaintiffs, MDP, and Western Native Voice to “unnecessary delay and expense,” this motion would be more roundly opposed. But Youth Plaintiffs’ view is that the other parties’ challenges to SB530 are compatible with Youth Plaintiffs’ case—and that Youth Plaintiffs’ challenge to HB506 is likewise harmonious with MDP and Montana Native Voice’s claims.

Defendant’s third factor—whether discovery needs between parties differ—counsels in Youth Plaintiffs’ favor. Youth Plaintiffs see little need for discovery beyond that sought by MDP and Western Native Voice and could comfortably agree to a reduced number of interrogatories (on their own behalf, not on behalf of other parties). Youth Plaintiffs plan to follow this reply in support of their motion for consolidation with a first set of combined discovery requests early in the week of November 29, 2021.

Youth Plaintiffs are aware that the significant majority of these requests will duplicate MDP and Western Native Voice's requests—depositions and future discovery requests will be made simpler by a consolidated case that provides the parties with the Court's blessing to coordinate.

The fourth factor Defendant presents is whether consolidation will prejudice a party. Without doubt, "considerations of judicial economy favor consolidation," but "those considerations 'must yield to a paramount concern for a fair and impartial trial.'" *Solvent Chem. Co. ICC Indus., Inc. v. E.I. Dupont De Nemours & Co.*, 242 F. Supp. 2d 196, 221 (W.D.N.Y. 2002) (quoting *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990)). Defendant claims that consolidating Youth Plaintiffs' case will prejudice its defense of the case and confuse the issues because "painstaking" efforts have already been made to reserve a 10-day trial date. Because Youth Plaintiffs' claims as to HB506 are likely resolvable on cross motions for summary judgment, Youth Plaintiffs could agree not to disrupt the existing scheduled trial with the addition of a fourth law to defend.

Defendant goes too far in suggesting that Youth Plaintiffs should somehow provide that all issues be resolved on motions for summary

judgment. But Youth Plaintiffs are prepared to abide by the existing scheduling order and could agree to separate HB506 from the other laws for purposes of ultimate resolution. Youth Plaintiffs maintain that Defendant would suffer no genuine hardship regardless of HB506's inclusion in the trial but can comfortably agree to the request to mitigate Defendant's concerns.

Failing to consolidate Youth Plaintiffs' challenges to HB169 and HB176 for the purpose of trial, however, would prejudice plaintiffs across all three cases. Evidence suggesting (1) cumulative discriminatory impact of the various laws at issue, and (2) discriminatory intent by the legislature in passing these laws, is relevant to claims brought by all three groups of plaintiffs. Forcing Youth Plaintiffs to duplicate the efforts of MDP and Western Native Voice, and vice versa, in separate trials would be inconvenient and inefficient for everyone involved. *See Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1371 (M.D. Ala. 1986) (granting consolidated trial of multiple plaintiffs' claims against multiple counties and officials under the Voting Rights Act).

Finally, Defendant makes much of the fact that HB506 targets minors, but Youth Plaintiffs are uniformly 18 years old by any relevant

Election Day. They are not different from any other party, except that they are generally younger—only recently eligible to vote. MDP also alleges that SB169, HB176, and SB530 discriminate on the basis of age, but Defendant complains that this is not enough to render the claims similar.

To be clear, Youth Plaintiffs acknowledge they raise a unique legal theory but point out that it is predicated on nearly the same body of facts as are all other legal claims presented among the three cases. These facts are mostly available in voter files and related demographic information already at issue in discovery. Moreover, even though one legal theory is distinct from the claims MDP and Western Native Voice advance, even that one theory relates to and is intertwined with claims that MDP brings. And, were that not enough, Youth Plaintiffs challenge two of the same laws that MDP challenges and one of the same laws that Western Native Voice challenges. Allowing these cases to proceed separately would be certain to produce duplication. Worse, it would create greater opportunity for inconsistency than already exists given the pending case. But consolidation will prevent duplication and inconsistency. The Court should grant Youth Plaintiffs motion.

II. Consolidation will allow efficient coordination to occur.

Defendant attempts to take the opportunity of its opposition to argue for a different structure to MDP's existing case and the existing proposed consolidation with Western Native Voice. These requests go beyond this motion. If the Court grants Youth Plaintiffs' motion, Defendant's requests require input from all Plaintiff parties—and not necessarily in briefs before this Court.

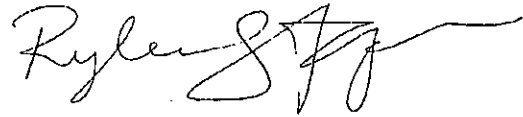
Four laws were passed during the 2021 legislative session that suppress Montanans' fundamental right of suffrage. As a result of her official role within the Montana State Government, Defendant Secretary Jacobsen is tasked with defending these laws. The fact that this is inconvenient for Defendant cannot justify taking a less efficient route to resolution—or prejudicing parties with legitimate claims by attempting to define the terms of engagement expressly to Defendant's benefit.

Ultimately, Youth Plaintiffs are eager to engage collaboratively to coordinate these cases in a fashion that is amenable to all parties, but cannot represent other parties in responding to Defendant's view of the proper form of consolidation

CONCLUSION

For the reasons set forth, Youth Plaintiffs ask that this Court grant their Motion for Consolidation.

Respectfully submitted this 29th day of November, 2021.



Rylee Sommers-Flanagan
Upper Seven Law

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 29th day of November, 2021, by email.

David M.S. Dewhirst
Office of the Attorney General
Justice Building, Third Floor
215 North Sanders Street
P.O. Box 201401
Helena, MT 59620-1401
david.Dewhirst@mt.gov

Austin Marcus James
Office of the Secretary of State
Montana Capitol Building, Room 260
P.O. Box 202801
Helena, MT 59620-2801
austin.james@mt.gov

Dale Schowengerdt
Ian McIntosh
Crowley Fleck, PLLP
900 North Last Chance Gulch, Suite 200
Helena, MT 59601
P.O. Box 797
Helena, MT 59624-0797
DSchowengerdt@crowleyfleck.com
incintosh@crowleyfleck.com

/s/ Rylee Sommers-Flanagan
Upper Seven Law