

RYLEE SOMMERS-FLANAGAN

Upper Seven Law

P.O. Box 31

Helena, MT 59624

Phone: (406) 396-3373

Email: rylee@uppersevenlaw.com

RYAN AIKIN

Aikin Law Office, PLLC

P.O. Box 7277

Missoula, MT 59807

Phone: (406) 840-4080

Email: ryan@aikinlawoffice.com

Attorneys for Plaintiffs

**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY**

<p>Montana Youth Action; Forward Montana Foundation; and Montana Public Interest Research Group,</p> <p style="text-align: center;"><i>Plaintiffs,</i></p> <p style="text-align: center;">vs.</p> <p>CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State,</p> <p style="text-align: center;"><i>Defendant.</i></p>	<p>Cause No. DV 21-0451</p> <p>Hon. Michael Moses</p> <p style="text-align: center;">DECLARATION OF Yael Bromberg, Esq.</p>
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I. Introduction and Summary of Conclusions

I have been asked by Plaintiffs in the above-captioned matter to offer an opinion about the impact on and targeting of youth voters with respect to Montana's recently enacted absentee ballot restrictions for first-time voters turning 18 years of age; removal of election day registration; and removal of student photo identification from the list of permissible standalone forms of voter identification for registration and voting. I have also been asked by Plaintiffs to explain the historical significance and context of youth enfranchisement in Montana's state constitution.

When Montana adopted its state constitution in 1972, it was at the forefront of state and federal youth voting rights. It is likely that the Twenty-Sixth Amendment would not have been ratified but for the eminence and acumen of United States Senate Majority Leader Mike Mansfield of Montana. Montana was among the first states in the nation to ratify the Twenty-Sixth Amendment in 1971. On the state level, Montana repeatedly supported state constitutionalism of youth enfranchisement, both predating ratification of the Twenty-Sixth Amendment and during its 1971-1972 Constitutional Convention approved by the 1972 electorate.

However, fifty years later, the Montana Legislature passed and implemented measures known to disproportionately impact youth and student voters and/or to single out characteristics uniquely or disproportionately held by youth and student voters. The Montana Legislature did so, even when less burdensome policies are not only possible, but had been temporarily added and then removed from the proposed bill text.

Notably, the justifications proffered by the sponsors and proponents of each of these laws bear all the hallmarks of pretext for voter discrimination on account of age, and are undermined by evidence, testimony, and other statements in the legislative history of each bill. Combined with their lack of justification, the independent and cumulative effects of the burdens placed on youth and student voters as a result of these laws, along with the timing of their passage on the heels of unprecedented youth electoral engagement nationally and statewide, can only be understood as a collective effort to deny or abridge the right to vote of youth voters.

I am being compensated at a rate of \$550 per hour for my services in this matter. My compensation is in no way contingent on the results of the analyses described herein nor on the contents of this report.

II. Qualifications and Expertise

I have an L.L.M. in Advocacy with distinction from Georgetown University Law Center, and a J.D. from Rutgers School of Law. I am an adjunct law professor at Rutgers School of Law, where I teach election law and the political process, and am an incoming Visiting Associate with the Eagleton Institute of Politics of Rutgers where I am affiliated with the Center for Youth Political Participation. My legal scholarship, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment* in the University of Pennsylvania Journal of Constitutional Law has been dubbed a "groundbreaking study" by Slate and has emerged as a blueprint for contextualizing youth voters as a protected class. My work has been cited in multiple legal briefs, by the Fifth

Circuit Court of Appeals, U.S. history books published by the New York University Press and the University of Pennsylvania Press, and in seven publications of legal scholarship including by renowned voting rights scholar Rick Hasen. I have presented nationally on this topic, most recently on CSPAN TV and CSPAN Live Radio, and on *We the People*, a podcast by the National Constitution Center with a dedicated base of 150,000 monthly listeners. I have lectured on voting rights, election law, and democracy issues in a range of academic settings, including as a special event speaker at Duke University Sanford School of Public Policy, Eagleton Institute of Politics Center for Youth Political Participation, Georgetown University Law Center, Hamilton College, George Washington University, Bard College, New York University, and Rutgers School of Law. I have also lectured on these issues within the legal community, in some cases as an accredited CLE speaker, including for the D.C. Bar Association's 2020 conference in dedication to the centennial of the 19th Amendment, the Vermont Bar Association, the New Jersey Hispanic Bar Association, and the New York City Bar Association.

In spring 2022, I am working with cross-disciplinary undergraduate and graduate students in Harvard Kennedy School's Center for Public Leadership to continue to study youth voting trends and ameliorate discrete obstacles. I additionally serve as a faculty advisor for the Rutgers Law Review's 2022 legal symposium, *Voting Rights Reform: the 26th Amendment, Youth Power, and the Potential for a Third Reconstruction*, the first-ever legal symposium dedicated to this topic. The resulting symposium publication will frame and burgeon new scholarship on this underexamined area of federal and state constitutional rights, including focus on discrete election administration mechanisms, the role of institutions of postsecondary education, developmental science on youth cognition, and the criminal justice system. I am developing my next piece of legal scholarship, which builds on my study of this area of the law and examines the availability of on-campus polling locations nationally.

My legal scholarship was developed while teaching voting rights and civil rights seminars and supervising litigation within the Georgetown University Law Center's Civil Rights Clinic and Voting Rights Institute. I have since worked with The Andrew Goodman Foundation, a national youth voting rights organization, as outside counsel, having previously served as Chief Counsel for Voting Rights, and as incoming Chief Counsel and Strategic Advisor. I have also litigated in this area of law, dating back to my 2009-2011 Kinoy/Stavis Fellowship with the Rutgers Constitutional Litigation Clinic, through my tenure with the Georgetown University Law Center, and in recent years in state and federal constitutional rights lawsuits in the District Court for the District of Columbia, Florida, New Jersey, New York, Tennessee, Wisconsin, and before the Seventh Circuit Court of Appeals and the United States Supreme Court. Upon graduating from law school, I had the privilege of clerking for nearly three years with the Honorable Dickinson R. Debevoise in the United States District Court for the District of New Jersey.

My CV is appended to this report.

III. Montana's State and Federal Constitutionalisation of Youth Enfranchisement

1. General Background

Montana's expansive provisions protecting and enshrining the right to vote as fundamental and affording increased protections to Montana youth are derived from the Montana Constitution. To appreciate the unique and expansive nature of those provisions and the importance of youth voting rights in Montana, it is helpful to understand the history of the Constitutional Convention that adopted these provisions and which were ultimately ratified by the voters of Montana, as well as the context of its timing amidst and in the wake of the ratification of the Twenty-Sixth Amendment.

Montana's constitutional development traces back to the 1880's, which culminated in the Constitution of 1889 through which Montana was admitted to statehood, and the 1960s and early 70s, resulting in Montana's current state constitution which was ratified by the voters in 1972. See Larry M. Elison & Fritz Snyder, *THE MONTANA STATE CONSTITUTION, A REFERENCE GUIDE 1* (G. Alan Tarr ed., Greenwood Press, 2001). The 100 delegates participating in the Constitutional Convention were "an unusual group." Forward by Leo Graybill Jr., *Montana Constitutional Society of 1972, 100 Delegates: Montana Constitutional Convention of 1972* (1989). Except for a few former state legislators, "they were not seasoned politicians" with "preconceived positions on major state issues," and "approached the principal issues before the convention in an objective manner" free of special interests and lobbyists. Id. See also *Forty-Second Legislative Assembly v. Lennon*, 156 Mont. 416, 422 (1971) (preventing elected state legislators from holding dual office by additionally serving as convention delegates).

The resulting state constitution was innovative, providing new rights not mentioned in the prior 1889 Constitution, and intentionally expanded rights beyond those afforded in the federal constitution— including broad rights against public and private discrimination, and positive rights to basic necessities, privacy, and a healthy and clean environment. For example, the broad equal protection and anti-discrimination language adopted within Art. II § 4 was embraced with the understanding that "a significant commitment" to these principles "could be made at the level of the fundamental law where none now exists." Rick Applegate, Study No. 10 at 312: Bill of Rights (Montana Constitution Convention Committee) (1972).

Critically, in Article II of the Montana Constitution, the Declaration of Rights explicitly affords political and civil rights relevant to the case before this Court, including:

- Popular Sovereignty (Art. II § 1);
- Individual Dignity, including equal protection of the laws and broad anti-discrimination protections in the exercise of civil or political rights (Art. II § 4);
- Right of Suffrage (Art. II § 13);
- Adult Rights for those 18 and older, including as a qualified elector (voting age lowered to 18 pursuant to the Twenty-Sixth Amendment) (Art. II § 14; see also Ar. IV § 2 (Qualified Elector));
- Rights of Persons Under the Age of Majority (lowered to 18) (Art. II § 15).

These provisions were seriously vetted by the Convention when it met between November 1971 and March 1972, including by Convention Committees who deliberated and proposed them to the full delegation, leading to further deliberation and eventual adoption of the constitution on March 22, 1972. The voters then approved and ratified the proposed constitution during the June 6, 1972 special election.

2. Montana's 1969-1972 Tipping Point for Youth Enfranchisement

Even prior to and after the passage of the Twenty-Sixth Amendment, Montana considered and took action to expand youth voting rights. A proposal to lower the voting age was approved by the legislature and submitted to the electorate in 1970 (lowering the age of suffrage from 21 to 19), and again in 1972 (lowering the age of suffrage from 19 to 18). Technically, the voters considered the measure in 1972 twice, since it was both directly referred by the legislature and included within the state constitution proposed by the Constitutional Convention. This 1972 double-effort is notable in that it was not technically necessary since the Twenty-Sixth Amendment had already been ratified in 1971, thereby lowering the voting age to 18 for all local, state, and federal races in the country, and outlawing age discrimination in access to the ballot. Montana championed the issue a fourth time, when it supported the federal analogue just six days after it was referred by Congress to the states.

An examination of the Montana Constitutional Convention's records and transcript reveals that the state constitution was meant to be more expansive and fulsome than federal constitutional law, including as it relates to adults' rights, rights of minors, the right of suffrage, and the right to equal protection of the laws.

Montana reached a tipping point in 1969-1972 to approve youth enfranchisement following various measures that had been introduced in the legislative assembly since 1889: in 1947 (HB 316); 1953 (HB 87); 1955 (HB 53); 1957 (HB 41); 1959 (SB 21); three measures in 1967 (SB 161, lowering voting age to 19) (HB 41, lowering voting age to 18) (HB 107, lowering voting age to 20); three measures in 1969 (SB 4, lowering voting age to 18) (SB 58, lowering voting age to 19) (HB 43, submitted to voters, lowering voting age to 19); and 1970 (HB 52, submitted to voters, lowering voting age to 18). See Constitutional Convention Research Memorandum No. 2, Constitutional Amendments 1889-1971, Prepared by the Montana Constitutional Convention Commission (1971-1972).

The legislature's attention to the issue in the forties, through the fifties, and again at the end of the sixties, tracks with congressional attention to the analogous federal proposal, consistent with the "military-suffrage connection [that] had been a persistent theme since the beginning of American History, catching steam during World War II when the Twenty-Sixth Amendment was first introduced, and reemerging during the Korean War and the Vietnam War." See Yael Bromberg, Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment, 21 U. PA. J. CONST. L. 1105, 1122 (2019).

3. 1969-1970 State Constitutionalisation to Lower the Voting Age to 19.

At the state level, Montana was one of only nine states in the nation to reduce the voting age from 21 years of age prior to ratification of the Twenty-Sixth Amendment: Georgia, 1943 (lowering voting age to 18); Kentucky, 1955 (18); Hawaii, 1950 (20); Alaska, 1956 (19) and 1970 (18); Maine, 1970 (20); Massachusetts, 1970 (19); Minnesota, 1970 (19); Montana, 1970 (19); Nebraska, 1970 (20). At the same time, at the federal level, Montana's elected United States Senator was one of the most influential legislators to ensure the success of federal constitutionalisation.

Governor Forrest H. Anderson championed youth enfranchisement, including in his 1969 Gubernatorial State of the State address. The ensuing 1969 legislative session considered various related measures, beginning with the House Constitution Elections and Federal Relations Committee, which on January 13, 1969 introduced and unanimously voted to submit to the voters a constitutional amendment to lower the voting age from 21 to 19.

The chief sponsor and proponent of the bill (HB-43), Representative Tom Harrison (R-Helena), explained:

[W]e have become a state the means of communication and improved education are such that people are qualified to vote at a younger age than they did when the age of 21 was set. Our education system exposes them to the problems and the average young person is much better prepared and aware of the issues than the most mature voters were 30 or 40 years ago.

