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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

WESTERN NATIVE VOICE, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe, Plaintiffs, vs. CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State, Defendant.	Consolidated Case No. DV 21-0451 Hon. Michael G. Moses **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to § 27-19-301, MCA, Plaintiffs apply for a preliminary injunction to prevent the enforcement of House Bill 176 ("HB 176") and House Bill 530 ("HB 530"), pending resolution of their claims that these statutes violate their constitutional rights. HB 176 ends the practice of Election Day voter registration ("EDR") by revising §§ 13-2-301, 13-2-304, 13-13-301, 13-19-207, and 13-21-104, MCA. HB 530 (an undesignated enactment) inhibits the collection or conveyance of absentee ballots. Undersigned counsel provided notice of this application to Defendant, on January 12, 2022, and duly served this application.

INTRODUCTION

By removing relied-upon EDR and by effectively ending organized ballot assistance, HB 176 and HB 530 ("the challenged statutes") violate Plaintiffs' fundamental rights under the Montana Constitution, including the right to vote, equal protection, freedom of speech, and due process. Rural tribal communities across the seven reservations in Montana depend on EDR and ballot assistance to participate in elections, and many Native Americans[1] will be denied the right to vote in the upcoming 2022 midterm elections unless these laws are enjoined.

Allowing the challenged statutes to be in effect for the 2022 primary and general elections will irreparably harm Native Americans and the organizations aiding them. Plaintiffs ask this court to exercise its discretion to "preserve the status quo and minimize the harm to all parties pending final resolution on the merits" by entering a preliminary injunction. *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 265, 405 P.3d 73, 85 (emphasis and internal citations omitted).

BACKGROUND

A. Voting in Montana

Election Day registration is a critical feature of Montana's electoral system and has been for over 15 years. As recently as 2014, Montana voters rejected an end to EDR. Thousands of eligible Montana voters are only able to exercise their fundamental right to vote each election through in-person registration on Election Day. EDR contributes to an appreciable increase in voter participation. It was used by 7,547 voters in 2008; 12,055 voters in 2016; and over 8,000 voters in both 2018 and 2020.[2]

[1] The terms "Native American", "American Indian", and "Indian" are used interchangeably throughout this motion to refer to the Indigenous people and tribes of Montana.

[2] Montana Secretary of State, *Total Late Voter Registration Activities by Election*, (last visited Jan. 6, 2022) https://sosmt.gov/elections/latereg/.

Voting by mail is also an important feature in Montana's electoral system. In-person voting in Montana is logistically challenging for many voters due to the state's large size and rural nature. Montana is the fourth-largest state in terms of land size. As of 2010, it is the third-least densely populated state. Thus, the vast majority of Montana voters who cast a vote utilize the absentee voting process: in the 2020 general election (when, due to the pandemic, 46 of 56 counties implemented a vote by mail election) the vote by mail rate was 98%; in the 2018 general election the rate was 73.13%; and in the 2017 special election the rate was 73.12%. Affidavit of Alex Rate, Jan. 12, 2022 (Rate Aff.) ¶¶ 1, 2; Ex. A; Ex. B.

B. Voting on Indian Reservations in Montana

Montana is home to seven Indian reservations. These reservations are home to thousands of Montana voters who lack equal access to registration and voting opportunities and who experience greater barriers to casting mail ballots (both absentee and ballots in mail-only elections) than do other Montanans.

One barrier is the mail system on Indian reservations. Expert Report of Daniel McCool, Jan. 10, 2022 (McCool Rep.) ¶¶ 74-96; Affidavit of Ryan Weichelt, Jan. 10, 2022 (Weichelt Aff.) ¶ 5; Affidavit of Ronnie Jo Horse, Dec. 17, 2021 (Horse Aff.) ¶ 16. Most Native Americans do not have home mail delivery. McCool Rep. ¶ 83; Horse Aff. ¶ 16.; Affidavit of Dawn Gray, Jan. 6, 2022 (Gray Aff.) ¶ 4; Affidavit of Councilman Lane Spotted Elk, Jan. 7, 2022 (Spotted Elk Aff.) ¶ 4. A significant percentage of Native Americans living on rural reservations have non-traditional mailing addresses. McCool Rep. ¶¶ 68, 83. Due to a severe housing shortage many tribal members have insecure housing and move from home to home. Gray Aff. ¶ 9; Affidavit of Robert McDonald, Jan. 4, 2022 (McDonald Aff.) ¶ 4; Spotted Elk Aff. ¶ 9; McCool Rep. ¶ 37. Postal delivery on reservations is often convoluted and inefficient due to limited mail routes and rural mail carriers. McCool Rep. ¶¶ 83, 144(k); *see also* Weichelt Aff. ¶ 44, App'x I.

Instead, Native Americans often rely upon post office boxes ("P.O. boxes") to access mail to vote by absentee ballot. McCool Rep. ¶ 83; Gray Aff. ¶ 4; McDonald Aff. ¶ 4; Spotted Elk Aff. ¶ 4. Yet, on average voters on reservations must travel nearly twice as far as voters off reservation to access post offices. Weichelt Rep. ¶¶ 38-42, 52; Horse Aff. ¶ 17. On Blackfeet, some members have to travel just over 30 miles roundtrip to access their P.O. Box. Weichelt Rep. ¶ 42, tbl. 4. P.O. boxes are often shared by multiple tribal members. McCool Rep. ¶ 84; Horse Aff. ¶ 16; Gray Aff. ¶ 4; Spotted Elk Aff. ¶ 4. Most tribal members do not regularly pick

up their mail and rely on others to pick up and drop off mail for them. Gray Aff. ¶ 4; McDonald Aff. ¶ 9; Spotted Elk Aff. ¶ 4. When mail is collected from a P.O. box, it is commonly pooled among individuals. McDonald Aff. ¶ 9. Native Americans have also reported low trust in the Postal Service. McCool Rep. ¶ 87.

