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**IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY**

Montana Democratic Party, Mitch Bohn,

Plaintiffs,

WESTERN NATIVE VOICE, Montana Native
Vote, Blackfeet Nation, Confederated Salish and
Kootenai Tribes, Fort Belknap Indian
Community, and Northern Cheyenne Tribe,

Plaintiffs,

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

Plaintiffs,

v.

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

Defendant.

Consolidated Case No. DV 21-0451

**MONTANA DEMOCRATIC PARTY
AND MITCH BOHN'S
MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

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INTRODUCTION

More than two decades ago, Montana began enacting legislation to improve access to the polls and facilitate greater participation in its elections by its citizens. Those reforms were working: 2020 saw the highest voter turnout in nearly fifty years, including among Montana’s youngest voters, who turned out nearly 40% more than they did in the last presidential election. Rather than celebrate this, the legislative majority got to work to undo it, enacting legislation making it harder for lawful voters to successfully cast a ballot.

First, House Bill 176 eliminated Montana’s popular and turnout-driving election day registration (“HB 176” or “Election Day Registration Ban”). It did so despite extensive testimony detailing how students, the elderly, disabled, and indigent voters have come to rely on election day registration (“EDR”) to vote and even though Montanans firmly rejected elimination of EDR by referendum only seven years ago. *Second*, Senate Bill 169 rolled back the decades-long use of student ID cards as proof of identity sufficient for voting (“SB 169” or “Voter ID Restrictions”), imposing burdensome additional identification requirements on these voters—and only these voters—despite no evidence that any such reforms were needed to safeguard Montana’s elections. *Third*, House Bill 530 outlawed organized ballot assistance programs relied upon by certain Montana voters to successfully cast their ballots (“HB 530” or “Renewed Ballot Assistance Ban”). Remarkably, this was the Legislature’s second attempt to ban ballot collection in as many years—even though two different Montana district courts found a similar law unconstitutional in 2020.

Because all three laws (collectively, the “Voting Restrictions”) unconstitutionally burden fundamental rights guaranteed by the Montana Constitution, Plaintiffs seek a preliminary injunction to prevent voters across Montana (including Plaintiff Mitch Bohn and voters among the Montana Democratic Party’s membership) from suffering immediate, irreparable harm to their constitutional rights. This Court’s intervention is essential to protect Montanans’ fundamental right to vote, including in the quickly approaching 2022 elections.

BACKGROUND

I. Montana has a long history of secure and accessible elections.

For more than two decades, Montana has made its elections increasingly accessible. Over 20 years ago, Montana adopted no-excuse absentee voting. Ex. 1.¹ Six years later, Montana

¹ Exhibits citations refer to the exhibits attached to the Affidavit of Matthew Gordon.

allowed all voters to become permanent absentee voters. Ex. 2. More than 15 years ago, Montana became one of seven states permitting eligible voters to register on election day. Ex. 3. That same year, Montana began permitting third party collection of absentee ballot applications. *Id.*

Each of these reforms helped remedy inequitable access to the franchise in Montana, and the result was a healthier democracy: In 2000, only 59.9 percent of registered Montana voters voted, Ex. 4, but by 2016, that number had increased to 74.4 percent. *Id.* In the 2020 general election, 81.3 percent of registered voters participated in the election. *Id.*

Despite significantly higher turnout, Montana's elections have been consistently secure, with virtually no instances of voter fraud. Expert Report of Kenneth R. Mayer ("Mayer Rpt.") at 6-8. Indeed, in late 2020, a federal court called an allegation that a directive permitting Montana counties to conduct the general election in part by mail would lead to widespread voter fraud "a fiction" and noted that the plaintiffs challenging the directive could not "point to a single instance of voter fraud in Montana in any election during the last 20 years." *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 822 (D. Mont. 2020). Similarly, in two cases filed in this court in 2021, the Attorney General's Office acknowledged that "Montana does not have a problem with voter fraud." *W. Native Voice v. Stapleton*, No. DV-20-0377, 2020 WL 8970685, at *14 (Mont. 13th Jud. Dist. Sept. 25, 2020); *see also Driscoll v. Stapleton*, 2020 MT 247, ¶ 3, 401 Mont. 405, 409, 473 P.3d 386, 389. Montana is not alone in that regard. The 2020 presidential election was "the most secure in American history," Ex. 5, despite the ongoing pandemic and record numbers of voters voting by mail, and despite claims by the Trump campaign and other similarly-minded plaintiffs that fraud and illegal voting undermined the integrity of the election—claims that court after court found baseless.

Nevertheless, in its first session following the 2020 election, the Republican majority of the Montana Legislature claimed that concerns about "election integrity" justified a sudden and severe reversal of the state's two-decade trend toward greater accessibility and eliminated EDR, Ex. 6; Ex. 7, relegated the use of student ID cards as proof of identity when voting, Ex. 8; Ex. 9, and effectively eliminated organized ballot assistance programs, Ex. 10; Ex. 11.

II. EDR in Montana.

In 2005, EDR was enacted with overwhelming bi-partisan support. Ex. 12. Since then, voters have been able to register to vote in-person at their county clerk's office through election

day. § 13-2-301(1)(a), MCA; Mont. Admin. R. 44.3.2015(1)(a). And over the past sixteen years, over 70,000 Montanans have done so. Mayer Rpt., at 10.

A. Tens of thousands of voters in Montana have relied on EDR.

Montana has two registration periods. During regular registration, which lasts until 30 days before an election, voters may register in person or by mail. § 13-2-301, MCA; Mont. Admin. R. 44.3.2003. After that, during late registration, voters may register in-person at their election official's office. § 13-2-301, MCA; Mont. Admin. R. 44.3.2015. Between 2005, when EDR first became available, and the enactment of HB 176, the late registration period included election day. And during that time, 70,277 Montanans relied on EDR to register and vote. Mayer Rpt., at 10.