HB43, Proceedings of the Constitution, Elections and Federal Relations Committee (Jan. 13, 1969) (Rep. Harrison).

A co-sponsor of the bill, noted the small handful of other states who already extended the suffrage to 18-year olds:

[O]ne reason for the explosion among the young people in this country is that we have no safety valve such as the vote. Last summer when he [sic] was in Kentucky, where the 18 year olds have the right to vote, he observed that they are more aware of politics and take an active part in the Democrat and Republican parties. He personally is against the 18 year old vote as they are still too tied to the apron strings whereas the 19 year old has been on his own a year, many to college.

Id. (Rep. Williams).

The sister Senate bill (SB-29) was heard days later on January 18, 1969 in the Senate Committee on Constitutions, Elections, and Federal Relations. The first proponent to speak on the measure was Lt. Gov. Thomas L. Judge, who reiterated Governor Anderson's backing for the legislation. Various student leaders from colleges and high schools across the state testified for the

proposal and submitted written comments, including elected student representatives for the Montana Student President's Association and the University of Montana. The ballot measure for 19-year old suffrage ultimately passed the House 84-17 and the Senate 46-7, and was ratified by the voters (109,227 : 102,110) via referendum on November 3, 1970, effective November 20, 1970.

The legislature's effort to lower the voting age through the state constitution took place alongside the most comprehensive federal hearings on the federal analogue in 1968 and 1970. Bromberg, 21 U. PA. J. CONST. L. at 1117 (citing S. Rep. No. 92-26, at 7-8 (1971)). Senator Birch Bayh, Chair of the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, introduced Senator Mike Mansfield of Montana – then Senate Majority Leader, and co-sponsor of the proposal – as the lead-off witness to the 1968 hearings, recognizing him as “one of the leading congressional advocates of constitutional reform in the area of voting age for a number of years.” *Lowering the Voting Age to 18: Hearing on S.J. Res 8, S.J. Res. 14, and S.J. Res. 78 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 90th Cong. 4-7 (1968) (statement by Sen. Michael Mansfield).

Montana's role in ratification of the Twenty-Sixth Amendment cannot be understated – ratification would not have been achieved but for the leadership of Senator Mike Mansfield. By that time, Senator Mansfield had already been serving as Senate Majority Leader for nearly a decade. Mansfield took federal office in 1943 when he began serving in the House of Representatives until being elected to the Senate in 1953. He would eventually become the longest-serving Senate Majority Leader, serving from 1961 to 1977.

Due to Senator Mansfield's prominent national role, his leadership in Montana politics, and his ardent support for youth enfranchisement, excerpts of his 1968 lead-off witness testimony are included herein:

One of the most difficult challenges we face is the growing barrier of misunderstanding that gulfs the young people of today from the older generation who were the youth of yesterday. As our living standards and educational opportunities have improved so have our youth become more experienced, more aware, perhaps more restless, but better equipped than ever to exercise responsibility.

The fact that some have flaunted their disdain for certain of the institutions that we long ago accepted as a way of life in no way should reflect upon the great majority of our young people. Their probing intelligence, deep interest, and eagerness to participate in the elective process exemplify the best qualities of responsible citizenship. The future, to repeat a truism, is in their hands. If it is to be a better nation and a better world – and I am confident that it will be – the youth of today will make it so. I think the time is long overdue when they should be given more in the way of recognition, more in the way of public responsibility.

The very first step should be to open to 18-year-olds the constitutional right to vote.

[. . .]

Indeed, it is the age of 18 that has long been regarded as the age when young people “try it on their own” and become responsible for themselves and for others. In fact, at this age the citizen has fresher knowledge and a more enthusiastic interest in government processes.

Moreover, 18 is the age when young men are told to fight our wars even though they themselves may have no right to choose the officials who make the policies that may lead to war.

Some people derogate this argument, but it also is a truism. At 18, they become young adults and are treated so by our courts. They are deemed legally responsible for their actions – both civil and criminal – and must suffer the full penalties of the law. Eighteen-year-old men and women marry and need not obtain the consent of parents or guardians to do so. Young adults of 18 hold full-time jobs. They pay taxes at the same level as everyone else; yet they have no voice in the imposition of those taxes. If we say they can assume the economical and social responsibilities of adults, of marriage and family, why not the vote?

[. . .]

The colleges and universities are filled with alert minds, eager, willing, and able to participate.

[. . .]

The problems of today may well become the crises our young people must face tomorrow, as the leaders of this Nation. The idealism and enthusiasm they bring to the ballot box cannot but have a beneficial influence on the conduct of government.

[. . .]

Id.

Senator Mansfield advanced many of the emerging themes in support of federal ratification, as echoed by proponents for the state analogue, including: 1) the value of idealism, courage, and moral purpose that youth provide in reenergizing the practice of democracy; 2) the increased political competence of the group compared to prior generations, due to greater access to information through standardized education and technology; 3) the increased responsibilities assumed by the group as they fought in war, assumed debt, and lived independently; 4) a general

recognition of the nation's expansion toward a more inclusive suffrage; and 5) the stemming of unrest by encouraging institutionalized mechanisms to advance change. See Bromberg, 21 U. PA. J. CONST. L. at 1131-32.

The first successful federal effort to lower the voting age was ultimately accomplished via statute within the 1970 Amendments to the Voting Rights Act of 1965. Senator Mansfield introduced the youth enfranchisement proposal within the Voting Rights Act Amendments of 1970. He urged that it may be “the last chance” to lower the voting age because the House and Senate Judiciary Committees were proving to be “burial grounds” for constitutional amendments. Bromberg, 21 U. PA. J. CONST. L. at 1125 (citing 116 Cong. Rec. 5950-51 (1970) (statement by Sen. Mansfield)).

The Mansfield Amendment (commonly referred to as Title III) was approved one week later by a sixty-four to seventeen roll call vote. The “key decision” to introduce and co-sponsor Title III was Senator Mansfield's; the decision proved pivotal to setting the stage for the Twenty-Sixth Amendment final ratification, as described below. See Carey Parker Interview at 7-8, Sept. 22, 2008, Edward M. Kennedy Oral History Project, Miller Center, University of Virginia (Chief Legislative Assistant for Edward Kennedy). Once Senator Mansfield put his weight behind the measure and lead on it, he legitimized it, and other legislators signed on. “It was Mansfield's power of leadership that got it through. If he hadn't been the majority leader, it probably wouldn't have happened.” Id. at 10; see also Jennifer Frost, LET US VOTE! YOUTH VOTING RIGHTS AND THE 26TH AMENDMENT (NYU Press 2022) (advanced copy) at 242-43 (summarizing legislative history of Title III). It is for this reason that Jason Berman, the former Chief of Staff for Senator Birch Bayh, the Chair of the Subcommittee for Constitutional Amendments, described Senator Mansfield as “the unsung hero of the Twenty-Sixth Amendment.” Bromberg Interview with Jason Berman (Jan. 4, 2022).

In Title III, Congress declared that the 21-age requirement: “denies and abridges the inherent constitutional rights of citizens” above eighteen to vote; denied these disenfranchised citizens “due process and equal protection of the laws that was guaranteed to them under the Fourteenth Amendment;” and “does not bear a reasonable relationship to any compelling state interest.” Bromberg, 21 U. PA. J. CONST. L. at 1126 (quoting Pub. L. No. 91-285, §§ 301-305).

This congressional text is striking in that it recognizes constitutional rights of those age eighteen and older; acknowledges that disenfranchisement violates both due process and equal protection pursuant to the Fourteenth Amendment; and applies to this newly enfranchised class the strictest form of judicial review available to violations of the fundamental right to vote. These Fourteenth Amendment principles would be repeated later during the ratification of the Twenty-Sixth Amendment. See Bromberg, 21 U. PA. J. CONST. L. at 1123 – 1131.

The Voting Rights Act of 1970 was signed by President Nixon on June 22, 1970, and expedited to the United States Supreme Court due to ongoing debate surrounding the constitutionality of federal action vis-à-vis state and local elections. Id. The Supreme Court found the federal statutory approach to youth enfranchisement valid as applied to federal elections, but

violative of the Fourteenth Amendment as applied to state and local elections. See Oregon v. Mitchell, 400 U.S. 112, 126 (1970); see also Bromberg, 21 U. PA. J. CONST. L. at 1123 – 1131.

This set the stage for a second round of Montana state constitutionalisation to further lower the voting age from 19 to 18 via both legislative referral and Constitutional Convention, and for federal ratification of the Twenty-Sixth Amendment.

4. 1971 State Legislative and Extraordinary Legislative Sessions for State and Federal Constitutionalisation of Youth Voting Rights.

Montana's commitment to youth voting rights holds a special place in history as one of the early ratifiers of the Twenty-Sixth Amendment, less than one week after its referral by Congress.

The Supreme Court's invalidation of Title III on December 21, 1970 created a potential election administrative crisis ahead of the 1972 presidential election which would require implementation of a dual voting system – one for voters age 18-20 vis-à-vis federal office, and another for voters age 21 and older for state and local office.

In Montana's case, unlike the vast majority of states in the nation, voters age 19 and older could vote in state and local elections as per the 1970 state constitutional amendment described above. Over 100,000 additional Montana voters would be enfranchised for state elections if the voting age were to be further lowered to 18, but it would not be possible to amend the state constitution before the November 1972 presidential election. See Report by Constitutional Amendments Subcommittee to the Senate Committee on the Judiciary, Lowering the Voting Age to 18: A Fifty-State Survey of the Costs and Other Problems of Dual-Age Voting (Feb. 1971). Montana Secretary of State Frank Murray explained that such a dual voting system would make it “impossible to preserve the secrecy” of the ballot in smaller precincts and that counting would be slower due to a paper balloting system that would need to be implemented. Id.

Two days after the Oregon v. Mitchell decision, Senator Mansfield wrote to Governor Anderson, urging for state uniformity on the 18-year-old vote. He wrote:

As you know, I have been a strong advocate of the eighteen year old vote in many areas. Not only was I pleased with the Supreme Court's decision, I feel the voters of Montana exhibited good judgment in approving the revision in our State Constitution to permit a reduction in the voting age to nineteen. I would respectfully suggest to the State Legislature that they adopt a further revision in our Constitution to reduce the state voting age requirement to eighteen thus conforming with the national election age requirement.

Letter by Senator Mike Mansfield to Governor Forrest Anderson (Dec. 23, 1970).

Governor Anderson responded to Senator Mansfield in agreement, informing him that Representative Francis Bardanoue was poised to introduce HB 52 accordingly. See Letter by Governor Anderson to Senator Mansfield (Jan. 6, 1971) (carbon copying Rep. Bardanoue).

Governor Anderson signed the measure on March 3, 1971, for referral to the citizens on the 1972 general election ballot. See Message from Governor Anderson to Speaker of the House (March 3, 1971).

About three weeks later, on March 23, 1971, the U.S. Congress sent the Twenty-Sixth Amendment to the states for ratification into the federal constitution:

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

The Congress shall have power to enforce this article by appropriate legislation.

Twenty-Sixth Amendment to the U.S. Constitution.

Although the federal proposal was introduced over 150 times over thirty years, when it was finally referred to the states for ratification, it became the quickest amendment to be ratified in U.S. history – taking less than 100 days to be ratified by the requisite 38 states.

In referring the Twenty-Sixth Amendment to the states, Congress invoked the Voting Rights Act, and the right to vote principles protected by the Fourteenth Amendment. For example, the Senate Report accompanying the Senate Joint Resolution, which was later enacted as the Twenty-Sixth Amendment, provides:

[F]orcing young voters to undertake special burdens – obtaining absentee ballots, or traveling to one centralized location in each city, for example – in order to exercise their right to vote might well serve to dissuade them from participating in the election. This result, and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise.

S. Rep. No. 92-26, at 14 (1971) (accompanying S.J. Res. 7, 92d Cong. (1971)).

In addition to repeating Fourteenth Amendment principles, the congressional language is noteworthy in that it seeks to invalidate “special burdens” in the way of young voters exercising their right to vote. Moreover, the language does not simply cover denial of the right to vote. Congress sought to enfranchise the class and eliminate age-based discrimination in access to the ballot, cognizant of the need to eradicate electoral mechanisms that would “dissuade them from participating in the election” in furtherance of encouraging “greater political participation on the part of the young.” Id.