Many other socioeconomic factors also increase the cost of Native Americans traveling to their P.O. boxes. Native Montanans have much higher unemployment rates and poverty rates than their white counterparts. McCool Rep. ¶¶ 18-21; Rate Aff. ¶¶ 3-6; Ex. C, D, E, F. Consequently, Native Americans living in Montana are much less likely to have access to a working vehicle, money for gasoline, or car insurance, making it more difficult to access their P.O. box. McCool Rep. ¶¶ 19, 53, 67 & tbl. 33, 142; Gray Aff. ¶¶ 7-8; McDonald Aff. ¶¶ 7-8; Spotted Elk Aff. ¶¶ 7-8.

The same burdens make it difficult to travel to satellite voting locations, which only opened on reservations pursuant to a settlement in a federal voting rights case. McCool Rep. ¶ 143; Rate Aff. ¶ 7; Ex. G. While satellite election offices currently operate on all seven Indian reservations, generally those locations are open only a few of the days of the early voting period, excluding Election Day, and only for limited hours. Rate Aff. ¶ 7; Ex. G; Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020), ¶ 21.k. Thus, Native American voters living on rural reservations already have reduced access to early voting and registration.

While individual voters may register to vote or drop off their ballots or voter registration applications at election offices, those offices are located in county seats. *See* McCool Rep. ¶ 65 & tbl. 31. With the exception of Flathead, Lake, and Roosevelt Counties, all county seats are towns located outside reservations. Native Americans living on reservations wanting to avail themselves of the full period for registration or absentee voting by using county election offices would have to travel further than their non-Native counterparts who live off-reservation—something that is especially difficult for the disproportionate number of Natives living in Montana who lack access to a vehicle or do not have money for insurance or gasoline. *See* Weichelt Rep. ¶¶ 16, 23, 29, 51; McCool Rep. ¶¶ 19, 53, 67 & tbl. 32. County seats are also often located in reservation "border-towns" where Native Americans often encounter racial hostility and discrimination. Rate Aff. ¶ 8; Ex. H; McDonald Aff. ¶¶ 10-11; McCool Rep. ¶¶ 43, 149-153; *see also* Gray Aff. ¶ 21.

Other socioeconomic factors—the result of centuries of discrimination against Native Americans—also make it more difficult for Native Americans living on reservations to register and vote, whether by mail or in-person. Native American voters often move due to insecure housing and employment opportunities. Gray Aff. ¶¶ 7, 9-10; McDonald Aff. ¶ 4; Spotted Elk Aff. ¶ 9; Horse Aff. ¶ 21; McCool Rep. ¶ 37. When voters move and become residents of other counties, they must re-register in that county. Horse Aff. ¶ 21; McCool Rep. ¶ 38. Native Americans in Montana are less likely to own a home and much likelier to be homeless or insecurely housed, making it difficult for them to have the political stability necessary for political participation. McCool Rep. ¶¶ 34-40. Native Americans in Montana have worse health outcomes than white people in the state—including in life expectancy and premature death rates. *Id*. ¶¶ 22-23. Native Americans in Montana have worse educational outcomes—an important predictor of political participation—than the rest of the state. *Id*. ¶¶ 29-33. Native Americans in Montana are far less likely to have internet access, making it harder for them to learn about election procedures. *Id*. ¶¶ 41-46. Finally, Native Americans are also simultaneously overrepresented in the criminal justice system and targeted by law enforcement, while also disproportionately the victims of crime. *Id*. ¶¶ 47-52.

Because of this daunting set of voter costs, individual Native American voters in rural reservation communities often rely on third parties to collect and convey their ballots. Western Native Voice collects ballots and delivers unvoted ballots to voters on all seven reservations in Montana, as well as in urban Indian centers such as Missoula, Great Falls, and Billings. Horse Aff. ¶ 31; Gray Aff. ¶¶ 11-12; McDonald Aff. ¶¶ 12, 15; Spotted Elk Aff. ¶¶ 11-12. These efforts have helped increase voter turnout in Indian Country. Horse Aff. ¶ 13.

Additionally, because of these barriers, many Native Americans residing on rural reservations rely on EDR, which enables them to register and vote on the same day in just one trip to a polling center. Horse Aff. ¶ 22. Native American voters consistently rely on EDR at higher rates than non-Native voters in Montana; this is especially true on the Blackfeet Reservation, where there is generally a satellite location allowing for registration and voting on Election Day. Affidavit of Alexander Street, January 10, 2022 (Street Aff.) ¶ 4 (and attached Report ¶ 21-23 & App'x); Gray Aff. ¶ 17. This discrepancy is not surprising given that Blackfeet tribal members have higher housing instability, less opportunities to register during the year, and longer distances to registration opportunities. Indeed, when registration is only available at the

county seat, some Blackfeet tribal members have to travel over 120 miles to register at the county seat. Gray Aff. ¶ 16; Weichelt Rep. ¶ 46.