Election day is by far the most popular day for registration. Voters in Montana are nearly 16 times more likely to register on election day than on any other day during the late registration period. *Id.* at 10-11. For example, in 2018, an average of 515 Montanans registered per day during late registration but 8,053 registered on election day. *Id.* And in almost every election since 2006, the number of Montanans who registered on election day nearly matched the number who registered during the 29 other days of late registration *combined*. *Id.*

EDR's popularity has grown over time. In 2006, the first election with EDR, 4,315 Montanans used EDR. *Id.* at 11. In every election since then, at least 7,500 Montanans have registered on election day. *Id.* By 2016, that number had nearly tripled to 12,055, and every single county in the state registered voters on election day. *Id.*

EDR has also resulted in higher turnout. Since 2006, an average of 1.1 percent of the total votes cast in Montana have been cast by voters who registered using EDR. *Id.* In general elections, EDR's impact has been even greater: an average of 1.4 percent of votes have been cast by election day registrants. *Id.* In 2016, 2.33 percent of votes were cast by EDR voters. *Id.* All told, more than 7 percent of currently registered Montana voters used EDR at some point. *Id.* at 13. And the impact of EDR on turnout in Montana is no anomaly. Research shows that EDR is uniquely effective at increasing voter turnout, boosting it by five percent on average. *Id.* at 9; Ex. 13 at 3; Ex. 14.

Moreover, several groups of Montana voters who have historically turned out at lower rates relied on EDR. For example, Native voters, whose lower turnout—20 percentage points below the state average—reflects the many barriers to registration and voting faced by Native people, often register and vote on election day when organizers arrange transportation to election officials' offices and polling locations. Ex. 15, House State Admin. Comm. at 42:9-19.

Elderly, disabled, and institutionalized Montanans, as well as those relying on direct care aids, often require special transportation, accessible voting machines, and assistance requesting, completing, and returning their voter registration forms, absentee ballot applications, and ballots. *See* Declaration of Bernadette Franks-Ongoy (“Franks-Ongoy Decl.”) ¶¶ 9, 11-19.; Ex. 15, Senate State Admin. Comm. at 7:17 9:18. EDR helps mitigate those barriers by allowing such voters to register and vote in a single trip and by allowing organizations who help elderly and disabled Montanans vote to aggregate resources on election day. *See* Franks-Ongoy Decl. ¶¶ 22-23; Ex. 15, House State Admin. Comm. at 31:1-7; *see also* Franks-Ongoy Decl. ¶¶ 16 (discussing how it is difficult for the caregivers to return multiple times), 22 (noting that patients often arrive at facilities shortly before election day), 23 (stating “each additional trip to the county election office imposes an additional burden.”). For these reasons, during legislative hearings on HB 176, EDR was described as a “godsend” for disabled voters. Ex. 15, House State Admin. Comm. at 20: 16-18.

For similar reasons, EDR has been crucial in enfranchising Montana’s low income, rural, and working voters. EDR allows these voters to register and vote in one stop, without requiring additional time off work. *Id.* at 26:9-18; 28:16-20; 33:12-14; 40:14-41:6. Because of voting rights organizations’ get-out-the-vote efforts on election day, many of those voters have greater access to transportation to the polls on election day. *See* Declaration of Trent Bolger (“Bolger Decl.”) ¶ 7. And electors can register to vote only during standard working hours on other days, § 13-2-201, MCA, EDR allowed voters to register and vote until 8 p.m. on election day. Those additional hours were particularly important in ensuring low-income, rural, and working voters had a meaningful opportunity to register and vote. *See* Declaration of Malia Bertelsen (“Bertelsen Decl.”) ¶¶ 7-10.

But perhaps no one has been positively affected by EDR in Montana as much as young voters. Mayer Rpt., at 13-14. EDR has an especially large effect on voters under the age of 24, and that effect has been profound in Montana: although voters aged 18-24 make up only 10.4 percent of registered voters, they account for 31.2 percent of those who have registered on election day. *Id.* at 13. And while the average age of registered voters in Montana is more than 50 years, the average age of election day registrants is 17 years’ younger. *Id.*

None of this should be surprising. Young voters are more likely to need to register for the first time in advance of any particular election, and more than half of voters who register on election day are likely registering in Montana for the first time. *Id.* at 14 (explaining that 52.6 percent of EDR registrants were most likely not registered in Montana at the time). Young voters

also move more frequently, Ex 15, House State Admin. Comm. at 21:9-15; *See* Declaration of Sarah Denson (“Denson Decl.”) ¶¶ 2, 3, and when voters move, they must update their registration information before they can cast their ballot and have it counted. EDR allowed voters to do this on election day. But, now, if a voter does not realize that their voter registration information is out of date, they cannot cast a regular ballot in their new precinct. Ex. 15, House State Admin. Comm. at 21:5-23; Denson Decl. ¶ 4.

It is not only young voters who have encountered the problem of stale information—it is not uncommon for Montanans to arrive at the polls only to learn that they are not properly registered. Ex. 15, Senate State Admin. Comm. at 15:6-22; *See* Denson Decl. ¶ 4. Many of those errors result from miscommunications between the Department of Motor Vehicles (“DMV”) or the U.S. Postal Service and election officials, and the voter may be entirely unaware of the problem until they attempt to vote. Ex. 15, Senate State Admin. Comm. at 14:12-17; 19:13-21; *See* Declaration of Thomas Bogle (“Bogle Decl.”) ¶¶ 3-4; *Cf.* Denson Decl. ¶¶ 4-5 (explaining how voter was unable to vote at all because, through no fault of her own, her registration had not been processed and because EDR had been eliminated). As one Senator noted, “story after story” describes instances where Montanans “do everything right” when registering to vote at the DMV, but the DMV clerk failed to transfer the voter’s registration form to election officials or failed to do so on time. Ex. 15, Senate State Admin. Comm. at 41:15-25. EDR has been a failsafe, allowing those voters to correct errors, cast their ballots, and have their ballots counted without facing additional burdens that could further impede their ability to successfully vote. *See* Declaration of Eric Semerad (“Semerad Decl.”) ¶¶ 4, 9; Declaration of Bradley Seaman (“Seaman Decl.”) ¶ 3.