The day after the measure was referred to the states by Congress, Governor Anderson opened the state's Extraordinary Legislative Session to expedite its approval in Montana, explaining:

Montana has long been one of the most progressive and responsive states in the West. I think it is appropriate that Montana be included among the first states to ratify this Constitutional Amendment.

See Press Release, Office of the Governor (March 24, 1971); see also Letter by Gov. Anderson to Senate President and House Speaker (March 24, 1971).

The resulting Extraordinary Session Senate Joint Resolution 1 passed the Senate unopposed and the House by supermajority (88 votes in favor, 8 opposed, 2 absent, and 6 excused).

Accordingly, on March 29, 1971 – just six days after referral from Congress to the states – Montana became the 8th state to ratify the Twenty-Sixth Amendment. By July 1, 1971, 38 states ratified the proposal, thereby adopting it into the U.S. Constitution.

The unprecedented speed and near-unanimity by which the Twenty-Sixth Amendment was ratified (passing the Senate unanimously, and the House 118:8) was in large part due to the cross-partisan support for youth enfranchisement and a recognition of the critical role that young people contribute to a healthy democracy. Indeed, it historically was championed across the aisle, including by President Dwight Eisenhower, Senator Barry Goldwater, and President Richard Nixon.

As noted by President Nixon during the ceremonial certification of the Twenty-Sixth Amendment, young people serve a critical role in the democratic process, infusing the practice of democracy with “some idealism, some courage, some stamina, some high moral purpose that this Nation always needs, because a country, throughout history, we find, goes through ebbs and flows of idealism.” Richard Nixon, U.S. President, Remarks at the Ceremony Marking the Certification of the 26th Amendment to the Constitution (Jul. 5, 1971).

Although the Twenty-Sixth Amendment was ratified in July 1971, and would therefore apply to all local, state, and federal elections, the Montana 1971-1972 Constitutional Convention nonetheless chose to additionally incorporate youth enfranchisement within a new provision of the Declaration of Rights by establishing that “a person 18 years of age or older is an adult for all purposes” (Article II §14), and coextensively embedded the right within the qualification of electors (Article IV § 2).

5. 1971-1972 State Constitutionalisation of Youth Voting Rights.

Even after passage of the Twenty-Sixth Amendment, Montana nevertheless included various provisions in its 1972 Constitutional Convention to further enshrine the right to vote as fundamental, expand the right to vote generally and for youth voters, ensure broad equal protection of the laws, including with an anti-discrimination provision, and otherwise protect the rights of Montana youth.

Montana's national and state leadership in support of youth enfranchisement described above – its multiple state legislative efforts supported by the highest rungs of state government, including constitutionalisation by the 1970 electorate, and its prominent national role in ratification of the federal analogue, including the eminence and acumen of Senate Leader Mansfield – all informed and animated the Constitutional Convention's understanding and embrace of youth rights and youth political participation when it gathered between November 1971 and March 1972.

The related committee proposals and debate revolved around two new state constitutional rights adopted into the Declaration of Rights concerning the rights of minors and the rights of adults, each set out separately below. Aside from minor grammatical changes, the 1972 text adopted by the voters is nearly identical to the Montana Constitution today, and is provided here in its original form. These new provisions to the Declaration of Rights should be read in conjunction with each other to establish a legal demarcation between juveniles and adults.

The provisions should also be read in conjunction with the immediately preceding Right to Suffrage provision within the Declaration of Rights (Art. II § 13, which remained unchanged from the original constitution and was unanimously adopted), and supplemental Art. IV (Suffrage and Elections). See Tr. Vol. 5 at 1745; see also Bill of Rights Committee Proposal, vol. 2 at 634 (Suffrage and Election Article meant to supplement rather than replace the right of suffrage). In pertinent part, the right of suffrage provides for “free and open” elections and the prevention of interference with the “free exercise of the right to suffrage,” Art. II §13. In turn, Art. IV (Suffrage and Elections) in part provides that any citizen “18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector,” with the exception of felony imprisonment or incapacity. Art. IV § 2 (Qualified Elector).

This is yet another recognition in the 1971 Montana Constitution of the Twenty-Sixth Amendment. In proposing Art. IV § 2, the Suffrage and Elections Committee plainly stated: “Eighteen is the voting age for all elections as established by the 26th Amendment to the national Constitution. The 1971 Montana Legislature was among the state legislatures that ratified the amendment.” See Suffrage and Elections Committee Proposal, vol 1. at 337.

As described further below, the 1972 Montana Constitution incorporated the Twenty-Sixth Amendment's promise of youth enfranchisement for those 18 and older as a matter of state constitutional law, and in the process acknowledged the value that young people play in democracy. Indeed, the transcript is replete with positive references to young, elected delegates serving admirably in the Constitutional Convention, and the general engagement of youth and student advocates and organizations in the ratification process.

a. Rights of Persons Not Adults

The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this article unless specifically precluded by laws which enhance the protection of such persons.

Art. II § 15, Mont. Const. (1972).

Article II § 15 was explained to the 1972 voters as: “New provision giving children all of the rights that adults have unless a law meant to protect children prohibits their enjoyment of the right.” Voter Pamphlet, Proposed 1972 Constitution for the State of Montana, Official publication by the Montana Constitutional Convention (1972).

A study of the Bill of Rights relied on by the Constitutional Convention dedicated a chapter to three new rights where the prior state constitution had been silent. The first listed addressed the rights of persons under the age of majority. See Rick Applegate, Study No. 10: Bill of Rights (Montana Constitution Convention Committee) (1972); see also vol. 5 Tr. at 1750 (Delegate Monroe introducing proposal and describing reliance on the study.) The study explained: “‘No area of the law is in greater flux than that of kids’ legal rights. For almost every court decision granting a specific right to a student or a minor, there is another decision denying him the same right.’” Id. at 301 (quoting Jean Strousse, *UP AGAINST THE LAW* (New York: Signet Books, 1970)).

In drafting Art. II § 15, the Convention delegates were attuned to the shift of the United States Supreme Court, which had “issued a series of decisions gradually affording greater protections to minors, thereby reconsidering and reframing the relationship between minors and the government.” Rebecca Stursberg, Still-in-Flux: Reinterpreting Montana’s Rights-of-Minors Provision, 79 MONT. L. REV. 259 (2018). The Bill of Rights study identified the inconsistency in federal constitutional law regarding youth constitutional rights; the difficulty in minors having fewer constitutional rights than adults; and the lack of “even a broad outline of the types of rights young people possess.” Id. at 301-02. It further noted various suggestions by Montana citizen groups to dedicate a youth rights provision within the constitution.

Accordingly, the Convention’s Bill of Rights Committee proposed the extension of constitutional rights to persons under the age of majority. The provision was taken, in part, from Delegate Proposal Nos. 65¹ and 87². See Bill of Rights Committee Proposal, vol. 1 at 636.

¹ Delegate Proposal No. 65 (Rights of Children) proposed: “Those under the age of majority are persons. Such persons have the right to that emotional, social, physical, educational, and moral environment necessary to attain their full potential. In accordance with this statement of principle, the rights of persons under the age of majority shall include, but not be limited to, all the fundamental rights of a Montana person, except where specifically precluded by law and the demands of a proper parent-child relationship.” Delegate Proposal No. 65, Montana Constitutional Convention 1971-72 (introduced Jan. 29, 1972 by Delegates Lyle R. Monroe, Dorothy Eck, Harold Arbanas, Frank Arness, Virginia Blend, Robert Vermillion, Arlyne Reichert, referred to Bill of Rights Committee).

² Delegate Proposal No. 87 (Rights of Children) proposed: “The rights of persons under the age of majority shall include, but not be limited to, all the rights of a Montana person.” Delegate Proposal No. 87, Montana Constitutional Convention 1971-72 (introduced Feb. 2, 1972 by Delegates Donald B. Foster, Carman Skari, referred to Bill of Rights Committee).

In introducing the provision to the Convention, Delegate Monroe explained:

The committee adopted, with one dissenting vote, this statement explicitly recognizing that persons under the age of majority have all the fundamental rights of the Declaration of Rights. The only exception permitted in this recognition are in cases in which rights are infringed by laws designed and operating to enhance the protection of such persons.

[. . .]

What this section is attempting to do is to help young people to reach their full potential. Where juveniles have rights at this time, we certainly want to make sure that those rights and privileges are retained; and whatever rights and privileges might be given to them in the future, we also want to protect them. But we do not want them to lose any rights that any other Montana citizen has, and this is specifically what this particular section is attempting to do.”

Transcript, vol. 5 at 1750 (Delegate Monroe); see also Bill of Rights Committee Proposal (Feb. 23, 1972), Constitutional Convention, vol. 2 at 635.

In response to a critique that the proposal was unnecessary because the Bill of Rights implicitly applied to all citizens regardless of age, the Chairman of the Bill of Rights Committee explained its need:

All we’re going to do is make sure that the young boys and the young girls, the young men, the young women, prior to reaching the age of majority, are going to know that during that particular period of maturity they shall have all the basic rights that are accorded to all citizens of the State of Montana, and they are going to be better trained to be more responsible citizens. This is the least we can do for them. We are not upsetting anything. This is not revolutionary by any means. It merely makes sure that they have the basic rights that many of us assume that they do have and which they do not have, and this will make sure that this Constitution and this Bill of Rights does apply to all citizens regardless of age.

Id. at 1752 (Delegate Dahood) (emphasis added.)

The proposal was accepted by a roll call of 76 Aye, 11 No. Id. The Convention voted on final adoption of the provision 83 Aye, 13 No. Id., vol. 7 at 2641-3.

The plain text of the provision and its legislative history thus make clear that the Convention intended to extend “all the fundamental rights” to youth that are attributable to adults. Art. II § 15, Mont. Const. (1972). These fundamental rights apply “unless specifically precluded

by laws which enhance the protection of such persons,” *id.*, such as with regard to the legal age to drink or to drive. See Tr. at 1751 (Delegate Monroe describing the Bill of Rights Committee’s intention of the phrase.)

Notably, neither the Committee nor the Convention directly described what was meant by the provision’s phrase that the “rights of persons under 18 years of age *shall include, but not be limited to*, all the fundamental rights . . .” Art. II § 15, Mont. Const. (1972) (emphasis added); see also Stursberg at 265 (accord). By its plain language, the provision affords youth fundamental rights beyond those afforded to adults.

The Montana Constitution’s 1972 recognition of this precept – that youth constitutional rights may not only be equal to those of adults, but more expansive than those afforded to adults – proves prescient in observing a string of federal constitutional law cases decades later. See, e.g., Roper v. Simmons, 543 U.S. 551 (2005) (holding death penalty for juvenile offenders unconstitutional); Graham v. Florida, 560 U.S. 48, 68 (2010) (holding life without parole sentences for juvenile offenders in nonhomicide cases unconstitutional).

Article II §13 instructs that the rights of those below the age of minority include “all the fundamental rights of this article,” and therefore by implication the Right to Individual Dignity (Art. II § 4, equal protection of the laws and anti-discrimination in the exercise of civil or political rights) and the Right to Suffrage (Art. II § 13). Where a law impedes on these associated rights, the Rights of Minors provision instructs that it must be for the “enhance[ment of] [their] protection” (Art. II § 15).

A reasonable reading of the Rights of Minors provision is that 17-year-olds who will be 18 on or before Election Day cannot face unequal access to the ballot compared to adults; if they do, then it must be for some enhanced protection of the 17-year-old. Moreover, the text of the Rights of Minors provision suggests that a reasonable argument might be advanced that first-time voters who are on the cusp of turning 18 before or on Election Day may avail themselves of something akin to a “fundamental right-plus” based on the vulnerabilities of the class. It is not necessary to reach that here, however, since basic equal access is at issue. Here, youth voters are being penalized and have unequal access to the ballot on account of age.

Discrimination against young voters is a distinct form of voter discrimination. Statistical studies reinforce the habit-forming nature of voting, making it all the more important that voting becomes normalized at an early age through unobstructed access to the ballot. See Bromberg, 21 U. PA. J. CONST. L. at 1112 n. 26-27 and accompanying text. As posited by Professor Diamond Cheng, discrimination based on age is unique because “[d]eliberately making it more difficult for *new* voters to build that habit of political participation quite literally threatens the future of participatory democracy.” Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653, 676 (2017).

b. Adult Rights

A person 18 years of age or older is an adult for all purposes.

Art. II § 14, Mont. Const. (1972).