Additionally, on Reservations without EDR, Non-Profit Plaintiffs provide rides to the county seat for EDR and voting. Horse Aff. ¶¶ 23, 27; Spotted Elk Aff. ¶ 16. In 2020, an organizer for Western Native Voice drove 150 people from the Crow Reservation to register to vote at the Big Horn County elections office. Horse Aff. ¶ 26. Recognizing the need to provide access for its unregistered members, CSKT has also historically provided rides to register and vote on Election Day and will do so again pandemic conditions permitting. McDonald Aff. ¶¶ 12-13.

C. Election Day Registration

The political science literature is remarkably consistent: EDR reduces voter costs and increases turnout. McCool Rep. ¶ 57. EDR has a long and successful history in Montana, since a bipartisan bill to implement it was introduced in 2005. 12,055 individuals registered to vote on Election Day in 2016, along with more than 8,000 each in 2018 and 2020. McCool Rep. ¶ 60 & tbl. 28. According to the Secretary of State and Chief of Elections Officer of the time, "Virtually everyone supported [EDR because] election day registration is the ultimate failsafe." In 2011, the governor vetoed an attempt to eliminate EDR, and in 2014, Montana voters in 80% of legislative districts rejected the ballot referendum that would have ended EDR. From 2014-2020, the percentage of voters using EDR was consistently higher for people living on-reservation in Montana than in the general population. Street Aff. ¶ 4 (and attached Report ¶¶ 20-23 & fig.1-2).

1. Relevant Legislative History of HB 176

On January 15, 2021, Representative Sharon Greef introduced HB 176. In legislative hearings, Defendant Jacobsen and her staff spoke in favor of the bill, invoking "election integrity" as the sole, vague rationale for its adoption. She failed to identify a single instance of fraud perpetuated by a Montana voter. McCool Rep. ¶ 118. The vast majority of those who testified vociferously opposed the bill, outlining the specific dangers to electoral participation of repealing EDR, and particularly highlighting the disproportionate harms to Indigenous voters. Rate Aff. ¶¶ 9-10; Ex. I, Ex. J.

WNV political director Keaton Sunchild explained why EDR is so important to Montana's Native voters, including having to overcome long distances to travel and the tradition of voting in person. Rate Aff. ¶ 9; Ex. I at 17-18. WNV organizer Lauri Kindness described how

her team had assisted 150 voters with registering on Election Day and that taking away EDR would add another barrier to a system that already disenfranchises Native voters. Rate Aff. ¶ 9; Ex. I at 37-39. Elections Administrator Regina Plettenberg testified that EDR's repeal would result in fewer people being able to vote. Rate Aff. ¶ 9; Ex. I at 54-55. When pressed by a member of the Senate State Administration Committee for examples of fraud that would be prevented by ending EDR, Representative Greef had no response. Rate Aff. ¶ 10; Ex. J, at 39-41. Other opponents of HB 176 testified that EDR is a fail-safe for voters who show up to vote on election day to discover that some administrative error has caused them to not be registered, and that forty percent of EDR were not new registrations. Rate Aff. ¶ 10; Ex. J, at 13-14.

D. Ballot Assistance Restrictions

There is a recent history of attempts to restrict ballot assistance in Montana in order to suppress the Native American vote. In 2017, the Montana Legislature placed the Ballot Interference Prevention Act (BIPA) on the 2018 ballot. Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020), ¶ 28. During legislative hearings, opponents (including Plaintiffs CSKT and Western Native Voice) testified that BIPA would "create even more obstacles to voting" for Native American voters. *Id.* The Montana Association of Clerk and Recorders and Election Administrators also testified that BIPA was unnecessary. *Id.*

On November 6, 2018, voters approved BIPA. On March 12, 2020, a group of plaintiffs representing a cohort of Montana's tribal nations and GOTV organizations filed suit challenging BIPA in Yellowstone County based on the harm to Native American voters. After a three-day trial, Judge Fehr found that BIPA violated the Plaintiffs' right to vote, freedom of association, and due process, and permanently enjoined BIPA's enforcement. Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020). In a 61-page order, Judge Fehr meticulously detailed how Native Americans were disproportionately affected by BIPA. *Id.* In the wake of Judge Fehr's decision, the legislature did not study impediments on Native American voters' access to the franchise, nor did it consider the impact on Native American voters when ballot collection is restricted, or attempt to remediate the access issues identified by the court.

1. Relevant Legislative History of HB 530

On February 12, 2021, a new ballot assistance restriction, HB 406, was introduced in the Montana House. This bill would have effectively revived BIPA, with minor modifications that did not correct its constitutional infirmities. Numerous groups testified against the legislation, including representatives of Plaintiffs. Further, the chief legal counsel for the Office of Commissioner of Political Practices came out against the bill, motivated by her "keep-us-out-of-court job duties." Rate Aff. ¶ 13; Ex. M, at 4-6. The bill did not pass the Montana Senate. As a last-ditch attempt to once again introduce a ballot assistance restriction, HB 530 was amended to include some of the language from HB 406. The amendment came after the committee process, which circumvented public testimony regarding the amendment. However, several Montana legislators spoke in opposition to the inclusion of the amendment. Thus, despite being well aware of how restrictions on ballot collection burden Native Americans' right to vote, as with the failed HB 406, HB 530 likewise did not consider nor correct the constitutional infirmities of BIPA.

At the April 26, 2021 Senate floor session, the sole offered justification for the amendment was a high-profile instance of election fraud that occurred in North Carolina several years ago.[3] This same incident had been cited by the State as a justification for BIPA and found unpersuasive by two separate Yellowstone County district judges following trials, given the long history of ballot assistance in Montana and the absence of *any* examples of absentee ballot fraud in Montana.