Simply put, Montanans have come to rely on EDR to vote. Mayer Rpt. 13. And when the Legislature last attempted to eliminate EDR via legislative referendum in 2013, Ex. 17, voters statewide strongly rejected the measure, Ex. 16.

B. EDR has not resulted in fraud.

EDR has not resulted in any voter fraud in Montana. Mayer Rpt., at 6-8; Semerad Decl. ¶ 8. Only a single case of registration fraud has been prosecuted in Montana, and it was unrelated to EDR. Seaman Decl. ¶¶ 9-11. Moreover, that instance demonstrates that Montana’s current election security practices are effective—the attempt was detected before any invalid votes were cast. Mayer Rpt., at 7. The Legislature knew this: Lewis and Clark County Clerk and Recorder Audrey McCue made it clear during deliberations on HB 176 that “we don’t have problems with the

integrity of our elections and certainly none caused by election day registration.” Ex. 15, Senate State Admin. Comm. at 11:13-16. Other election officials agree: in his 30 years on the job, Eric Semerad, Clerk and Recorder of Gallatin County, there has never been an instance of voter fraud associated with EDR. Semerad Decl. ¶¶ 8, 11, 12. The same is true for Missoula County: Clerk and Recorder Bradley Seaman knows of no voter fraud from any form of voting. Seaman Decl. ¶ 9. Election officials from other states agree that EDR does not threaten the security or integrity of the voting process. Ex. 13 at 20. Even proponents of the Election Day Registration Ban concede this: bill sponsor Representative Greef admitted that, in referencing voter fraud, she “wasn’t talking about Montana specifically.” Ex. 15, Senate State Admin. Comm. at 40:8.

Montana has numerous safeguards that effectively prevent fraud from occurring during the registration process. Registrants must prove both their identity and residence, § 13-2-110(5)(a), MCA, and are registered only when the identifying information is verified. *Id.*; Mont. Admin. R. 44.3.2012. Election officials work with the Defendant’s office, the Department of Justice’s Motor Vehicle Division, the Social Security Administration, and other agencies to ensure the continued accuracy of information provided by registration applicants. § 13-2-220, MCA; Mont. Admin. R. 44.3.2014; Mont. Admin. R. 44.3.2012(2). And as the Secretary’s Elections Director, Dana Corson, explained, registration applications are no less scrutinized on election day: election officials verify the information contained on a voter’s registration application immediately, even when a voter registers to vote using EDR. Ex. 15, House State Admin. Comm. at 47:20-48:8. Regardless of when an applicant registers, the verification process is the same. *Id.* at 45:24-48:8.

If anything, EDR enhances the integrity of elections. Semerad Decl. ¶ 8. Election day registrants provide their most current information and can register only in person, and only at one or two locations within one’s county—typically, the county clerk’s office. Semerad Decl. ¶ 5. The registration application requires voters to affirm under penalty of perjury that the information on their application is true. Ex. 15, House State Admin. Comm. at 46:22-47:1. Election day registrants make that affirmation in-person, before an election official. *Id.* at 51:21-52:3; Semerad Decl. ¶ 8. This face-to-face interaction is an additional barrier to fraud. *Id.* Moreover, only during the late registration period, including on election day, the Montana Votes database will flag whether an in-person applicant is registered elsewhere and whether they have already received an absentee ballot. Ex. 15, House State Admin. Comm. at 61:21-62:14; 87:19-15; Semerad Decl. ¶ 8.

Like election officials, Montana voters also do not see election integrity as a problem—more than 90 percent report feeling confident in the state’s electoral process. Mayer Rpt., at 7.

C. EDR does not impose administrative burdens.

For 15 years, Montana’s election officials have routinely offered EDR without serious administrative problems. Ex. 15, House State Admin. Comm. at 30:17-20; Semerad Decl. ¶ 5; Seaman Decl. ¶ 7. Election officials register voters almost every business day of the year, and the process is the same on election day. Ex. 15, House State Admin. Comm. at 45:24-48:8. Because they do it so often, Gallatain County Clerk and Recorder Eric Semerad says his staff can register voters efficiently, even on election days. *See* Semerad Decl. ¶ 5. Likewise, Missoula County had a robust system that enabled it to manage the demand for EDR. *Id.* ¶¶ 4-7. When testifying before the Legislature, Audrey McCue “wanted to be on the record saying that [the Election Day Registration Ban] will not help [her].” Ex. 15, Senate State Admin. Comm. at 10:7-10. Even proponents of the ban conceded there are no administrative problems currently burdening Montana’s election officials. Ex. 15, House State Admin Comm. at 94:14-95:7. Once again, the views of Montana’s election officials are widely held: Election officials in other states generally do not believe EDR increases administrative burdens. Ex. 13 at 17.

The EDR process is not time-consuming. Voters often arrive to register with a completed application. Ex. 15, House State Admin. Comm. at 47:20-25. But even if a voter does not, election officials need only hand the voter an application. *Id.* Once the voter has completed it, the official simply enters the applicant’s information into the Montana Votes database, which automatically verifies the applicant’s information. *Id.* at 47:24-48:3. Nor does EDR increase lines at polling locations; voters registering during late registration, including on election day, do so at their election official’s office, not their polling place. § 44.3.2015, MCA; Semerad Decl. ¶ 5.

D. The Legislature eliminated EDR without justification.

Despite widespread support for EDR and its positive effect on democratic participation, the Legislature introduced HB 176 to end the practice. Exs. 6, 18. HB 176 immediately met with substantial opposition, including from groups representing voters most likely to be adversely impacted. *See generally* Ex. 15. The Legislature heard explicit and repeated testimony about how those voters would be adversely impacted by HB 176. *Id.* But the majority was not moved, and the Legislature passed HB 176 along strict party lines. Ex. 7.