A separate but related new provision to extend rights to adults eighteen and older was also adopted in the Montana Constitution. (Art. II § 14, Rights of Adults). The original proposal by the Bill of Rights Committee included a further stipulation that eighteen-year-olds “shall have the right to hold any public office in the state.” Bill of Rights Committee Proposal, vol. 1. at 635 (Feb. 23, 1972). The Bill of Rights Committee approved its original unified proposal with one dissenting vote (10: 1), explaining “that the admirable steps taken by the federal government in adopting the Twenty-sixth amendment and by the Montana legislature in ratifying it should be extended to their logical conclusion.” Id.

The Executive Committee also proposed deletion of age requirements for high political offices such as Governor, Lieutenant Governor, and Secretary of State within Art. VI § 3 (The Executive, Qualifications). The Executive Committee explained:

This age deletion was discussed in detail, but the majority of the committee concluded the people, the basic power source for effective government, could be relied upon to make the proper judgment as to candidates’ qualifications and abilities to cope with the responsibilities elective officials acquire with election. The majority of the committee concluded the newly franchised young voters would vote just as wisely and cautiously as do their elders.

Executive Committee Proposal, vol. 1 at 445.

Despite the majority reports from both the Bill of Rights and the Executive Committees concerning the removal of age qualifications for office, after significant deliberation and re-deliberation, the age requirements for high political office were eventually maintained in Art. VI § 3, and removed from Art. II § 14 was the original clause to specify that those eighteen years old and older may hold any political office in the state.

The tension between the expansion of youth enfranchisement and its recognition within the state constitution on the one hand, and the imposition of age qualifications for high office on the other hand, was a matter of substantial debate. It is included herein with some detail because of the manner in which the debate relates to, and reaffirms, the Convention’s commitment to youth enfranchisement and voting rights.

First, on February 24, 1972, the Executive Committee proposal for Article VI § 3 (The Executive, Qualifications) was submitted to the delegation and unanimously approved. See Transcript, Montana Constitutional Convention, vol. 4 at 884-99.

During the discussion, the Chairman of the Bill of Rights Committee, Delegate Dahood, spoke at length about his change of heart from initially supporting age qualifications for office to

ultimately opposing them, based on his committee's experience listening to witnesses and reading literature on the subject. Id. at 888. He recalled the contraposition of the youth franchise:

If we are going to say to someone of the age of 18 that you have the right to vote and you have the right to die for your country, and we want you to be fully responsible and, within the area of our legal system, follow the line that the law lays down, then I think they ought to be given all of the privileges, even though, in reality those privileges are not attainable [due to the unlikelihood that a young person would be elected to such high political office].

Id.

Delegate Campbell also called the delegates' attention to youth enfranchisement, and the significance of Montana "hav[ing] a rare opportunity" as "one of only two states to have a constitutional Convention after the 26th Amendment has given political equality and the right to vote to all citizens of this nation 18 years of age." Transcript, Constitutional Convention at 885 (Delegate Campbell, a member of the Bill of Rights Committee, opposing the Executive Committee's minority report).

The next day, February 25, 1972, a motion for reconsideration succeeded in reversing course and adopting the minority report's age limitation for high political office by a vote of 56:38. Id. at 980-86.

Delegate Campbell opposed the reversal, reiterating the significance of the Twenty-Sixth Amendment and the historic role of the convention as one of only two state conventions following ratification of federal youth enfranchisement. Id. at 981.

Delegate Habedank explained his support for the motion for reconsideration, which ultimately prevailed, voicing a concern raised repeatedly throughout the debate over the polarization of the issue and the fear that it would threaten the electorate's approval of the proposed constitution. Id. at 979.

A last-minute attempt to suspend the rules and reconsider the question on Art. VI § 3 took place on March 8, 1972, but it failed by a divided roll call. See Transcript, Montana Constitutional Convention, vol. 5 at 1693-94 (Delegate Campbell's motion failed by a roll call of 55:40.)

Critically, despite this tension and significant debate, the Convention articulated broad, consistent, and unopposed support for youth enfranchisement and youth voting rights. This is primarily evident by the Convention's unanimous final adoption of the Adults Rights provision. It was also impliedly acknowledged within the original minority report and during its introduction to the full floor, when credence was given to youth enfranchisement and youth abilities. See Executive Committee Minority Report (Feb. 17, 1972), Montana Constitutional Convention, vol. 1 at 464 (recommending age qualifications for office while explaining: "We are conscious of the increased intelligence and ability of our young people Virtually all state constitutions require higher age qualifications for state officers than for the right to vote."); see also Transcript, Constitutional Convention, vol. 4 at 884 (same).

Taken as a whole, there is every indication that the Convention recognized the value of and sought to embrace youth enfranchisement within the state constitution, particularly with regard to Adults Rights (Art. II § 14) and Art. IV § 2 (Suffrage and Elections, Qualified Elector) which supplemented the Right of Suffrage (Art. II § 13.)

Finally, it should be noted that the Convention outright rejected the notion of making certain voting mechanisms available to only some voters. Specifically, Delegate Kelleher proposed an amendment to Article IV § 3 (Suffrage and Elections, Elections)³, to specify that only students and servicemen may vote absentee: “Now, as far as servicemen and students, of course, who are away from home, it is all right to vote—to have absentee voting for them. But those wealthy residents who have left the state and gone to warmer climes [sic] and who do not even live here and who do not make purchases here, I do not feel that they should have the right to vote in this state.” *Id.* at 431 (Delegate Kelleher). No delegate contested the presumption that youth and servicemen have the right to vote-by-mail.

Moreover, no other delegate supported Delegate Kelleher’s advocacy to preclude some groups’ access to certain voting mechanisms. A deliberation ensued about how such a scheme to limit access to vote-by-mail would invariably lead to disenfranchisement by discriminating on account of: being rich; or the need to work in another part of the state, such as for a construction job; or the need to work out-of-state, such as for Montana federal representatives residing in Washington, D.C.; or being sick or disabled. The difficulty was also raised about how the proposal would impact older students or lifelong students, and how its vagueness would lead to age-based discrimination in ballot access.

The final comment in opposition prior to a unanimous vote rejecting the proposal was by Delegate Simon: “*I wonder if there was any possibility that we have any intention of dividing our people as to their way of voting? I doubt whether you could do such a thing with any continuity.*” *Id.* at 433 (emphasis added). No response was offered, and the Noes had it. *Id.*

In other words, the Convention deliberated whether certain groups may be carved in or out of access to specific voting mechanisms in the context of an amendment raised for Art. VI § 3 (Suffrage and Elections, Elections). In reaching the conclusion that voting mechanisms should not be limited to some, but rather should be available to all, the Convention necessarily connected the shared fabric of rights laid out in the Declaration of Rights, including the Right to Individual Dignity (Art. II § 4, equal protection of laws and antidiscrimination in the exercise of civil or political rights); Adult Rights (Art. II § 14); and the Right of Suffrage (Art. II § 13).

In conclusion, the historical perspective of Montana’s role in state and federal constitutionalism of youth voting rights demonstrates the extent to which Montana was a leader among the states. It was one of the few states to lower the voting age from 21 prior to the ratification of the Twenty-Sixth Amendment. Its long-time elected representative, highly esteemed Senate Majority Leader Mike Mansfield, played a key role in the process – chief aides to Senate

³ Art. IV (Suffrage and Elections) § 3 (Elections) provides: “The legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process.”

leaders at the time acknowledge that “[i]f he hadn’t been the majority leader, it probably wouldn’t have happened,” and describe him as “the unsung hero of the Twenty-Sixth Amendment.” Moreover, although it did not need to, the 1971-1972 Constitutional Convention further enshrined the right within the Declaration of Rights of the Montana Constitution. It is against this backdrop and the crucial role that the State of Montana played in securing and protecting fundamental rights for youth voters that the recent laws at issue must be considered.

IV. RECENT CHANGES OF LAW THAT IMPACT YOUTH VOTERS

1. Rising and Electorally Significant Montana Youth Voting Trends

Montana youth voting rates have increased significantly in recent years, and have been top in the nation. The Montana youth voting rate more than doubled in 2018 (42%) compared to 2014 (18%).⁴ In 2018, Montana boasted second highest in youth turnout in the nation (42%), well above the national rate of 28.2%.⁵ Montana youth stayed on track in 2020, when the youth voting rate rose to 56%, a 15 percentage point increase compared to the last presidential cycle (41% in 2016).⁶ For comparison, the national youth voting rate in 2020 was 50%.⁷

The Youth Electoral Significance Index (“YESI”) calculated by the Center for Information & Research on Civic Learning and Engagement (“CIRCLE”) at Tufts University measures the potential of youth to influence electoral results. Montana ranked third (#3) in the nation on the YESI for 2020 U.S. Senate races. For context, states ranking behind Montana included North Carolina (#4) and Georgia (#6 and #7 for the two open 2020 Senate seats). Montana also made the YESI list in 2018, ranking fourth (#4) in the nation for 2018 U.S. Senate races.

It should be noted that the YESI methodology takes into consideration the presence of state election laws that facilitate the youth vote. The YESI “Facilitative Election Law Score” examines the availability of 5 factors: pre-registration; online registration; same-day registration; automatic voter registration; and whether the state election website includes easily accessible information such as voting out of state, voting as a student, and as an ex-felon. Of these five, YESI marked Montana as only providing for one factor in 2020 and 2018: same-day registration, which has now been significantly curtailed pursuant to passage of HB 176 which eliminated election day registration.

Another method by which to demonstrate youth voting trends in Montana is by the National Study of Learning, Voting, and Engagement (“NSLVE”), a project of the Institute for Democracy

⁴ See Table, 2018 Youth Voter Turnout & Increases Over 2014, Center for Information & Research on Civic Learning and Engagement (Apr. 2, 2019), *available at*: <https://circle.tufts.edu/latest-research/2018-youth-voter-turnout-increased-every-state> (last accessed Jan. 11, 2022.)

⁵ *Id.*

⁶ See State-by-State 2020 Youth Voter Turnout: West and Southwest, Center for Information & Research on Civic Learning and Engagement, *available at*: <https://circle.tufts.edu/latest-research/state-state-2020-youth-voter-turnout-west-and-southwest> (last accessed Jan. 11, 2022).

⁷ See 2020 Election Center, Center for Information & Research on Civic Learning and Engagement, *available at*: <https://circle.tufts.edu/2020-election-center> (last accessed Jan. 11, 2022).

& Higher Education (“IDHE”) at Tufts University. NSLVE offers colleges and universities an opportunity to learn their student registration and voting rates. Montana State University (“MSU”), the largest four-year institution in Montana, is among nearly 1,200 colleges and universities in the nation which have participated in NSLVE.

The MSU NSLVE 2020 Report⁸ reveals a student voting rate of 76.2%, which is a 15.8 percentage point increase from the last presidential cycle (60.4% in 2016). For comparison, the NSLVE voting rate for institutions was 66% in 2020, and 53% in 2016. The report also breaks down these figures based on age group, explaining “[w]hile in the past, we have seen voting rates increase across age groups, in recent cycles, the most significant increases have been among first-time and the youngest voters.” Indeed, the MSU NSLVE 2020 Report demonstrates a voting rate increase among 18-21 year olds of 19 percentage points between the 2016 and 2020 presidential cycles (56% and 75% respectively), and a similar voting rate increase among 22-24 year olds of 20 percentage points between those cycles (55% and 75% respectively). The voting rate increase among the subsequent age groups is significantly less drastic: for 25-29 year olds, nine percentage points (60% to 69%); for 30-39 year olds, six percentage points (69% and 75%); for 40-49 year olds, ten percentage points (69% to 79%); and for 50+ year olds a decline of two percentage points (81% to 79%).

The MSU NSLVE Report for 2018⁹ further confirms these trends. In comparing the 2018 and 2014 midterms, the report reveals a 21.1 percentage point student voting rate increase from 26.5% in 2014 to 47.6% in 2018. In comparison, the 2018 voting rate for all NSLVE institutions was 39.1%, demonstrating that MSU students were yet again ahead of the national curve. The MSU NSLVE 2018 Report also breaks down the student voting method used by MSU students in 2018: 66.3% of all votes were absentee; 0.6% were early votes; 18.4% were mail votes; 13.8% were cast in-person on Election Day; and 1% were unknown.

In sum, heading into 2021, Montana youth were among the most electorally significant in the country, with voting rates consistently above national averages and considerably on the rise.

2. Hallmarks of Discrimination Against Youth and Student Voters

In the midst of rising youth turnout and influence, in one month, Montana enacted the three laws at issue to: (1) eliminate a student photo ID as a standalone form of identification for registration and for voting; (2) prohibit election officials from issuing ballots to duly registered voters who are 17 but will turn 18 by Election Day, until they meet the age requirements; and (3) eliminate Election Day Registration. These bills, individually and collectively, bear all the hallmarks of intentional discrimination based on age with respect to the right to vote.