Representative Tyson Running Wolf testified in opposition to the HB 530 amendments. He explained that Section 2 of HB 530 "effectively ends the legal practice of ballot collection," which is heavily relied upon by Native voters in Montana and would result in "en masse" disenfranchisement. In his words, "[b]allot collection is a lifeline to democracy for rural indigenous communities" because of social and economic barriers such as long distances to election offices and lack of access to transportation in Indian Country.[4]

[3] *See*, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20210426/-1/43504.

[4] *See*, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/43525?agendaId=223947; https://dailymontanan.com/2021/04/27/election-security-bill-heads-to-gov-gianfortes-desk/

E. Voting from Indian Reservations After HB 176 and HB 530

Native American voters will be disproportionately impacted by HB 176 and HB 530. Street Aff. ¶¶ 4, 6; McCool Rep. ¶¶ 160, 165. As discussed above, Native Americans living on reservations have less access to the postal mail, live farther away from polling sites and P.O. boxes, and are less likely to have access to reliable vehicles. Consequently, and also as discussed above, Native Americans living on reservations disproportionately rely on ballot collection and conveyance in order to participate in Montana's elections.

Non-Profit Plaintiffs' get-out-the-vote (GOTV) work has been critical to increasing voter turnout in Montana. In 2018 and 2020, Non-Profit Plaintiffs hired local community organizers to collect and convey ballots for Native American voters on reservations and in urban Indian centers. Horse Aff. ¶ 10. These organizations have been very successful in their work to facilitate Native American voting, due largely to their ballot collection efforts. Horse Aff. ¶¶ 13, 14. In 2018, eighty percent of the voters they contacted voted. *Id*. Ballot collection is a critical part of Non-Profit Plaintiffs' work. In 2018, these organizers collected and conveyed at least 853 ballots, and in 2020, they collected and conveyed at least 555 ballots. Horse Aff. ¶ 31. Now, such organizations will be deterred from continuing their robust GOTV program and will have to cease collecting ballots if HB 530 is allowed to stay in effect. Horse Aff. ¶¶ 31-33. Other means of voting are insufficient to replace the loss of these organizations' ballot collection activities. As a result, many Native American voters will be disenfranchised.

Likewise, repealing EDR will have a disproportionately harmful effect on Native American voters living on reservations because of distance, transportation, and related socioeconomic issues. In short, Native American voters living on reservations have less access to the mechanics of voting and voter registration than do non-Native voters in Montana. Providing rides to the county seat on Election Day is a key component of Non-Profit Plaintiffs' and CSKT's strategy to increase Native American turnout. Members of the Blackfeet Nation particularly rely upon the availability of Election Day registration through the satellite location open on the reservation on Election Day. Gray Aff. ¶ 17. Compared to non-Native voters, Native American voters living on reservations in Montana disproportionately made use of Election Day registration, Street Aff. ¶ 4, and thus will be burdened more greatly if HB 176 is allowed to go into effect for the coming election cycle. This disparity is even more stark for those in the Blackfeet Nation. *Id.* (attached Report ¶ 21 & App'x).

ARGUMENT

Plaintiffs satisfy the requirements for a preliminary injunction under Montana law. "[A] party need establish only a prima facie violation of its rights to be entitled to a preliminary injunction—even if such evidence ultimately may not be sufficient to prevail at trial." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 16, 401 Mont. 405, 414, 473 P.3d 386, 392 (internal citations omitted). Under Montana law, "'[p]rima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Weems v. State by & through Fox*, 2019 MT 98, ¶ 18, 395 Mont. 350, 359, 440 P.3d 4, 10 (internal citation omitted).

Montana law entitles Plaintiffs to an injunction when "it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;" or "it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant," or "it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual." § 27-19-201, MCA. A request "for preliminary injunctive relief require[s] some demonstration of threatened harm or injury, whether under the 'great or irreparable injury' standard of subsection (2), or the lesser degree of harm implied within the other subsections." *BAM Ventures, Ltd. Liab. Co. v. Schifferman*, 2019 MT 67, ¶ 16, 395 Mont. 160, 167, 437 P.3d 142, 146. Finally, the "loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued." *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 229, 296 P.3d 1161, 1165; *see also Driscoll*, ¶ 15. Here, issuance of a preliminary injunction is necessary to protect Plaintiffs from irreparable injury to their clear constitutional rights, and rests well within this Court's discretion.

A. Plaintiffs have made a prima facie showing that HB 176 and HB 530 infringe on their fundamental rights.

Plaintiffs have made a prima facie showing that the challenged statutes impermissibly infringe upon their fundamental rights to suffrage, equal protection of the laws, freedom of speech, and due process of law. These rights are enshrined in Montana's Declaration of Rights and therefore are analyzed under strict scrutiny. *Mont. Cannabis Indus. Ass'n*, ¶ 16 ("Legislation

that implicates a fundamental constitutional right is evaluated under a strict scrutiny standard, whereby the government must show that the law is narrowly tailored to serve a compelling government interest."); *see also Wadsworth v. State* (1996), 275 Mont. 287, 302, 911 P.2d 1165, 1174 ("The most stringent standard, strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right").

1. HB 176 and HB 530 infringe on Plaintiffs' fundamental right to vote.

The Montana Constitution guarantees, "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const. art. II, § 13. "The right of suffrage is a fundamental right." *Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, 352, 325 P.3d 1204, 1210.