Even though it has been in effect during only one off-year, low-turnout, non-statewide election, the Election Day Registration Ban has already disenfranchised otherwise eligible voters. Semerad Decl. ¶ 7; Bogle Decl. ¶¶ 7-9; Denson Decl. ¶ 4; Bertelsen Decl. ¶¶ 8-10; Declaration of Gavin Zaluski ¶¶ 5-7. Missoula County turned away nine voters seeking to register on election day. Seaman Decl. ¶ 8. In Gallatin County, 17 eligible voters were unable to cast their ballots because of the Ban. Semerad Decl. ¶ 7. Some of those voters had no reason to know they were not registered to vote. *See* Bogle Decl. ¶¶ 7-8. In total, at least 58 voters were unable to vote because of the elimination of EDR. Affidavit of Kendra Miller ¶ 21. That number will only increase in 2022, when federal and statewide elections will drive much higher turnout.

III. Voter IDs in Montana.

Montana has required some form of voter ID for in-person voting since 2003, but the law as it existed for nearly two decades allowed voters to prove their identity with one of several forms of ID, including out-of-state driver's licenses and Montana college or university IDs. Ex. 19.

A. Montana has long permitted using college and university IDs to vote.

For nearly two decades, Montana's voter ID scheme has required voters to provide a photo ID, including but not limited to "a valid driver's license, a school district or postsecondary education photo identification, or a tribal photo identification." § 13-13-114(1)(a), MCA (2005). If a voter could not provide qualifying photo ID, they could instead provide any one of several categories of identifying documents, such as "a current utility bill, bank statement, paycheck, notice of confirmation of voter registration . . . government check, or other government document that shows the elector's name and current address." *Id.*

The inclusion of student IDs in the first category was particularly important in allowing young voters to vote because many students do not possess other qualifying forms of identification. Mayer Rpt., at 15; Ex. 20. There are sixteen colleges and universities in the Montana University System, enrolling over 40,000 students, over 10,000 of whom are from out-of-state. Mayer Rpt., at 16. Montana is among the states with the highest proportion of out-of-state students who vote in their campus state. Ex. 21. Out-of-state students are particularly unlikely to possess a Montana drivers' license. Ex. 20, Senate State Admin. Comm. at 13:6-15, House State Admin. Comm. at 19: 6-8. And students are generally less likely to have a drivers' license or state ID. Mayer Rpt., at 15. Moreover, students living on-campus or in shared living situations often do not receive utility

bills, have bank statements addressed to their school addresses, have any reason to have a government issued check, or have a job for which they receive paychecks. *See generally* Ex. 20.

Students are, however, very likely to have a college-issued ID because they are so integral to the student experience. *See id.* At MSU, for example, student ID cards serve as meal cards, library cards, laundry cards, as well as keys to residence halls, academic buildings, recreational and fitness centers, computer and math labs, and student health services. Ex. 22. Students may even use their ID cards as debit cards at various locations on campus. *Id.* Perhaps most significantly to students, their ID cards are their ticket into the MSU football games. *Id.*

Transgender students rely student IDs to vote for another reason. The process for obtaining a gender-affirming driver's license or state ID card is lengthy, difficult, and intrusive. Declaration of Shawn Reagor ("Reagor Decl.") ¶¶ 6-10. To change the name listed on their driver's license or state ID, individuals must file a court petition and then publish a notice of the hearing in a county newspaper for four weeks. *Id.* ¶ 7. Only after the court issues an order legally changing the individual's name can they change the name on their driver's license or state ID. *Id.* To change the gender marker, they must have a birth certificate or social security card showing the affirming gender marker. *Id.* ¶ 10. To update the gender marker on a birth certificate in Montana, an individual must obtain a court order, which requires them to provide the court with a letter from a physician that affirms the individual has undergone sex confirmation surgery and completed the transition process. *Id.* ¶ 8; Ex. 23. To update the gender marker on their social security card, they must provide a similar letter to the Social Security administration, which can take eight to ten weeks. Reagor Decl. ¶ 9. In contrast, transgender students typically do not need a court order or physician's letter to change their name and gender marker on their student identification. *Id.* ¶ 13.

Historically, Montana has not achieved particularly high turnout among its young voters. However, that changed dramatically during the 2020 general election, when voters between the ages of 18 and 29 turned out nearly 40 percent more than they did during the prior presidential election. Ex. 24. The Voter ID Restrictions threaten to roll back this progress without justification.

B. The use of student IDs has not resulted in fraud.

Montana has not had any student ID-related election fraud in the nearly two decades since such IDs have been permitted as voter identification. Mayer Rpt., at 6-8; *See Semerad Decl.* ¶ 11; *Seaman Decl.* ¶ 10. Defendants' Election Director even admitted this during legislative hearings on SB 169. Ex. 20, House Judiciary Comm. at 22:5-21. Gallatin County, home to MSU and its

more than 17,000 students, has had no problems with voters using student IDs at the polls, nor has Missoula County, home to the University of Montana. Semerad Decl. ¶ 11; Seaman Decl. ¶ 10. And as noted, voter fraud, in general, is vanishingly rare in Montana. Mayer Rpt., at 6-8.

Moreover, Montana University System schools issue ID cards securely because student IDs are keys that grant access to virtually every aspect of student life and may even act like credit cards. Thus, MSU applicants must provide various forms of personally identifying information—including social security numbers, immunization records, their ACT or SAT scores, and high school transcripts. Ex. 25. Once admitted, they must present a valid, government-issued photo ID before they can receive their student ID. Ex. 22. Students at the University of Montana must similarly show a valid government-issued photo ID to receive their student ID. Ex. 26.