⁸ See Institute for Democracy & Higher Education: National Study of Learning, Voting and Engagement. (2021). 2016, 2018, and 2020 report for Montana State University. Medford, MA, *available at*: <https://allinchallenge.org/wp-content/uploads/Montana-State-University-NSLVE-Report-2020.pdf> (last accessed Jan. 11., 2022.)

⁹ See Institute for Democracy & Higher Education: National Study of Learning, Voting and Engagement. (2019). 2014 and 2018 report for Montana State University. Medford, MA.

First, they are exactly the types of measures which significantly and disproportionately impact youth and student voters or which single out characteristics uniquely and/or disproportionately held by youth and student voters. Second, they reduce or eliminate voting laws and practices for many youth and student voters which were already in effect. Third, they rely on weak, generalized justifications without sufficient evidence, and are undermined by internal inconsistencies and other evidence in the legislative history. Finally, they were passed despite the existence of less discriminatory alternatives, including those raised as amendments in prior versions of the bills, but that were removed from the final versions of the laws that were ultimately enacted.

a. Disparate Impact and Singling Out Characteristics Uniquely and Disproportionately Held by Youth and Student Voters

The Montana Legislature passed three laws that represent exactly the types of measures which significantly and disproportionately impact youth and student voters. Indeed, as my scholarship details, three of the greatest barriers to suppress youth voting include (1) onerous voter identification laws which preclude use of student voter identification; (2) cuts to pre-registration and other programs for youth under 18; and (3) cuts to same-day and/or election day-registration. See Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1107-08 (2019) (“Today’s young people face invidious threats to their voting rights through targeted voter identification restrictions, cuts to early voting and same-day voter registration opportunities; [and] cuts to programs that pre-register sixteen-and seventeen-year-olds to vote . . .”).

As set forth below, a common thread in each of the three laws at issue is that they all target youth and student voters directly and/or single out characteristics that are unique to or disproportionately held by youth and student voters. The manner in which each of these laws targets youth voters and students at various stages of the voting process is unmistakable. Cf. League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205, 1222-23 (N.D. Fla. 2018) (noting in the context of a Twenty-Sixth Amendment claim that the impact of a law and whether it affects one age group more heavily than another is a good starting point for analyzing intentional discrimination, and that in some instances, impact alone can demonstrate intentional discrimination when a clear pattern emerges) (relying in part on Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). “[A] stark pattern of discrimination” is revealed where the law is “unexplainable on grounds other than age because it bears so heavily on younger voters than all other voters.” Id. at 1222.

Moreover, each of these laws represents an instance where the change in law makes it more difficult for youth and students than under prior existing law. Cf. Tex. Democratic Party v. Abbott, 978 F.3d 168, 190-91 (5th Cir. 2020) (noting that for purposes of the Twenty-Sixth Amendment, a person’s right to vote is considered “abridged” when the law “makes voting *more difficult* for that person than it was before the law was enacted or enforced” and “applies to laws that place a barrier or prerequisite to voting, or otherwise make it more difficult to vote, relative to the baseline”) (emphasis in original).

b. Alleged Justifications as Pretext for Discrimination

The motivation behind such measures which drastically and disproportionately impact youth and student voters is often further elucidated by the proposed justifications for such laws, particularly the extent to which justifications tend to be (1) based on generalized and non-specific concerns to which the laws at issue are not tailored in any significant way to address; (2) not grounded in any substantial factual basis applicable to the specific jurisdiction and/or situation; (3) proffered contrary to and/or without addressing facts and testimony before the legislative body; and/or (4) not articulated at all and/or articulated in an irrational, strained, or tenuous manner. These types of justifications are often present when discrimination underlies the Legislature's motivations. See, e.g., N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 238 (4th Cir. 2016) (“In sum, the array of electoral ‘reforms’ the General Assembly pursued in [North Carolina’s omnibus election law] were not tailored to achieve its purported justifications, a number of which were in all events insubstantial. In many ways, the challenged provisions of [the law] constitute solutions in search of a problem. The only clear factor linking these various ‘reforms’ is their impact on African American voters. The record thus makes obvious that the ‘problem’ the majority in the General Assembly sought to remedy was emerging support for the minority party. Identifying and restricting the ways African Americans vote was an easy and effective way to do so. We therefore must conclude that race constituted a but-for cause of [the law], in violation of the Constitutional and statutory prohibitions on intentional discrimination.”). As set forth below, here the justifications for Montana’s laws at issue implicate a combination of all four of these dubious markers.

3. Summary of Changes in Law

In a less-than-one-month period, the Governor signed into law the three bills at issue here: (1) SB 169 (enacted April 19, 2021), which altered the list of identifying documents and information a voter needs to produce to register and to cast their vote; (2) HB 506 (enacted May 14, 2021), which prohibited election officials from distributing ballots to duly registered voters who have not yet met, but will meet by Election Day, age and residency requirements; and (3) HB 176 (enacted April 19, 2021), which eliminated Election Day Registration (“EDR”).

a. Voter ID (SB 169)

SB 169 changed the requirements that individuals must show in order to register and to vote. Significantly, SB 169 removed the ability of individuals to use “a school district or postsecondary education photo identification,”¹⁰ (hereinafter “Student Photo ID”) as a standalone form of identification sufficient for registering to vote and for casting a ballot without the need to provide an additional second form of identification.

Prior to passage of SB 169, the existing law (Section 13-2-110, MCA) required that individuals registering to vote provide (1) a Montana driver’s license number, or (2) the last four

¹⁰ See SB 169, Final Version, Sec. 1 and Sec. 2, https://leg.mt.gov/bills/2021/SB0199/SB0169_X.pdf (removing “school district or postsecondary education photo identification” from the list of standalone forms of identification for registration and voting under Sections 13-2-110, MCA and 13-13-114, MCA).

digits of their social security number. If they did not have either of these, then they could provide (3) an alternative form of identification, including a current and valid Student Photo ID.¹¹ Similarly, the prior existing law (Section 13-13-114, MCA) required that in order to receive a ballot or vote, individuals could present a photo identification showing the elector's name, including but not limited to a (1) valid driver's license; (2) Student Photo ID; or (3) tribal photo identification. If such identification could not be produced, then the voter could provide (4) an alternative form of identification.¹²

Upon passage of SB 169, Student Photo ID was eliminated as an acceptable form of standalone identification, both for registration and voting purposes. The list of standalone forms of identification for both registration and voting now includes the following: (1) Montana driver's license¹³; (2) Montana state identification card¹⁴ issued pursuant to 61-12-501; or (3) last four digits of social security number (for registration purposes only). If unable to provide this information, then the voter must produce (4) military identification card; (5) tribal photo identification; (6) United States passport; or (7) Montana concealed carry permit. Alternatively, an individual can provide another form of photo identification, such as a Student Photo ID, but that photo identification is no longer sufficient on its own; instead, the voter must also provide an additional form of identification that shows name and current address.¹⁵

The only forms of photo identification that were explicitly mentioned in the prior existing law as acceptable forms of standalone identification, which have now been removed are a Student Photo ID and an out-of-state driver's license.¹⁶ SB 169 now adds new explicit forms of identification such as a military identification card, United States Passport, and Montana concealed carry permit. These three would have been permissible standalone identification pursuant to the catch-all in the prior existing law, but SB 169 now explicitly names them, and singles out and relegates the Student Photo ID to require a secondary additional form of identification.

Importantly, Student Photo ID was conspicuously removed as a standalone form of identification when SB 169 was first introduced. However, a later version of the bill proposed allowing individuals to provide "a photo identification card issued by a Montana college or

¹¹ Other alternative forms of identification included the following: (1) any current and valid photo identification with the individual's name; (2) current utility bill; (3) bank statement; (4) paycheck; (5) government check; or (6) other government document that shows the individual's name and current address.

¹² Such alternative forms of identification included the following: (1) current utility bill; (2) bank statement; (3) paycheck; (4) notice of confirmation of voter registration issued pursuant to 13-2-207; (5) government check; or (6) other government document that shows the elector's name and current address.

¹³ For purposes of registration, only the Montana driver's license *number* is needed.

¹⁴ For purposes of registration, only the Montana state identification card *number* is needed.

¹⁵ Such additional forms of identification include the following: (1) current utility bill; (2) bank statement; (3) paycheck; (4) government check; or (5) other government document that shows the individual's name and current address.

¹⁶ Under prior existing law, a voter only needed to show a "valid driver's license" to vote; the law did not specify the state of issuance. SB 169 now specifies that the only type of driver's license permissible as a standalone form of identification to vote is a "Montana driver's license," and the provision does not specify the need for it to be "valid."

university”¹⁷ (hereinafter “Montana College ID”) as a standalone form of identification both to register and to vote.¹⁸ Nevertheless, a Montana College ID was inexplicably removed as a standalone form of identification in a subsequent version of SB 169 and was not included in the final bill.¹⁹

b. Age & Residency Requirements for Ballot Distribution (HB506)

HB 506 amends Section 13-2-205, MCA by prohibiting a ballot from being “issued” to an individual “who is not eligible to register because of residence or age requirements but who will be eligible on or before election day.” HB 506 did not eliminate the ability of an individual who will turn 18 or establish 30 days of residency by Election Day to register to vote, but prevents her from receiving a ballot until she meets the age and residency requirement.

c. Elimination of Election Day Registration (HB176)

HB176 amends Section 13-2-304, MCA by eliminating Election Day Registration and shortening the late registration period by ending it at noon on the day before the election instead of at the close of polls on Election Day.²⁰

4. Discussion of the Three Laws at Issue and How they Target Youth and Student Voters and are Supported by Pretextual Justifications.

a. Voter ID

Targeting Youth and Student Voters

In enacting SB 169, the Montana Legislature implemented a measure known to disproportionately impact youth voters. The class is uniquely vulnerable due to its predominance of first-time voters and highly mobile voters.

Voter ID laws that exclude student IDs and out-of-state government-issued IDs disproportionately impact youth and student voters. In the 2016 election, 21% of registered young

¹⁷ See SB 169 Version 3, Sec. 1 and 2, https://leg.mt.gov/bills/2021/SB0199/SB0169_3.pdf (including “a photo identification card issued by a Montana college or university” in the list of standalone forms of identification for registration and voting under Section 13-2-110(4)(a)(I), MCA and Section 13-13-114(1)(a)(I), MCA).

¹⁸ Compare SB 169, Version 1, Sec. 1(3) - (4) and Sec. 2(1), https://leg.mt.gov/bills/2021/SB0199/SB0169_1.pdf (removing Student Photo ID as standalone), with SB 169, Version 3, Sec. 1(4)(a)(I) and Sec. 2(1)(a)(I), https://leg.mt.gov/bills/2021/SB0199/SB0169_3.pdf (adding Montana College ID as standalone).

¹⁹ Compare SB 169, Version 3, Sec. 1(4)(a)(I) and Sec. 2(1)(a)(I), https://leg.mt.gov/bills/2021/SB0199/SB0169_3.pdf (adding Montana College ID as standalone), with SB 169, Version 4, Sec. 1(4)(a)(I) and Sec. 2(1)(a)(I), https://leg.mt.gov/bills/2021/SB0199/SB0169_4.pdf (removing Montana College ID as standalone), and SB169, Final Version, Sec 1(3) - (4) and Sec. 2(1)(a), https://leg.mt.gov/bills/2021/SB0199/SB0169_X.pdf (bill passed without Montana College ID or Student Photo ID as standalone).

²⁰ Additionally, it amends the prior existing law (Section 13-2-304, MCA) by eliminating the ability of late registrants to receive a ballot by mail, and requires them to obtain their ballots at the election administrator’s office.

voters (ages 18-29) did not vote due to problems with voter ID.²¹ An analysis of the 2012 American National Elections Study (ANES) found that the majority of those who report not owning a government-issued photo identification are younger than 25 years old, including 15% of 17-20 year olds and 11% of those ages 21-24.²² These trends track with an analysis of the impact of a new strict voter identification law on North Carolina youth; the elimination of the availability of student ID and out-of-state government-issued identification at the polls was found to impact 14% of young voters who could not meet the new requirements.²³

Young people and students are disproportionately less likely to have a driver's license. See Michael Sivak, *Choosing Not to Drive: A Transient or a Permanent Phenomenon?*, Green Car Congress (Feb. 2019) (compiling data from the Federal Highway Administration and finding that only 62% of 18 year-olds have a driver's license, as compared to 90.4% of 35-39 year-olds in 2017), available at <https://www.greencarcongress.com/2019/02/20190202-sivak.html>. This is particularly true for out-of-state students who have the right to vote from their school address,²⁴ although they have not obtained a new driver's license that reflects their Montana residence.