HB 530 infringes on Plaintiffs' fundamental right to vote. Just last year, multiple Montana district courts held that a similar restriction on ballot collection and conveyance unconstitutionally violated this fundamental right. In *Western Native Voice v. Stapleton*, the court found that restricting ballot collection "disproportionately harms . . . Native Americans in rural tribal communities" because "Native Americans living on reservations rely heavily on ballot collection efforts in order to vote in elections," in large part "due to lack of traditional mailing addresses, irregular mail services, and the geographic isolation and poverty that makes travel difficult" for these Native voters. Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020), ¶¶ 18-20. In finding that the ballot collection restriction "infringes on Plaintiffs' fundamental right to vote," the court noted that Native Americans residing on reservations in Montana "still live below the poverty line with limits to health care, government services, mail services, and election offices." *Id.* at 1. Meanwhile, in *Driscoll v. Stapleton*, the court held that the restriction on ballot collection "burden[ed] the right to vote" for Native Americans and those living in rural tribal communities "by eliminating important voting options that make it easier and more convenient for voters to vote," thereby "increasing the costs of voting." Slip op. at 23, ¶ 7. Ballot collection on Native reservations occurs frequently through hiring locally based organizers. Horse Aff. ¶ 12. Without the ability to pay organizers, ballot collection will cease on reservations in Montana and some Native voters will not be able to access the vote. *See* McCool Rep. ¶¶ 97-98 ("HB 530 sets up a situation where people are expected to work without pay. No one else in society is expected to do that."). Plaintiffs have presented ample evidence that without paid

ballot collection efforts, many Native Americans living on rural reservations in Montana will be unable to exercise their fundamental right of suffrage.

HB 176 also unlawfully "burdens the right to vote" for Native Americans living in rural tribal communities because it "eliminate[es] [an] important voting option[]" for those communities: EDR. *Driscoll*, slip op. at 23, ¶ 7. Native American voters face numerous barriers to the franchise including rampant poverty, long distances to polling places and post offices, lack of internet or residential mail services, and inadequate transportation. *See, e.g.*, McCool Rep. ¶¶ 18-21, 41-46, 67 & tbl. 32-33, 83-85. The data is clear that Native Americans living on reservations use EDR at a consistently higher rate than other Montanans. Street Aff. ¶ 4. Consequently, HB 176 serves as a prohibition on a vital service for Native American voters who will otherwise be disenfranchised without EDR.

2. HB 176 and HB 530 violate Plaintiffs' rights under the Montana Constitution's equal protection clause.

The Montana Constitution guarantees equal protection of the laws, in recognition of the "inviolable" dignity of the human being. Mont. Const., art. II, § 4. The equal protection clause's "principal purpose . . . is to ensure citizens are not subject to arbitrary and discriminatory state action." *Snetsinger v. Mont. Univ. Sys*., 2004 MT 390, ¶ 27, 325 Mont. 148, 157, 104 P.3d 445, 452. Specifically, it protects individuals against discrimination "in the exercise of [their] civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." *Id.* This is a fundamental right under Montana's Constitution, and it accords even greater protection than United States Constitution's equal protection clause. *Cottrill v. Cottrill Sodding Serv*. (1987), 229 Mont. 40, 42, 744 P.2d 895, 897. Montana courts have found that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 261, 109 P.3d 219, 222.

The first step in an equal protection analysis is to "identify the classes involved and determine whether they are similarly situated." *Snetsinger*, ¶ 16 (internal citation omitted). Even a facially neutral classification may constitute an equal protection violation "if in reality it constitutes a device designed to impose different burdens on different classes of persons." *Id.* (internal citation, quotations, and brackets omitted).

For purposes of the equal protection analysis, Native American voters and non-Native voters are similarly situated, and both HB 176 and HB 530 disproportionately harm Native American voters. HB 176 disproportionately burdens the right to vote of Native Americans living on rural reservations in Montana. McCool Rep. ¶¶ 160, 165; *see also* Street Aff. ¶¶ 4, 6. Throughout most of the year, Native Americans must travel further to register at their county seats than non-Natives across the state and have less access to vehicles and money for gas and car insurance. Weichelt Rep. ¶¶ 16, 23, 29, 51; McCool Rep. ¶¶ 19, 53, 67 & tbl. 32. And as noted *supra*, Native voters use EDR at consistently higher rates than the general population. Eliminating EDR disproportionately affects Native communities.

HB 530 likewise disproportionately affects Native Americans on the basis of race. Because Native Americans disproportionately face structural barriers to casting a ballot through mail – lack of residential mail; longer distances to Post Offices; less access to working vehicles – Native Americans rely upon ballot collection more than non-Natives.

Following passage of HB 530, the Montana Advisory Committee to the U.S. Commission on Civil Rights reflected "[t]he passage of a bill that imposes the same burdens is intentional discrimination and will increase barriers to voting for Native Americans on reservations in Montana." This discrimination both in effect and intent violates the Montana Constitution's commitment to equal protection under the law. In the face of such blatant and demonstrable discrimination, the State as noted *infra* has offered no interest – much less a compelling interest – justifying these laws. As such, they violate Plaintiffs' right to equal protection of the laws.

3. HB 530 violates certain Plaintiffs' fundamental right to freedom of speech.

HB 530 violates Non-Profit Plaintiffs', Blackfeet Nation's, and Confederated Salish and Kootenai Tribe's freedom of speech. The Montana Constitution prohibits passage of any law that impairs this fundamental right. Mont. Const. art. II, § 7. The Montana Supreme Court has held that freedom of speech is a "fundamental personal right and essential to the common quest for truth and the vitality of society as a whole." *State v. Dugan*, 2013 MT 38, ¶ 18, 369 Mont. 39, 44, 303 P.3d 755, 761 (citations omitted); *see also Oberg v. City of Billings* (1983), 207 Mont. 277, 280, 674 P.2d 494, 495 (listing "freedom of speech" as an example of a fundamental right under the Montana Constitution).