C. The Voter ID Restrictions impede the voting rights of young voters.

Despite the lack of evidence that student IDs threaten election integrity, the Legislature passed SB 169, revising Montana’s voter ID rules to young voters’ detriment. Ex. 9. Now, a Montana student ID card must be accompanied by other documentary evidence before a voter may cast a regular ballot, and out-of-state drivers’ licenses no longer suffice. *Id.* SB 169 also removed registration confirmations as qualifying IDs, so students cannot use their student ID and their registration confirmation to vote. *Id.* Further, SB 169 simultaneously elevated other forms of ID that young voters are less likely to possess—including a Montana concealed carry permit, which Montana voters can now use to vote without presenting additional identifying information. *Id.*

The differing treatment of those forms of ID defies logic. The purpose of the voter ID requirement is to prove that the voter is who they say they are, not that they are eligible to vote. Mayer Rpt., at 16. Eligibility is addressed during the registration process, when voters must prove their identity and obtain a voter registration confirmation form before they receive a voter registration card. § 13 2 110(3)(a)(c), (4)(a), MCA. And other than a U.S. passport or Tribal ID, none of the primary forms of identification affirm voting eligibility—indeed, noncitizens can obtain a Montana driver’s license or state ID card, concealed carry permit, and a military ID. Mayer Rpt., at 17. Nor do any of those forms of ID prove a voter’s residence. *Id.*

Despite its incoherence, the relegation of documents that young voters are likely to possess is no coincidence. Speaker Galt was explicit: during a hearing on SB 169, Galt wondered “if you’re a college student in Montana and you don’t have a registration, a bank statement, or a W-2, it

makes me kind of wonder why you're voting in this election anyway." *Id.* at 15. Answering his own question, he concluded that young voters have "little stake in the game." *Id.*

IV. Organized ballot assistance in Montana.

Montanans have long had the right to vote absentee, and the vast majority of the state's voters now do so. Each year, this reliance increases. Ex. 27. In the 2016 election, 65.38 percent of Montana voters cast absentee ballots. *Id.* In the 2018 general election, over 73 percent of voters—372,400—voted absentee. *Id.* In 2020, that number nearly doubled, to 604,042. *Id.* And as the number of absentee voters increased, so too did assistance provided by civic and political organizations, including secure and reliable ballot collection.

A. Thousands of Montana voters rely on organized ballot assistance.

As Defendant's own Elections Director, Dana Corson, admitted under oath, organized ballot assistance programs are good for democracy because they increase voter turnout. Ex. 28, Volume III at 537-38. Mr. Corson is right: Ballot assistance programs have helped swaths of voters request and return their ballots. Exs. 28, 29; 156-173; Declaration of Mitch Bohn ("Bohn Decl.") ¶ 5; Bolger Decl. ¶ 20; Franks-Ongoy Decl. ¶ 19; Semerad Decl. ¶ 12. Those services have been invaluable to Montanans whose work commitments, school schedules, family care responsibilities, mobility impairments, lack of access to postal mail service, or lack of access to transportation made returning their absentee ballot difficult or even impossible. Exs. 28, 29; Bohn Decl. ¶¶ 5-6; Bolger Decl. ¶ 20; Franks-Ongoy Decl. ¶ 19. Organizations reduced these barriers by allowing voters to give their absentee ballot to a representative of a community organization or campaign, who then transported the sealed ballot envelope to an official drop-off site. Exs. 28, 29; Bohn Decl. ¶ 6; Bolger Decl. ¶¶ 15-18, 20; Franks-Ongoy Decl. ¶ 19. In 2016 and 2018, organized ballot return assistance programs likely helped over 2,500 voters cast their ballots. Mayer Rpt., at 17.

Native voters in particular rely on organized absentee ballot assistance. Ex. 29. Many live in remote areas with limited access to transportation, often far from county elections offices. *Id.* Mailing ballots can be difficult for Native voters because they often have limited access to postal services, and mail sent from tribal nations often takes longer. *Id.* As a result, Native voters rely on organized ballot return assistance programs provided by civic and political organizations. *Id.*

Many senior and disabled voters have also relied on organized absentee ballot assistance. Franks-Ongoy Decl. ¶¶ 16-19; Ex. 29, House Judiciary Comm. at 18:8-11, Senate State Admin. Comm. at 12:14-13:13. These voters' mobility limitations can make obtaining and returning

absentee ballots challenging, and it can be difficult for them to stand in line at polling locations or elections offices. Franks-Ongoy Decl. ¶¶ 16-19. And they may not have a family member who can make sure that their absentee ballots make it to the polls on time. *Id.* ¶ 14. Instead, these voters have relied on organized assistance. *Id.* ¶¶ 16-19; Bolger Decl. ¶ 20. Low-income, rural, and working voters rely on organized absentee ballot assistance for similar reasons. Ex. 29, House Judiciary Comm. 15: 7-11; 16:11-19; 22:16-20, Senate State Admin. Comm. at 12:14-13:13.

Students, too, have come to rely on ballot assistance programs. Ex. 28, Volume I at 10-40; Ex. 29, House Judiciary Comm. at 15:7-11; 16:11-19; 22:16-20, Senate State Admin. Comm. at 12:14-13:13; Semerad Decl. ¶ 12. Many young voters must navigate voting for the first time while balancing schoolwork and jobs. Ex. 28, Volume I at 10-40; Ex. 29, House Judiciary Comm. at 15:7-11; 16:11-19; 22:16-20, Senate State Admin. Comm. at 12:14-13:13. Additionally, they often do not have access to personal transportation. *Id.* To help mitigate those burdens, organizations have run ballot return assistance programs on college campuses to assist college students. Ex. 28, Volume I at 10-40; Ex. 29, House Judiciary Comm. at 7:11-8:3, Senate State Admin. Comm. at 14:4-7; 18:24-20:11. These groups provide secure lock boxes on campuses where students can drop off their absentee ballots, as well as door to door assistance programs. *Id.*

Many of those same groups of voters also rely on third-party assistance to obtain absentee ballots. Political organizations as well as disability rights groups have provided such assistance in past elections. Franks-Ongoy Decl. ¶¶ 16-17; Bolger Decl. ¶ 23. MDP engages in organized ballot assistance to accomplish its mission and to “communicate[] its belief in working together to help all citizens participate in democratic elections, particularly for voters who have experienced historically low turnout rates when compared to the rest of the population, or who for various reasons—disability, advanced age, poverty, or discrimination—would have difficulty voting.” Bolger Decl. ¶¶ 4, 6, 13.

B. Organized ballot assistance programs have not resulted in fraud.

Organized ballot assistance in Montana has not resulted in any fraudulent voting. Mayer Rpt. at 6-8; Semerad Decl. ¶ 12; Seaman Decl. ¶ 11. Last year, representatives of both the Secretary and the Commissioner of Political Practices admitted there is no evidence that any third party has failed to return or has interfered with a voter’s absentee ballot. *W. Native Voice*, 2020 WL 8970685, at *14. In Gallatin County, many student organizations at MSU have collected and returned ballots for other students without issue or instance of fraud. Semerad Decl. ¶ 12.