Youth and student voters are also unlikely to have and/or carry with them many of the other standalone forms of identification prescribed by SB 169, such as Montana state ID, military ID, tribal photo ID, U.S. passport, or concealed carry permit.²⁵ Many students live in dormitories where their lives revolve mostly around the college and the college campus. Because they live in dormitories and/or are highly mobile, students often do not own the secondary proof of identification with current residence listed therein which SB 169 requires to accompany a Student Photo ID – i.e., a current utility bill, bank statement, paycheck, government check, or other government document. In many cases, students do not receive mail directly to their college dormitory residence. If they do receive campus mail, it is often directed to a post office box which is distinct from their dormitory residence.

Simply put, Student Photo ID is the most readily available form of identification carried by student voters. However, SB 169 surgically targets youth and student voters by eliminating Student Photo ID as an acceptable standalone form of identification, despite the fact that it has been an acceptable form of standalone proof for almost 20 years since Montana first enacted voter identification in 2003. It is notable that while Student Photo ID was removed from the list of acceptable standalone documents, SB 169 now explicitly names new standalone proofs such as a concealed carry permit, and that SB 169 eliminated “valid” as a requirement for use of a driver's

²¹ See Alberto Medina, *Broadening Youth Voting: Barriers to Voting Chart*, CIRCLE (2021), available at <https://circle.tufts.edu/our-research/broadening-youth-voting#barriers-to-voting>.

²² See Vanessa M. Perez, *Americans with Photo ID: A Breakdown of Demographic Characteristics*, Project Vote Research Memo (Feb. 2015) (based on 2012 American National Elections Study), available at <http://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf>.

²³ See Expert Report Submitted on Behalf of the Duke Intervenor-Plaintiffs, *League of Women Voters of N.C. v. North Carolina*, No. 1:13-CV-660-TDS-JEP (M.D.N.C. May 19, 2014), at 6.

²⁴ See *Symm v. United States*, 439 U.S. 1105 (1979), aff'g *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978).

²⁵ See Perez, at p.13 (“Young and low-income people are least likely to have photographic identification.”).

license. These maneuvers and their legislative history are described in further detail in the next subsection on pretextual justifications.

Importantly, a prior version of the bill added a Montana College ID as standalone identification. However, this was subsequently removed and remained excluded in the final bill. Compare SB 169, Version 3, Sec. 1(4)(a)(I) and Sec. 2(1)(a)(I), https://leg.mt.gov/bills/2021/SB0199/SB0169_3.pdf (adding Montana College ID as standalone), with SB 169, Version 4, Sec. 1(4)(a)(I) and Sec. 2(1)(a)(I), https://leg.mt.gov/bills/2021/SB0199/SB0169_4.pdf (removing Montana College ID as standalone), and SB 169, Final Version, Sec 1(3) - (4) and Sec. 2(1)(a).

In sum, the actions of the Montana Legislature singled out a form of ID that is disproportionately and uniquely held by youth and student voters. The only form of photo identification explicitly listed in SB 169 that requires a secondary form of identification to accompany it is a Student Photo ID. The intention and result of the law is to make it more difficult to vote compared to prior existing law, which is further borne out in its legislative history described below.

Pretextual Justifications

Having enacted a strict Voter ID law that disproportionately impacts youth voters, having tailored the law to single out characteristics uniquely and disproportionately held by youth and student voters through the elimination of Student Photo ID (and the elimination of out-of-state driver's license) as a standalone form of identification, and having made it more difficult for youth and students to vote, the Montana Legislature's alleged justifications for SB 169 also reek of pretext for age discrimination in voting. The restrictive measures set forth in this bill were passed due to alleged concerns of fraud and preserving election integrity. However, the legitimacy of such claims is severely undermined by a variety of factors.

First, it is important to note that fraud and election integrity are broad, vague, and amorphous concepts, which due to their generality, can be quite meaningless absent a specific context. In the context of federal constitutional provisions that protect against intentional discrimination, fraud and election integrity are the types of justifications that are more closely scrutinized in light of their propensity to mask discrimination. See, e.g., McCrory, 831 F.3d at 235-36 (holding that regardless of whether North Carolina has a generalized interest in combatting voter fraud and/or promoting public confidence in the electoral system, and regardless of whether a photo ID requirement would generally serve that interest, the true inquiry is whether the state would have enacted the law if it did not have a disproportionate impact on African American voters, and finding that the restrictions enacted undermined the Legislature's alleged motives); cf. Detzner, 314 F. Supp. 3d at 1222 n.17 ("In the Twenty-Sixth Amendment context, this Court is more willing [as compared to the *Anderson-Burdick* analysis] to call out a pretextual rationale—or 'a banana a banana' in the Plaintiff's counsel's words.") (citation omitted).

Additionally, proponents of SB 169 were unable to point to any evidence of voter fraud or issues of election integrity in Montana. At the various Senate and House committee meetings, many questions about the existence of any instances of voter fraud in Montana were directed to

Dana Corson, Elections Director for the Montana Secretary of State's Office, who served as an informational witness. At the Senate State Administration Committee Hearing on February 3, 2021, he claimed that he was not directly aware of any fraud committed by those voting in person, which is the type of voter fraud that the SB 169 is allegedly intended to combat. See Senate State Admin. Hrg. Video (Feb. 3, 2021) (discussion starting at 15:43:01).²⁶ At a subsequent House State Administration Committee Hearing on February 19, 2021, Director Corson was asked for any documentation of fraud in Montana, to which he could not provide any but nevertheless responded that he believed there were some law enforcement reports in 2017, but was not sure what happened or what the status was. See House State Admin. Hrg. Video (Feb. 19, 2021) (discussion starting at 10:01:00)²⁷; see also id. at 9:36:22 (Director Corson was unable to point to an instance of fraud in Montana involving Student Photo IDs). However, at that same hearing, Jeff Mangan, the Commissioner of Political Practices, was called as an informational witness and testified that during his tenure there were only three potential reports of voter fraud which his office referred to the local county attorney, and while he was unsure of their status, he did not believe that any of them had anything to do with fraud based on Voter ID. See id. (discussion starting at 10:38:04); cf. McCrory, 831 F.3d at 235 (rejecting voter fraud as a pretext for race discrimination and finding photo ID requirement in North Carolina to be both too narrow and too broad in the sense that it addressed only voter impersonation fraud despite no evidence of any individual committing this offense); Veasey v. Abbott, 830 F.3d 216, 238-39 (5th Cir. 2016) (expressing skepticism over alleged justification of ballot integrity where measure only addressed in-person voter fraud and there were only two convictions of this kind in the prior ten years).

Similarly, when asked for specific evidence of voter fraud in Montana at the Senate State Administration Committee Hearing on February 3, 2021, bill sponsor, Senator Mike Cuffe only alluded to seeing fraud in other states and claiming to have heard about people coming across the border from Canada and voting illegally, and acknowledged that they have not found such fraud in Montana. See Senate State Admin. Hrg. Video (Feb. 3, 2021) (discussions starting at 15:49:39; 15:58:26). He further commented that he was not saying that Montana had a bad system or that it was not working. See id. (discussion starting at 15:52:15). At the Senate Floor Session on February 10, 2021, Senator Cuffe admitted that he was not asserting that there was any claim of fraud or wrongdoing in Montana elections, that he understands that the integrity of elections in Montana is strong, and that there were no proven cases of voter fraud in Montana. See Senate Floor Session Video (Feb. 10, 2021) (discussion starting at 13:08:36).²⁸

In essence, the bill sponsors and proponents of SB 169 could not point to a single instance of voter impersonation fraud in Montana, and admitted that the current system was working well and that there were no issues with the current integrity of elections in Montana. Indeed, in 2020, a

²⁶ Video of the proceedings at the Senate State Administration Committee Meeting on February 3, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41471?agendaId=222308>.

²⁷ Video of the proceedings at the House State Administration Committee Meeting on February 19, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41471?agendaId=222308>.

²⁸ Video of the proceedings at the Senate Floor Session on February 10, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41112?agendaId=227400>.

United States District Court Judge for the District of Montana noted that the plaintiffs therein “were compelled to concede that they cannot point to a single instance of voter fraud in Montana in any election during the last 20 years,” and concluded that “there is no record of election fraud in Montana’s recent history.” See Donald J. Trump for President, Inc. v. Bullock, 491 F. Supp. 3d 814, 822 (D. Mont. 2020). Thus, the need for enacting SB 169 was tenuous at best, and wholly lacking a substantial factual basis in the record that was specific to Montana or based on any credible and specific, rather than conjectural and generalized, concerns. Cf. McCrory, 831 F.3d at 214-15 (in context of racial discrimination) (“In response to claims that intentional racial discrimination animated its action, the State offered only meager justifications. Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures to problems that did not exist.”).

Furthermore, the Montana Legislature was made aware of the adverse impact this law would have on youth and student voters, as well as corresponding constitutional concerns, and was even provided with – and temporarily approved – an amendment that would help to ameliorate the disparate impact on such voters. However, the legislature nevertheless proceeded to forge forward with the discriminatory provisions. At the Senate State Administration Committee Hearing on February 3, 2021, various opponents of the bill testified as to the adverse impacts on youth and student voters. Ruthie Barbour, with Forward Montana, testified that young people are less likely to have a license. See Senate State Admin. Hrg. Video (Feb. 3, 2021) (discussion starting at 15:30:14). Katjana Stutzer of Montana PIRG testified that not all students have a license or state ID from Montana, including many out of state students who may have moved for college very recently, and that SB 169 will also create barriers to students who are used to using a Student Photo ID but who will now be required to present additional and/or different documentation. See id. (discussion starting at 15:33:32). As an informational witness, Sam Forstag of the ACLU of Montana testified that the disparate impact SB 169 would have on young voters would create constitutional concerns. See id. (discussion starting at 15:38:1).

Similar testimony was provided by these bill opponents at the House State Administration Committee Hearing on February 19, 2021. Katjana Stutzer of Montana PIRG detailed various issues that are unique to students. See House State Admin. Hrg. (Feb. 19, 2021) (discussion starting at 9:16:16). For example, she shed light on the fact that students in their first semester may have just moved to the dorm, may not drive, would have no need or opportunity to have obtained a state-issued ID, but would have a student ID with a photo. See id. She noted that there was a current backup with the motor vehicle department with people waiting to get ID and that substitute IDs often do not arrive for months. See id. She further explained that many students do not have or have not yet found employment, are living in dorms so they would not have a utility statement, may have just moved so bank information may not be updated to reflect their current address, and many are not likely to be receiving government checks or be in other government programs where they would receive other government documents. See id.

Also, during the House Floor Session on March 24, 2021, Montana State Representative Geraldine Custer warned that an amendment which would relegate Student Photo ID from a

primary, standalone form of identification to vote to a secondary form of identification, requiring additional documentation to vote, was discriminatory against students and thus makes it susceptible to court challenge. See House Floor Session Video (Mar. 24, 2021) (discussion starting at 13:53:10).²⁹ Likewise, during the Senate Floor Session on March 30, 2021, Montana State Senator Bryce Bennett asserted that there was no reason for removing a campus ID from the list of top tier ID and requiring voters to find an additional ID, and characterized the measure as “a thumb in the eye of young people trying to cast a ballot.” See Senate Floor Session Video (Mar. 30, 2021) (discussion starting at 13:12:36).³⁰

Worse, as set forth above, in addition to being aware of the adverse impact on youth and student voters, an amendment was made in the House to SB 169 which would have specifically allowed a Montana College ID to serve as a standalone form of identification and thereby reduce the burden disproportionately impacting youth and student voters. In introducing the amendment in Executive Session, Representative Custer explained that the original bill required two forms of ID for college students that were relying on a college ID and that putting this requirement on a particular class of voters would land this bill in court. See House State Admin. Executive Committee Video (Mar. 16, 2021) (discussion starting at 11:49:06).³¹ She also discussed how a college ID was well-vetted. See House State Admin. Executive Committee Video (Mar. 17, 2021) (discussion starting at 9:31:17).³² However, the House nevertheless amended that version of the bill to remove a Montana College ID as a standalone form of identification and relegate a Student Photo ID to the list of secondary forms of identification requiring additional documentation. The House also failed to act on suggestions from Representative Geraldine Custer to allow a Montana College ID as a standalone form of identification for purposes of voting, even if the Legislature did not want to deem it sufficient for registration purposes. See House State Admin. Hrg. Video (Feb. 19, 2021) (discussions starting at 10:13:27, 10:15:50, 10:21:35; House Floor Session Video (March 24, 2021) (discussion starting at 13:54:19). As Representative Custer explained, this would have allowed college students who registered with the last four digits of their social security number, and who have thus already been vetted through the registration process, to use their Montana College ID to establish their identity to vote. See id. SB 169 was nevertheless passed by both the House and the Senate without making such provision. Cf. Veasey, 830 F.3d at 240-41 (court found it relevant for purposes of determining pretext in the context of racial discrimination that proponents of the voter ID law refused to answer as to why the law could not be amended “to ameliorate the expected disparate impact”).