Freedom of speech protections extend not only to individuals, but also to organizations. *Mont. Auto. Ass'n v. Greely* (1981), 193 Mont. 378, 388, 632 P.2d 300, 305. Core political

speech is accorded "the broadest protection." *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995). Indeed, several federal courts have held that these protections apply "not only to laws that directly burden speech, but also to those that diminish the amount of speech by making it more difficult or expensive to speak." *See League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 723 (M.D. Tenn. 2019) (internal citations omitted) (applying speech diminution rationale in *Meyer v. Grant*, 486 U.S. 414 (1988), to restrictions on voter registration drives); *see also Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich. 2020) (extending this rationale to restrictions on assistance with absentee ballot applications).

When BIPA was struck down, the district courts explicitly held that, "[l]ike the circulation of an initiative petition for signatures, ballot collection activity is 'the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Western Native Voice*, No. DV 20-0377, 2020 WL 8970685, at *23 (citing *Meyer*, 486 U.S. at 422–23); *see also Driscoll*, slip op. at 24, ¶ 9 ("Helping voters, particularly vulnerable populations, to return their ballots implicates core political speech and conduct protected by . . . Montana's Constitution."). HB 530 directly restricts core political speech and expressive conduct in communicating Plaintiffs' belief in the importance of civic engagement and voter participation to the Native American community. "The constitutional guaranty [sic] of free speech provides for the opportunity to persuade to action, not merely to describe facts." *Mont. Auto. Ass'n v. Greely*, 193 Mont. 378 (internal citation omitted). Non-Profit "Plaintiffs' public endeavors to collect and convey ballots for individual Native American voters living on rural reservations are an integral part of their message that the Native American vote should be encouraged and protected and that voting is important as a manner of civic engagement." *Western Native Voice*, No. DV 20-0377, 2020 WL 8970685, at *23; *see also Driscoll*, slip op. at 24, ¶ 9 ("Helping voters, particularly vulnerable populations, to return their ballots implicates core political speech and conduct protected by . . . Montana's Constitution."); *see also* Horse Aff. ¶¶ 7, 36, 37.

By collecting and conveying ballots, Non-Profit Plaintiffs engage in the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," which is at the heart of freedom of expression protections. *Dorn v. Bd. of Trustees of Billings Sch. Dist. No. 2* (1983), 203 Mont. 136, 145, 661 P.2d 426, 431 (striking down school district's policy prohibiting appellant's solicitation of signatures for an initiative petition). Plaintiffs

Blackfeet Nation and CSKT similarly engage in this exchange when they promote and facilitate the work of Non-Profit Plaintiffs' paid organizers or hire their own ballot collectors. Whether individuals should submit their ballots and ultimately participate in an election is a "matter of societal concern that [Plaintiffs] have a right to discuss publicly without risking . . . sanctions." *Meyer*, 486 U.S. at 421; *see also Buckley v. American Const. Law Found., Inc.*, 525 U.S. 182, 186 (1999) (quoting *Meyer*, 486 U.S. at 422). Thus, the Plaintiffs' ballot collection efforts should be afforded the broadest judicial protection.

4. HB 530 violates Plaintiffs' fundamental right to due process.

Enshrined in the Montana Constitution's Declaration of Rights, due process of law is a fundamental right. Mont. Const. art II., § 17 ("No person shall be deprived of life, liberty, or property without due process of law."). Its "basic principle" is that "an enactment is void for vagueness if its prohibitions are not clearly defined." *City of Whitefish v. O'Shaughnessy* (1985), 216 Mont. 433, 440, 704 P.2d 1021, 1025. A facial due process challenge to a statute may be maintained under a theory that "the statute is so vague that it is rendered void on its face." *Dugan*, ¶ 66. "Vague laws may trap the innocent by not providing fair warning." *Id.* (citing *City of Whitefish*, 216 Mont. at 440, 704 P.2d at 1025-26; *Grayned v. City of Rockford*, 408 U.S. 104, 114–15 (1972)). To be constitutionally valid, laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly." *Id.*

HB 530 is unconstitutionally vague as to when and to whom it applies: "A person may not provide or offer to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots." Anyone who violates this prohibition is subject to a civil penalty in the form of a $100 penalty for each ballot unlawfully "distributed, ordered, requested, collected, or delivered." At least three separate provisions of HB 530 are unconstitutionally vague.

First, the statute does not make sufficiently clear what constitutes a "pecuniary benefit." For example, does the prohibition apply only to organizers who are paid only to collect ballots and are paid per ballot? Or does it extend to anyone who, as part of their paid employment duties, engages in ballot collection or conveyance among many other tasks, such as Non-Profit Plaintiffs' organizers or other staff? Additionally, does a volunteer who receives rides, food, or other non-monetary resources from an organization or individual in exchange for engaging in ballot collection or conveyance violate HB 530? Would it apply if gas money is offered to a

neighbor, family member, or friend to pick up their mail that includes a ballot? The statute does not provide any answers to these important questions. Second, the statute leaves unclear whether, if an individual "request[s]," "distribut[es]," "collect[s]," *and* deliver[s]" a single ballot for pecuniary gain, that individual would be subject to multiple fines or just one. Third, while HB 530 exempts "a governmental entity" from its prohibition on ballot collection or conveyance, the statute does not define what constitutes an exempt "governmental entity." Do sovereign tribal governments (including Plaintiffs Blackfeet Nation, CSKT, and Fort Belknap) fall into this category? Does it also encompass any organizers hired or otherwise compensated by those tribes to engage in ballot collection? Does it prohibit tribal governments from hiring organizations that in turn compensate their ballot collectors? Indeed, Plaintiffs CSKT have already expressed concern that HB 530's failure to define the scope of its governmental exemption may lead CSKT to inadvertently run afoul of the law. McDonald Aff., Ex. 1.