The lack of evidence of fraud reflects Montana's robust statutory scheme. Only legally registered voters may apply for absentee ballots. § 13-13-201(1), MCA. Absentee ballot applications and absentee ballots are subject to signature matching. § 13-13-213(3)(a), MCA; § 13-13-241(1)(a), MCA. Other provisions ensure the secrecy of voted ballots. § 13-13-201(2), MCA. Election officials inspect and confirm the validity of each ballot before it is counted. *See* § 13-13-245, MCA; § 13-15-107, MCA. If an election official has any questions regarding a ballot's validity, the question must be resolved before the ballot is counted. § 13-13-241(6), MCA.

The Election Code also ensures that voters cast only one ballot. Any voter that has requested an absentee ballot may vote in person only after an election official has marked the voter's absentee ballot as void. § 13-13-204, MCA. If there is some reason to believe that a voter has voted previously in an election, any other registered voter may challenge their right to vote. § 13-13-301, MCA. Similarly, the Election Code ensures that absentee ballots are sent only to qualified voters who continue to reside at the address provided in their initial application. § 13-13-212(b)(i), MCA. And, of course, the Election Code criminalizes attempts to coerce voters or fraudulently manipulate ballots. § 13-35-205, MCA.

In addition to the security measures imposed by the Election Code, organizations operating ballot assistance programs take great care in ensuring the security of the ballots they collect. *See* Exs. 28, 29; Bolger Decl. ¶¶ 15-17. MDP, for example, instructs staff and volunteers that they should never pressure a voter to collect their ballot, but rather offer it as an option only if it appears the voter will otherwise not timely return their ballot. Bolger Decl. ¶ 15. They are also instructed not to ask the voter about the content of their ballot, and if the voter volunteers that information anyway, MDP staff and volunteers ensure that the ballot is returned to county elections officials regardless of its content. *Id.* If a voter has not completed their ballot, MDP staff and volunteers are instructed to give the voter privacy, to never touch the ballot, mark the ballot, or sign for a voter, and to only accept the envelope containing the ballot after it has been signed and sealed. *Id.*

MDP further trains its staff and volunteers that ballots collected before election day must be returned to county elections officials by 5 pm the same day. *Id.* ¶ 16. If a county elections office is not open within the next 24 hours because, for example, the ballot was collected on a Saturday, staff and volunteers must turn it in on Monday. *Id.* For ballots collected on election day, MDP instructs staff and volunteers to ensure that all collected ballots are turned in before the deadline for receipt. *Id.* ¶ 18. MDP staff and volunteers are directed never to leave a ballot overnight in a

car or home. *Id.* ¶ 17. If for some reason the ballot could not be returned in the same day it was collected, they must store the ballot in a secure container in a locked campaign office. *Id.*

C. The Legislature’s previous attempts to effectively prohibit organized ballot assistance have failed.

In 2017, the Legislature enacted Senate Bill 352 (“SB 352”), which sought to make it unlawful for a person to take possession of a voter’s absentee ballot unless the person fell under an exception. Ex. 30. Except for election officials and postal workers, SB 352 would have criminalized assisting more than six voters by collecting and returning their absentee ballots. *Id.*

Scores of Montanans testified in opposition to SB 352 at public hearings. Ex. 31. They described the negative impacts SB 352 would have on the voting rights of Native voters, student voters, low-income voters, as well as elderly and disabled voters. *Id.* No members of the public testified in support. *Id.* Nonetheless, on a heavily partisan basis, the Legislature passed SB 352. Ex. 32. The measure was placed on the 2018 midterm election ballot under the title “Montana Ballot Interference Prevention Act” (“BIPA”), and Montana voters approved it.

Last year, two Montana district courts held that BIPA violated the Montana Constitution. Among other things, those courts held that BIPA unconstitutionally burdened the right to vote and unconstitutionally infringed on speech and association rights. *See Driscoll v. Stapleton*, No. DV 20-408, 2020 WL 5441604, at *1 (Mont. 13th Jud. Dist. May 22, 2020), Affirmed in Part, Vacated in Part by *Driscoll v. Stapleton*, Mont., September 29, 2020. But before the ink on those decisions dried, the Legislature began drafting a very similar version of the unconstitutional ban, House Bill 406 (“HB 406”). Once again, the Legislature heard extensive testimony illustrating how a ban on ballot assistance would operate to disenfranchise students and young voters, rural and Native voters, disabled and elderly voters, as well as low income and working voters. *See generally* Ex. 29.

Testimony about the bill’s overlap with BIPA also echoed throughout the legislative hearings. Legal counsel for COPP—the agency tasked with implementing and enforcing BIPA—testified about how HB 406 replicated BIPA’s unconstitutional aspects. *Id.*, House Judiciary Comm. at 4:25-6:2. That similarity was not lost on the legislators. One Senator described HB 406 as having “double[d] down on BIPA and added new restrictions.” *Id.* at 36:3-9. Even sponsoring Representative Noland acknowledged that HB 406 presented “many” of the “exact same issues”

that made BIPA unconstitutional. *Id.* at 36:10-19. But even “if it [took] another little bit of a look at through the court system,” he claimed HB 406’s supporters were “willing to do that again.” *Id.*

Over the course of three committee hearings on HB 406, Montanans testified in opposition to the bill’s ban on organized ballot assistance 46 times. Ex. 29. Despite passing out of all three committees, the bill failed to pass through a second reading on the floor of the Senate. Ex. 34.