²⁹ Video of the proceedings at the House Floor Session on March 24, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41081?agendaId=209301>.

³⁰ Video of the proceedings at the Senate Floor Session on March 30, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41143?agendaId=211483>.

³¹ Video of the proceedings at the House State Administration Executive Committee Meeting on March 16, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20210316/-1/40986>.

³² Video of the proceedings at the House State Administration Executive Committee Meeting on March 17, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20210317/-1/40987>.

In fact, no logical and consistent justification was offered as to why a Student Photo ID was surgically removed from the list of acceptable standalone identification documents to be able to vote, nor as to why a Montana College ID could not be included. In response to Representative Custer's compromise suggestion, Director Corson non-responsively replied that students would just need a current photo ID and one of the other documents, and stated that there was "no need to make student ID something special." See House State Admin. Hrg. Video (Feb. 19, 2021) (discussion starting at 10:21:35).

Furthermore, claims that a Student Photo ID was excluded or that a Montana College ID was not included as an acceptable form of standalone identification for lack of listing the voter's residence ring hollow. As borne out in testimony and questioning witnesses, a Montana driver's license is accepted as standalone identification for voting even if expired. See House State Admin. Hrg. Video (Feb. 19, 2021) (discussion starting at 10:03:54). When asked by Representative Brian Putnam if a voter with an expired license that moved and had a different address than what was listed on the license would still be able to vote, Director Corson replied that the voter would in fact be able to vote. See id. (discussions starting at 10:05:49, 10:06:44). He further stated that it was the duty of citizens to keep their information current but that the department did not always know when someone changed their address, and voters could literally show up at the polls and change their address. See id. Representative Putnam also pointed out that the final bill even deleted the word "valid" from the requirements for a Montana driver's license. See House Floor Session Video (Mar. 24, 2021) (discussion starting at 14:08:20).

Similarly, concerns of residency and citizenship did not appear to apply to a tribal photo ID or United States Passport. In fact, when asked by Representative Tyson Running Wolf about someone who has a tribal photo ID from another state or even has dual citizenship from a tribe in the US and in Canada, and whether those tribal photo IDs (even issued from Canada) would be accepted as standalone forms of identification, Director Corson responded that the tribal photo ID does not have to be from Montana. See House State Admin. Hrg. Video (Feb. 19, 2021) (discussions starting at 10:28:04, 10:29:06, 10:29:53). An even more egregious example of the inconsistency is seen with respect to a U.S. Passport, which is an acceptable form of standalone identification under SB 169, both for registration and for voting, but does not contain a residence address for the voter. When the House originally amended SB 169 to include a Montana College ID as a standalone form of identification, it explicitly added a U.S. Passport. See SB 169, Version 3, Sec. 1(4)(a)(I) and Sec. 2(1)(a)(I), https://leg.mt.gov/bills/2021/SB0199//SB0169_3.pdf. However, while a U.S. Passport remained in the bill through its passage, by contrast, a Montana College ID was subsequently removed, even though both documents present photo identification without a residence address listed.

These examples make clear the lack of consistency and evenhandedness in the way that the Montana Legislature treated a Student Photo ID. No legitimate reason was provided as to why Student Photo ID was treated differently than a military identification card or Montana concealed carry permit, which were added as explicitly permissible forms of standalone identifications; as to why Student Photo ID was treated differently than an expired license with the wrong address, or a tribal identification card from out of state (or country), or a U.S. Passport which does not include

a residence address; nor as to why a Montana College ID was added and then excluded from the acceptable forms of standalone identification. The alleged distinctions are arbitrary, inconsistent, and irrational.

The only logical explanation is that Student Photo IDs were directly singled out for elimination and treated differently from other forms of photo identification, and that Montana College IDs were removed from inclusion in the bill to make the process of voting more difficult for youth and student voters, thereby intentionally discriminating against them. When the form of ID that is inexplicably eliminated is one that historically is uniquely and/or disproportionately used by a protected class of voters, discriminatory pretext becomes apparent. See Detzner, 314 F. Supp. 3d at 1223 (“This Court can conceive of fewer ham-handed efforts to abridge the youth vote than Defendant’s affirmative prohibition of on-campus early voting. Because the Opinion is unexplainable on grounds other than age, Plaintiffs have established a substantial likelihood of success on the merits of their Twenty-Sixth Amendment claim.”); McCrary, 831 F.3d at 227 (finding intentional racial discrimination, and noteworthy to the determination that “[t]he new bill – now fifty-seven pages in length – targeted four voting and registration mechanisms, which had previously expanded access to the franchise, and provided a much more stringent photo ID provision . . . [which] retained only those types of photo ID disproportionately held by whites and excluded those disproportionately held by African Americans.”) (internal citations omitted).

b. Age & Residency Requirements for Ballot Distribution

Targeting Youth and Student Voters

Pre-registration and related civics programs for individuals who have not yet turned 18 are critical to facilitating their participation in the democratic process. See supra at p. 15 (describing the habit-forming nature of voting and the uniqueness of age-based discrimination in its suppression of new voters); see infra at p. 35 (describing information costs to first-time voters who have not developed the habit of voting). By its own terms, HB 506 is explicitly directed at youth voters, who are the only voters uniquely affected by its restrictions to access to vote by mail, and who are disproportionately more likely to move and change their residence close to an election.³³

HB 506 fundamentally changed election officials’ approach to vote-by-mail ballots and young voters. Prior to the passage of law, election officials were permitted to issue ballots to all registered voters who would be eligible to vote by Election Day. However, HB 506 now prohibits the issuance of these ballots until the voter turns 18 before or on Election Day. This change focuses on two characteristics disproportionally attributable to student and youth voters compared to other voting groups. Quite obviously, voters who will be turning 18 by Election Day are by any definition youth voters. Additionally, youth and students are more likely to move more frequently than other voters. See Charlotte Hill, *Young People Faced Higher Voting Costs and are Less*

³³ It should be noted that informational witness Regina Plettenberg, President of the Montana Clerks and Recorders and Election Administrators Association provided testimony in response to questions by legislators that voters do not actually advise election officials as to what day they would meet residency requirements, essentially acknowledging that the bill would really be directed at age requirements. See House State Admin. Hrg. Video (Feb. 24, 2021) (discussion starting at 10:43:36), available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/42591?agendaId=201039>.

Informed about State Voting Laws, Berkeley Institute for Young Americans (Aug. 2020), p. 5, available at https://youngamericans.berkeley.edu/wp-content/uploads/2020/08/Hill_BIFYA_Working_Paper_08_08_2020.pdf (“Individuals between the age of 18 and 29 change addresses more than twice as frequently as those over the age of 30. Many relocated for college just as they become eligible to vote; in one study, more than half of people between the ages of 18 and 21 who reported having moved in the previous year cited education or schooling as a major reason for relocation.”) (internal citations omitted).

HB 506 does not appear to accomplish anything other than to shorten the window of time in which ballots can be issued to voters and is otherwise a recipe for substantial voter confusion and disenfranchisement. This is especially concerning for such voters who are unable to get to the polls or who will otherwise be away from the county where they are registered during the short period of time between when they meet age or residency requirements and Election Day. Among others who are acutely impacted are students who are registered to vote at their home address but are attending college in a different county or outside of Montana.

Montana voters already disproportionately relied on vote by mail prior to the pandemic – 73% of Montanans took advantage of vote-by-mail in the 2018 general election. *See* Montana Secretary of State, Absentee Turnout, available at <https://sosmt.gov/elections/absentee/> (73.13% of total votes cast were by absentee in the 2018 General Election). The Montana State University NSLVE Report for 2018 indicated that 66.3% of all votes cast by MSU students were absentee votes. Across the nation, the reliance on vote-by-mail increased in the midst of the COVID-19 pandemic when 70% of young people voted early/absentee in 2020. *See Election Week 2020: Young People Increase Turnout, Lead Biden to Victory*, CIRCLE (Nov. 2020), available at <https://circle.tufts.edu/latest-research/election-week-2020#when-and-how-young-people-voted>.

As with SB 169, in addition to singling out characteristics disproportionately found in student and youth voters, HB 506 needlessly changes the existing law to erect barriers targeted at youth voters. In doing so, HB 506 burdens youth, making it more difficult for them to vote compared to prior existing law and compared to all other age groups, and in some cases removes their ability to take advantage of an otherwise universally offered voting mechanism altogether.

Pretextual Justifications

Having placed restrictions on programs designed to facilitate voting for youth and student voters, having enacted a measure which singles out age and residency characteristics uniquely and/or disproportionately held by such voters, and having made it more difficult for such voters to vote, the Montana Legislature nevertheless relies on weak and clearly pretextual justifications for HB 506. Sponsors and proponents of the bill assert that it would (1) ensure that no vote would be counted that was cast by an individual who had not yet met age and residency requirements to be eligible to vote; and (2) provide clarity and consistency between counties with respect to the issuance and processing of ballots for individuals who will but have not yet turned 18 by Election Day. However, a review of the record reveals invidious motives in passing this measure. The Montana Legislature appears to have ignored or otherwise disregarded testimony from witnesses as to the impact of HB 506 on youth and student voters, and outright removed a temporarily-

approved amendment which would have accomplished the same objectives without placing a discriminatory burden on such voters.

Opponents and witnesses at various committee meetings set forth the impact and burdens that HB 506 would have on voters who had not yet turned 18, but will by Election Day. Katajana Stutzer of Montana PIRG testified that HB 506 would create real barriers for such individuals voting by mail; for example, she explained that if such a voter's birthday was very close to an election, they could be boxed out of having the opportunity to vote by mail. See House State Admin. Hrg. Video (Feb. 24, 2021) (discussion starting at 10:32:08).³⁴ She further explained that many youth voters and students may not be on campus for a variety of reasons. See id. Allison Reinhardt of Montana Associated Students highlighted additional issues such voters could face with receiving a ballot by mail. See id. (discussion starting at 10:34:00). Rachel Schmidt of the Associated Students of Montana State University testified that this measure would be bad for student voter turnout, would cause confusion, and would require navigation through unnecessary bureaucracy. See id. (discussion starting at 10:35:17). She further explained that the Montana Secretary of State's Office already has guidelines in place to ensure that voters meet the age and residency requirements and that HB 506 could leave some voters with birthdays close to Election Day with no clear path to cast a vote. See id. Keetan Sunchild of Western Native Voice testified that HB 506 would create another restriction that will disenfranchise even more Native American youth, and highlighted the difficulties for voters who will be shut out of the absentee ballot process and face barriers on Election Day such as finding reliable transportation and dealing with weather issues, etc. See id. (discussion starting at 10:36:42). Sam Forstag of the ACLU of Montana testified that this bill was the latest in a slate of bills requested by the Secretary of State's office which specifically impacts young voters and college students despite serving no compelling government interest, and emphasized that voters affected by the law would have less time to look at their ballots. See id. (discussion starting at 10:37:43). Ruthie Barbour of Forward Montana testified that some college students from Montana are 17 and will be 18 by Election Day and might be attending an out of state school, so without an ability to receive a ballot by mail, they could effectively be precluded from voting where they are registered in Montana. See id. (discussion starting at 10:39:23).

In response to questions from lawmakers, informational witness Regina Plettenberg, who is the President of the Montana Clerks and Records and Election Administrators Association and the Ravalli County Election Administrator testified that in her county, their office currently does issue ballots to a voter who has not yet turned 18 but will by Election Day, and then if she receives it back before the voter turns 18, she just holds up its processing until the voter actually does turn 18. See id. (discussion starting at 10:45:14). She noted that if the bill as currently drafted passes, they would not be able to send the voter a ballot. See id. She also testified that there was not any current issue of concern with holding the ballot for processing until the voter turned 18, but acknowledged that some counties handle it differently. See id. (discussion starting at 10:50:45).