HB 530's vagueness is especially pernicious as it "abuts upon sensitive areas of basic First Amendment freedoms" and thus "operates to inhibit the exercise of those freedoms." *City of Whitefish*, 216 Mont. at 440, 704 P.2d at 1025. Plaintiffs are concerned that they and the organizers they hire may be subject to civil penalties—including substantial fines that would render engaging in or helping to organize ballot collection cost-prohibitive, and potentially even financially ruinous. These penalties have chilled and will continue to chill Plaintiffs from participating in, organizing, or otherwise contributing to ballot collection efforts while HB 530 remains in effect. "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked," *City of Whitefish*, 216 Mont. at 440, 704 P.2d at 1025–26, and where there are ambiguities as to the scope of a law that regulates speech and expression, those ambiguities are "problematic for purposes of the First Amendment," *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

5. HB 176 and HB 530 do not meet strict scrutiny and must be enjoined.

As HB 176 and HB 530 infringe on Plaintiffs' fundamental rights, which enjoy "the highest level of protection by the courts," it is well-within this Court's power to enjoin them. *See Kloss v. Edward Jones & Co.*, 2002 MT 129, ¶ 52, 310 Mont. 123, 139, 54 P.3d 1, 12. Any governmental infringement on a fundamental right cannot be justified unless strict scrutiny is satisfied—in other words, the law must be narrowly tailored in service of a compelling government interest. *Mont. Cannabis Indus. Ass'n*, ¶ 16. Strict scrutiny "is seldom satisfied."

Butte Cmty. Union v. Lewis, (1986) 219 Mont. 426, 431, 712 P.2d 1309, 1312. Whether a compelling state interest exists is a question of law. *State v. Pastos* (1994), 269 Mont. 43, 47, 887 P.2d 199, 202. "[T]o sustain the validity of [an] invasion [upon a fundamental right]" Defendant "must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174. Such a showing cannot merely be stated, it must be demonstrated and proven via "competent evidence." *Id*.

It is the State's burden to demonstrate that the challenged laws are narrowly tailored to serve compelling government interests. "When the government intrudes upon a fundamental right, any compelling state interest for doing so must be closely tailored to effectuate only that compelling state interest . . . [and] the State, to sustain the validity of such invasion, must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Id.*

The government interests cited by proponents of HB 176 during the legislative session leading to its adoption have not been proven via competent evidence. Bill sponsor Representative Sharon Greef stated that the legislation would help combat voter fraud; however, when pressed, she was unable to provide any evidence of voter fraud. McCool Rep. ¶¶ 117-118. When asked to provide an example of voter fraud, Representative Greef said, "[w]hen I talked about voter fraud I wasn't talking about Montana specifically," and then claimed, without any corroborating evidence, that voter fraud was a national problem. *Id.* ¶ 118.

In reality, the data show clearly that voter fraud is not a problem in either Montana or the nation more broadly. The Heritage Foundation, a conservative think tank, has found that the occurrence of voter fraud was "about 0.00006 percent of the total votes cast" in local, state, and federal elections in the past several decades. *Id.* ¶ 109. In Montana, out of millions of votes cast, only one person has ever been convicted of voter fraud; the case had nothing to do with ballot collection or EDR. *Id.* ¶¶ 105-106. No fraud was identified in Montana's 2020 post-election audit. *Id.* ¶ 106. And in connection with last year's ballot collection litigation, the Cascade County Clerk testified under oath that no counties have "ever had any cases of voter fraud." *Id.* ¶ 108. The State cannot satisfy its burden of proving that voter fraud justifies the substantial burden caused by HB 176 when all evidence shows that voter fraud is nonexistent. *See Wadsworth*, 275 Mont. at 303, 911 P.2d at 1174 ("Necessarily, *demonstrating* a compelling

interest entails something more than simply saying it is so…. Simply because the State alleges a compelling interest, does not obviate the necessity that the State prove the compelling interest by competent evidence.").

The State's alternate justification for HB 176 – efficiency – is likewise without merit. The legislative record contained no evidence that eliminating EDR would alleviate long lines at the polls. McCool Rep. ¶ 117. Indeed, EDR could not have contributed to lines at polling places, as the process was only available at county election offices. But there was ample testimony that thousands of voters (particularly Native Americans, first-time voters, and registered voters who need to update their registrations) rely on EDR each year. The election administrator for Lewis and Clark County also explained that moving the last day to register to vote would simply make lines longer on an earlier date. Rate Aff. ¶ 10, Ex. J, at 11, 36-39.

Just last year the State held up EDR as a "helpful provision" and a reason that Montana's election framework is "robust" and "highly convenient" in "offer[ing] electors a versatile set of options to exercise the franchise." Rate Aff. ¶¶ 11, 12; Ex. K, at 4, 19; Ex. L ¶ 2, 5, 8. They cited EDR as a reason Montana's "voting model empowers voters" and made no mention of concern about voter fraud. Def.'s Br. in Support of Mot. for Summ. J. at 2, *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. July 30, 2020).