D. The Legislature passed the Renewed Ballot Assistance Ban.

Just days after HB 406 died in the Senate, Senator Fitzpatrick requested to amend a different bill, HB 530, to include the Renewed Ballot Assistance Ban. Ex. 10. He made the request from the Senate floor, not during the regular committee process, six days after the deadline for transmitting amendments from one chamber to the other. *Id.* With seven session days remaining, HB 530 was sent to the Governor. *Id.* On May 14, 2021, the Governor signed it into law. *Id.*

Like its unconstitutional predecessor, BIPA, and BIPA’s doppelganger, HB 406, the Renewed Ballot Assistance Ban effectively bans organized absentee ballot assistance efforts by prohibiting ballot assistance performed in exchange for a “pecuniary benefit.” Ex. 11. Although the Ban does not define “pecuniary benefit,” it carves out from its prohibition certain paid employees—including election officials and mail delivery service employees—who, in the scope of their employment, help voters request or return absentee ballots. *Id.* But it does not exclude paid staff members of organizations who, in the scope of their employment, help voters request or return absentee ballots. *Id.* Thus, the lone definition embedded in the Renewed Ban indicates that paid staff members of MDP and other organizations may not assist voters with their absentee ballots.

Moreover, the Renewed Ban goes even further than its unconstitutional predecessors. While BIPA and HB 406 targeted only ballot *return* assistance, the Renewed Ban outlaws ballot assistance much more broadly, imposing a civil penalty of \$100 each time a person receiving a “pecuniary benefit” “distribute[s], order[s], request[s], collect[s], or deliver[s]” ballots. *Id.* In other words, the Renewed Ban does not just apply to assisting a voter in returning their completed ballot, it also applies to assisting a voter in requesting and receiving their ballot in the first place.

To the extent there is any ambiguity as to whether HB 530 prohibits paid staff of MDP and other organizations from helping voters request or return their absentee ballots, it poses real problems for organizations that need to plan and allocate resources to ballot assistance efforts well in advance of the next election. Bolger Decl. ¶¶ 22, 24. One election has already passed without any guidance. Meanwhile, organizations and individuals are left to guess about the scope of the

prohibition and whether it will prevent someone like an aid who is paid to assist elderly or disabled voters, or even a volunteer who receives reimbursements for costs, from helping their patients request, receive, or complete their absentee ballots. *Id.* ¶ 22; Franks-Ongoy Decl. ¶¶ 20-21.

ARGUMENT

A preliminary injunction is warranted where an applicant meets any one or more of the five enumerated grounds in § 27-19-201, MCA. *See Sweet Grass Farms, Ltd. v. Bd. of Cty. Comm'rs of Sweet Grass Cty.*, 2000 MT 147, ¶ 27, 300 Mont. 66, 72, 2 P.3d 825, 829. Two grounds independently warrant an injunction here. *First*, a preliminary injunction is merited when a movant 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.” § 27-19-201(1), MCA. *Second*, an injunction is appropriate when “the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant,” § 27-19-201(2), MCA, which includes “the loss of a constitutional right.” *Driscoll*, 2020 MT 247, ¶ 15.

I. The Voting Restrictions are unconstitutional.

Plaintiffs are entitled to an injunction under § 27-19-201(1), MCA because the Voting Restrictions independently and together, violate Plaintiffs’ fundamental constitutional rights.

A. The Voting Restrictions violate Montanans’ right to vote.

Like the rights of free speech, association, and due process, the right to vote is guaranteed in the Declaration of Rights of the Montana Constitution and is, consequently, a fundamental right. *See State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 206, 113 P.3d 281, 288 (“A right is ‘fundamental’ under Montana’s Constitution if the right . . . is found in the Declaration of Rights”). All statutes that implicate fundamental rights “must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State’s objective.” *Montana Env’t. Info. Ctr. v. Dep’t of Env’t. Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 225, 988 P.2d 1236, 1246. The evidence establishes that all three Voting Restrictions burden the right to vote and are not justified by any countervailing state interests.

First, ending EDR burdens Montanans’ right to vote. More than 70,000 Montanans have used EDR to register and vote. *See supra* Background Part II.A. Voter registration is typically available only during working hours, and many voters rely on election day-specific amenities like

time off from work, organized transportation, and extended hours, in addition to the one-stop option afforded by EDR. *See supra* Background Part II.A. Eliminating EDR will make it harder, and perhaps impossible, for some citizens to vote. *See supra* Background Part II.A. Moreover, previously registered voters who discover errors in their registration on election day will no longer be able to update their registration and cast a ballot. *See supra* Background Part II.A. Without election day registration, many Montanans will discover the problem with their voter registration only after it is too late to correct. *See supra* Background Part II.A.

Second, the Voter ID Restriction burdens young voters' voting rights. By denying young voters the right to vote in the manner that other, similarly situated voters enjoy, the Voter ID Restrictions impose an unconstitutional burden on their right to vote. *See Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 261, 109 P.3d 219, 222 (“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.”) (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)). Young voters are far more likely to vote using IDs issued by Montana colleges and universities. *See supra* Background Part III.A. Out-of-state students registered to vote in Montana are unlikely to possess a Montana driver's license. *See supra* Background Part III.A. Although they could previously use a driver's license issued by another state, or their public college or university ID, under the Restriction, they now cannot do the former and they must provide additional documentation—which they are far less likely to possess—to use the latter. *See supra* Background Part III.A, C. *See supra* Background Part III.A

Third, the Renewed Ballot Assistance Ban burdens voters who rely on organized absentee ballot assistance. Just last year, two Montana district courts held that a similar restriction on absentee ballot assistance unconstitutionally violated Montanans' fundamental right to vote. *See W. Native Voice*, 2020 WL 8970685, at *22; *Driscoll*, 2020 WL 5441604, at *6. The facts that informed those decisions have not changed. Thousands of voters have relied on ballot collection, and for many, it made the difference between voting and not voting at all. *See supra* Background Part IV.A. The Ban disproportionately burdens populations who already face greater hurdles to participation and are less likely to be able to overcome the increased costs of participation—Native voters, seniors, first-time student voters, voters with disabilities, and young parents working multiple low-wage jobs. *See Supra* Background Part IV.A; *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 542, 545 (6th Cir. 2014) (finding significant burden that fell

disproportionately on African American, lower-income, and homeless voters likely to use the voting opportunities eliminated by challenged law).

No legitimate, let alone compelling, state interests justify these burdens. Montana does not have a problem with election integrity. *Driscoll*, 2020 WL 5441604, at *5 (finding the Secretary failed to present evidence sufficient to uphold her purported interest in preventing voter fraud); *Western Native Voice*, 2020 WL 8970685, at *27 (same). And no problems have resulted from EDR, student IDs, or organized ballot collection services. The Voting Restrictions are solutions in search of a problem. *See supra* Background Part II.B-C (Election Day Registration Ban will not prevent voter fraud or administrative problems because election day registration has not led to either), Background Part III.B (Voter ID Restrictions will not prevent voter fraud because there is no evidence that use of student IDs or registration confirmations has led to fraud), Background Part IV.B (Renewed Ballot Assistance Ban does not enhance integrity of the voter rolls).

B. The Voting Restrictions violate Montanans' right to equal protection.

The Voting Restrictions also violate Montana Constitution's Equal Protection Clause by disproportionately and disparately abridging the right to vote of young Montana voters. Montana courts evaluate equal protection violations by following a three-step process: (1) identifying the classes involved and determining if they are similarly situated; (2) determining the appropriate level of scrutiny to apply to the challenged statute; and (3) applying that level of scrutiny to the statute. *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 18, 402 Mont. 277, 290, 477 P.3d 1065, 1073. A class is similarly situated if, after isolating the quality that is the target of the discrimination, the discriminated-against class is equal in other respects to the other class. *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 21, 314 Mont. 314, 322, 65 P.3d 576, 581. If the differential treatment implicates a fundamental right, strict scrutiny applies and the challenged provision can only survive if the law is "narrowly tailored to serve a compelling interest." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 154, 104 P.3d 445, 450.

Here, the record establishes that the Voting Restrictions treat young voters differently from similarly situated voters and cannot survive strict scrutiny. Under the Restrictions, young Montanans are unduly affected because the Restrictions constrict identification and voting methods disproportionately used by them. *See supra* Background Parts II.A, III.A. This means that young Montanans are less able to be able to vote. *See supra* Background Parts II.A, D, III.A, C.

Because they impinge on a fundamental right, the Voting Restrictions can survive only if they are justified by a compelling state interest, *see Matter of S.L.M.*, 287 Mont. 23, 35, 951 P.2d 1365, 1373 (Mont. 1997), but there is no such compelling interest here. *Driscoll*, 2020 WL 5441604, at *5 (the Secretary present insufficient evidence to establish her purported interest in preventing voter fraud); *W. Native Voice*, 2020 WL 8970685, at *27 (same). And, as discussed, no problems have resulted from EDR, student IDs, or organized ballot collection services. *See supra* I.A.

C. The Renewed Ballot Assistance Ban violates the right to free speech.

The Montana Constitution provides that “[t]he people shall have the right peaceably to assemble, petition for redress or peaceably protest government action” and that “[n]o law shall be passed impairing the freedom of speech or expression.” Mont. Const. art II §§ 6, 7. These provisions protect “the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Dorn v. Bd. of Trs. of Billings Sch. Dist. No. 2*, 203 Mont. 136, 145, 661 P.2d 426, 431 (1983). Restrictions on access to semi-public and public fora for petition circulations must be content-neutral, factually based, and finely tailored to serve substantial state interests. *See id.* at 146. Further, 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, e.g., League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 723 (M.D. Tenn. 2019) (regarding voter registration drives); *see also Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich. 2020) (regarding assistance with absentee ballot applications). Montana district courts have applied that same logic to restrictions on absentee ballot return assistance. *See, e.g., W. Native Voice*, 2020 WL 8970685, at *23.

The Renewed Ballot Assistance Ban violates these guarantees by restricting organizations’ ability to engage with voters to encourage and assist them to vote. When MDP and its members engage in get-out-the-vote efforts, including assisting voters with returning ballots, they communicate their belief in the power and importance of voting. *See supra* Background Part IV.A. Without justification, the Ban inhibits these organizations from such expression in violation of the Montana Constitution. *See supra* Background Part IV.D.

II. The Voting Restrictions impose irreparable harm to Plaintiffs’ constitutional rights that cannot be remedied.

Plaintiffs are independently entitled to an injunction under § 27-19-201(2), MCA because they will suffer irreparable injury from the loss of fundamental rights if the state enforces the Voting Restrictions. “An applicant for a preliminary injunction must establish a prima facie case or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated.” *Sweet Grass Farms*, ¶ 28 (quoting *Porter v. K & S P Ship*, 192 Mont. 175, 181, 627 P.2d 836, 839) (1981)). “If either showing is made, courts are inclined to issue the preliminary injunction.” *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 298 (1995).

Given that the rights at issue here are fundamental constitutional rights—voting, equal protection, speech, expression, and due process—it is much more than doubtful that Plaintiffs will suffer irreparable injury if the Voting Restrictions are not enjoined; it is a certainty. The loss of constitutional rights “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 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Weems v. State*, 2019 MT 98, ¶ 25, 395 Mont. 350, 363, 440 P.3d 4, 13; *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (“the right to vote is too precious, too fundamental to be so burdened or conditioned”). That loss is irreparable in the voting context, because judgment in Plaintiffs’ favor after the 2022 elections cannot cure the loss of the right to vote or to speak about voting. *See City of Billings v. Cnty. Water Dist. of Billings Heights*, 281 Mont. 219, 232, 935 P.2d 246, 253 (1997).²

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enjoin the Secretary of State and her agents, officers, employees, successors, and all persons acting in concert with each or any of them, from enforcing the Election Day Registration Ban, the Voter ID Restrictions, and the Renewed Ballot Assistance Ban.

² This Court should exercise its discretion to waive a security bond upon issuance of an injunction. *Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 21, 303 Mont. 342, 347, 16 P.3d 342, 345. No bond is warranted here because the Secretary of State will suffer no interim damages. A bond should be also waived “in the interest of justice,” as Plaintiffs are seeking to protect fundamental constitutional rights. § 27-19-306(1)(b)(ii), MCA.

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Respectfully submitted,

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