As for HB 530, the only articulated governmental interests contained in the legislative record were a generalized hope of improving election security and keeping elections as "unimpeded or uninfluenced by monies as possible."[5] Meanwhile, the bill sponsor utterly failed to address concerns that the amendments would increase voter confusion and the workload of election officials, nor did she refute or respond to the assertion that "[b]allot collection is a lifeline to democracy for rural indigenous communities," given the barriers they face to casting their ballots. Crucially, she presented no evidence that Montana elections have been tampered with through the influence of paid ballot collection and conveyance.

All existing evidence strongly indicates that there is no connection between ballot collection and fraud. A recent analysis of three states with all vote-by-mail elections calculated that the number of "possible cases" of voter fraud was 0.0025 percent of all votes cast. McCool

[5] *See,* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20210426/-1/43504; http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/43525?agendaId=223947; https://dailymontanan.com/2021/04/27/election-security-bill-heads-to-gov-gianfortes-desk/

Rep. ¶ 109. More importantly, Plaintiffs' analysis reveals that the rate of voter fraud—while infinitesimally small in all states—is actually slightly *higher* in states that ban ballot assistance, rather than those that permit ballot assistance. *Id*. ¶¶ 110-11.

Additionally, HB 530 is wholly unnecessary to address vague concerns about election integrity. Montana already has statutes in place to regulate election security, including criminalizing violations of the election code, a very clear anti-intimidation law, as well as strict regulations on political contributions and expenditures. *See, e.g.*, § 13-35-103, MCA; § 27-1-1501, MCA *et seq*. ("An individual or organization who is attempting to exercise a legally protected right and who is injured, harassed, or aggrieved by a threat or intimidation has a civil cause of action against the person engaging in the threatening or intimidating behavior."); § 13-35-503, MCA (noting that "the people of Montana intend that there should be a level playing field in campaign spending that allows individuals, regardless of wealth, to express their views to one another and their government").

The State's vague and unsupported "interests" in restricting ballot collection were roundly rejected by the *Western Native Voice* Court. Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020), ¶¶ 97-98. That court noted that even if it had accepted Montana's asserted interest as compelling, it could not uphold a law whose legislative record "lacked any rationale to explain" the relationship between those interests and the measures enacted. *Id.* ¶ 70.

Even assuming *arguendo* that the challenged statutes are justified by compelling state interests, they are far from narrowly-tailored enough to achieve those interests, nor are they the least restrictive path to achieve those objectives. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174; *Snetsinger v. Montana University System*, ¶ 17. Both HB 176 and HB 530 are not narrowly tailored because state laws already prohibit fraud, and there is no evidence that fraud is more likely to occur during EDR or when a pecuniary benefit for ballot collection is involved. Finally, even if this Court were inclined to apply a less exacting level of review, the burdens these statues impose on Native voters are far too onerous for them to survive judicial scrutiny.

B. Plaintiffs will suffer irreparable injury absent a preliminary injunction.

HB 176 and HB 530 will cause irreparable harm to Plaintiffs. Montana courts look to federal precedent when determining whether a constitutional violation will cause irreparable harm. *See Mont. Cannabis Indus. Ass'n*, ¶ 15 (citation omitted). However, the standard for

granting a preliminary injunction in Montana is more lenient than under federal law. As state courts have explained, a party need not establish a prima facie case for a preliminary injunction, but rather must simply show "that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated." *See, e.g.*, *Sandrock v. DeTienne*, 2010 MT 237, ¶ 16, 358 Mont. 175, ¶ 16, 243 P.3d 1123, ¶ 16 (quoting *Porter v. K & S P'ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839). Further, the Montana Supreme Court recently found, based on federal case law, that a violation of First Amendment rights would lead to irreparable injuries. *Weems*, ¶ 25.

The United States Supreme Court has recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Indeed, the Ninth Circuit has stated that even a "colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005) (internal quotation marks omitted)).

"Because there can be no 'do-over' or redress of a denial of the right to vote after an election, denial of that right weighs heavily in determining whether plaintiffs would be irreparably harmed absent an injunction." *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (noting that once an election comes and goes, "there can be no do-over and no redress. The injury to these voters is real and completely irreparable"). "A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also id.* ("When constitutional rights are threatened or impaired, irreparable injury is presumed.").

Here, Plaintiffs' and their members' right to vote will be severely burdened by HB 176 and HB 530, an unacceptable and irreparable harm. Furthermore, the freedom of speech of Non-Profit Plaintiffs, Plaintiff Blackfeet Nation, Plaintiff CSKT, and Plaintiff Fort Belknap will be severely burdened. Finally, Plaintiffs and their staff will be subject to penalty pursuant to a vague and overly broad law in violation of their due process rights.

C. The balance of equities weighs in favor of Plaintiffs and the injunction would not be adverse to the public interest.

The balance of equities tips sharply in Plaintiffs' favor. In contrast to the severe and irreparable ongoing constitutional injuries that Plaintiffs face under the challenged statutes, Defendant will suffer no harm if these laws are enjoined. In fact, county election administrators testified before the legislature against passage of these bills. Injunctive relief serves the public interest in this case because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (internal citation omitted).

D. Plaintiffs should not be required to post a bond.

This Court should exercise its discretion to not require a bond with issuance of a preliminary injunction. *See* § 27-19-306(1), MCA. Here, no bond should be required because Defendants stand to suffer no pecuniary harm as a result of a preliminary injunction, and because the injunction would serve the interest of justice.

DATED THIS 12th day of January, 2022.

Respectfully submitted,

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