³⁴ Video of the proceedings at the House State Administration Committee Meeting on February 24, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/42591?agendaId=201039>.

In light of the above testimony borne out at the House State Administration Committee Meeting on February 24, 2021, and particularly the issues raised by the opponents and Ms. Plettenberg, bill sponsor Paul Fielder acknowledged such concerns and encouraged the Committee to address them while providing consistency between counties, including potential consideration of the method employed by Ms. Plettenberg to issue the ballots but then hold them and not enter them into the voting system until the voter turns 18. See id. (discussion starting at 10:59:17).

The compelling concerns raised by these opponents led to an amendment by the House which removed language in the original bill prohibiting the *issuance to and voting of* a ballot by an individual who will by Election Day but has not yet met age and residency requirements, and instead replaced it with language that prohibited only the *processing and counting* of ballots submitted by such young voters until they met the age and residency requirements. See HB 560, Version 2, Sec. 1(2), https://leg.mt.gov/bills/2021/HB0599/HB0506_2.pdf. Amendment sponsor, Representative Kelly Kortum, explained that the amendment would satisfy the concerns of the opponents and the election officials by clarifying the practice for the clerks and recorders and not disenfranchising individuals by preventing them from getting their ballots in their birth week prior to the election. See House State Admin. Executive Committee Video (Feb. 26, 2021) (discussion starting at 8:37:50).³⁵ After that amendment passed on the House Floor, it was introduced to the Senate by bill sponsor, Representative Fielder, with support. See Senate State Admin. Hrg. Video (Mar. 19, 2021) (discussion starting at 15:08:46).³⁶ Additionally, Director Corson admitted that the bill, even as amended, would help to clarify how those turning 18 years old will receive a ballot and vote. See id. (discussion starting at 15:10:35). However, instead of adopting the bill as amended by the House, the Senate instead adopted an amended version which essentially restored the bill back to its original language, thereby prohibiting the issuance of ballots to and voting by such individuals until they meet the age and residency requirements. See Senate Floor Session Video (Apr. 14, 2021) (vote adopting amendment starting at 14:47:31). Moreover, the final version of the bill maintains the original language and excludes the amendments initially passed by the House. See HB 560, Final Version, Sec. 2(2), https://leg.mt.gov/bills/2021/HB0599/HB0506_X.pdf.

The legislative history of HB 506 demonstrates ample evidence that the Montana Legislature was aware of the various burdens and impact on youth and student voters. It even considered and temporarily adopted an amendment which would have ensured that no vote was actually counted prior to that voter meeting age and residency requirements. That same amendment would also have clarified the manner in which election officials could process the voters at issue in a way that would provide consistency among counties.³⁷ Quite simply, the Montana Legislature

³⁵ Video of the proceedings at the House State Administration Executive Committee Meeting on February 26, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20210226/-1/40977>.

³⁶ Video of the proceedings at the Senate State Administration Committee Meeting on March 19, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41488?agendaId=208475>.

³⁷ In fact, testimony provided by Director Corson from the Secretary of State's Office to the House State Administration Committee on January 21, 2021, with respect to a different bill, HB 176 (which is discussed below),

rejected a less discriminatory amendment which would have satisfied the purported justifications for the bill without creating a burden on affected youth and student voters. Cf. Veasey, 830 F.3d at 236-37 (context of intentional racial discrimination) (finding fact that legislature was aware of likely disproportionate effect on minorities and nevertheless passed the bill without adopting other proposed measures to lessen the impact to be evidence that could support a finding that the alleged justification of ballot integrity was a pretext). There is no legitimate justification for removing the language that was included in the House Amendment; it would have accomplished the same purpose without burdening the rights of youth and student voters.

c. Election Day Registration

Targeting Youth and Student Voters

Youth and student voters are also particularly more likely to take advantage of Election Day Registration, and their reliance on this mechanism leads to a demonstrated boost in youth turnout.

Turnout for voters between 18 and 24 years of age increases significantly when they can take advantage of Election Day Registration. See Grumbach & Hill, *Rock the Registration: Same Day Registration Increases Turnout of Young Voters*, The Univ. of Chicago Press Journals (Aug. 9, 2020), available at <https://www.journals.uchicago.edu/doi/pdf/10.1086/714776>.

Same day registration (SDR) laws are especially likely to improve voter turnout among young people. SDR laws lower the cost of the major barrier to young potential voters: the registration process. Young people's life circumstances make traditional registration uniquely costly. They are more likely to change residential addresses. They less frequently use government offices that provide registration materials. They have not yet developed habits of voting and may not know where or how to register. SDR laws should make voting less costly for these young voters by combining registering and voting into a single act.

Id. (internal citations omitted).³⁸

Research consistently demonstrates that EDR leads to a significant boost in turnout, with estimates ranging from three to seven percentage points. See Barry C. Burden et al., *The Effects & Costs of*

is insightful. In response to a question from Representative Marvin Weatherwax, Jr. about voters who are 17 but will turn 18 by Election Day, Director Corson stated the following: "The trick on the law is...and the law isn't 100% clear but the idea is the ballot for the voter wouldn't count until he is 18, so the clerks have a variety of processes...we talked about this last week with one of the technical committees for, with our clerks, the [inaudible] Committee, and the opportunity exists for people to do that. The clerks will typically hold that ballot until they turn the age of majority, eighteen, and then allow that ballot to be counted. So there is a process for that now. I think you'll see some standardization in process come out across the counties to make it more uniform." See House State Admin. Hrg. Video (Jan. 21, 2021) (discussion starting at 9:24:03), available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/39873?agendaId=178249>.

³⁸ Grumbach & Hill explain that of the over 20 states (and the District of Columbia) that adopted same day registration, only one state, North Carolina, did not allow voters to register and vote on Election Day itself. Id.

Early Voting, Election Day Registration, & Same Day Registration in the 2008 Elections, Report to the Pew Charitable Trusts, at 3 (Dec. 21, 2009); see also Bromberg, 21 U. PA. J. CONST. L. at 1110 and n.17 (In 2018, young voters who lived in EDR states voted at a rate of nine percentage points higher than those who live in deadline-only states.) (citing *Youth Voting*, Ctr. for Info. & Res. on Civic Learning & Engagement, <https://civicyouth.org/quick-facts/youth-voting/> (last visited May 14, 2019)). Relatedly, a nationwide study of the 2016 election found that 20% of registered voters between the ages of 18 to 29 who did not vote cited issues with voter registration. See Alberto Medina, *Broadening Youth Voting: Barriers to Voting Chart*, CIRCLE (2021), available at <https://circle.tufts.edu/our-research/broadening-youth-voting#barriers-to-voting>.

The Montana Constitution explicitly provides for the ability of the state legislature to “provide for a system of poll booth registration.” Mont. Const., Art. IV § 3. In 2005, the Montana Legislature did just that, implementing a process for same day registration whereupon voters could both register and vote at the same time. Of critical importance to this program was the ability to both register and vote at the same time on Election Day itself. Thus, since the program was enacted into law in 2005, election day registration has always been available to voters.

Not surprisingly, since its enactment in 2005, same day registration has been widely popular in Montana, with more than 60,000 voters taking advantage of the program between 2006 and 2018. See Montana Secretary of State, Total Later Voter Registration Activities by Election, available at <https://sosmt.gov/elections/latereg/> (total numbers added from changing the election year in the dropdown menu). In the 2020 General Election alone, over 8,000 voters registered on Election Day. *Id.* In fact, when the Legislature submitted a referendum question to voters in 2014 in an effort to eliminate EDR, voters overwhelmingly rejected the measure and defeated the referendum. See Montana Secretary of State 2014 Statewide General Election Canvass, available at <https://sosmt.gov/wp-content/uploads/attachments/2014-General-Official-Statewide-Canvass.pdf?dt=1484944629070&dt=1485276314527&dt=1519325647920>.

Nevertheless, in the face of wide popularity and a rare opportunity to have obtained direct voter approval for the program, the Montana Legislature passed HB 176 to curtail late registration by eliminating Election Day Registration and rolling back the deadline for late registration to noon on the day prior to the election. Thus, in addition to eliminating a program for registration and voting which is disproportionately used by youth and student voters, HB 176 represents a measure which makes it more difficult to vote for such individuals as compared to the existing baseline. Eliminating Election Day Registration, used disproportionately by young voters, again creates barriers to voting, where none are needed.

Pretextual Justifications

The justifications for HB 176’s elimination of Election Day Registration are similarly conspicuous. Throughout the course of testimony, various vague, unsubstantiated, and shifting justifications were presented, including encouraging voter responsibility, preventing fraud, promoting election integrity, reducing wait times at the polls, and reducing opportunities for mistakes by election officials by allowing them to manage less tasks on Election Day. However, a closer review reveals the extent to which these alleged justifications are undermined.

Despite the laundry list of proffered justifications, the bill’s purpose was made clear by bill sponsor Representative Sharon Greef when she first introduced HB 176: that this was the first of a series of election integrity bills which would mitigate against voter fraud and promote voter integrity. See House State Admin. Hrg. Video (Jan. 21, 2021) (discussion starting at 8:03:12).³⁹ The proponents, witnesses, and other legislators speaking in support of HB 176 were unable to provide any specific example of voter fraud in Montana related to EDR. For example, bill sponsor, Representative Sharon Greef, was specifically asked for proof that EDR led to fraud or voter disenfranchisement, and responded by saying that when she was speaking about voter fraud she was not talking about Montana, but rather about a more generalized distrust in national elections. See Senate State Administration Committee (Feb. 15, 2021) (discussion starting at 17:35:00).⁴⁰ Moreover, as set forth above, there is no evidence of voter fraud in Montana in the record, and a recent 2020 federal court decision concluded the same. See *supra* p. 27-28. As such, voter fraud and election integrity, in the context of the laws at issue here, represent nothing more than a façade behind which to pass measures to disproportionately burden various vulnerable voting populations, including youth and student voters, who are more likely to rely on these mechanisms to register and to vote.

When introducing HB176, bill sponsor, Representative Sharon Greef also claimed that the right to vote comes with “the responsibility of registering to vote.” See House Floor Session Video (Feb. 4, 2021) (discussion starting at 13:23:48).⁴¹ Encouraging voter responsibility by making it more difficult to register is not a legitimate state interest, nor is the placement of additional restraints and barriers on the ability to register tailored in any way to serve that interest. Decreasing opportunities to register to vote is consistent with voter suppression, not with encouraging voter responsibility.

Before the Senate State Administration Committee, bill sponsor Representative Greef suggested that HB 176 would make the process more efficient for citizens discouraged from voting due to long lines and extended wait times, and also claimed it would “reduce the opportunity for mistakes” in light of multiple tasks for election officials on Election Day. See Senate State Admin. Hrg. Video (Feb. 15, 2021) (discussion starting at 16:49:36).⁴² Yet, neither Representative Greef nor any of the other proponents and witnesses provided any evidence of mistakes made related to EDR in Montana. By contrast, when bill co-sponsor Senator Mike Cuffe was asked for specifics about such errors in Montana being a “train wreck,” he was unable to point to any errors and instead responded by clarifying that he meant to say that based on conversations he had a few years ago with some clerks and recorders about a completely different bill, they thought they were

³⁹ Video of the proceedings at the House State Administration Committee Meeting on January 21, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/39873?agendaId=178249>.

⁴⁰ Video of the proceedings at the Senate State Administration Committee Meeting on January 21, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41476?agendaId=228055>.

⁴¹ Video of the proceedings at the House Floor Session on February 4, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41050?agendaId=226983>.

⁴² Video of the proceedings at the Senate State Administration Committee Meeting on February 15, 2021 are available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41476?agendaId=228055>.

headed for a “train wreck.” See House State Admin. Hrg. Video (Jan. 21, 2021) (discussion starting at 10:02:03). Similarly, informational witness Regina Plettenberg, President of the Montana Clerks and Recorders and Election Administrators Association and the Ravalli County Election Administrator, testified that she was not aware of any challenge or successful suit in any county resulting from processing errors on Election Day. See id. (discussion starting at 10:04:13). Similarly, when asked if the bill would help to eliminate mistakes, Ms. Plettenberg also testified that she did not believe that there were any errors at all. See id. (discussion starting at 9:52:21).

The Montana Legislature appears to have ignored or disregarded the testimony of, Audrey McCue, Election Supervisor in Lewis & Clark County. She addressed the Senate State Administration Committee and testified that while “a lot of the proponents of the bill are talking about this as helping election administrators and election officials, I wanted to be on the record saying that this will not help me.” See Senate State Admin. Hrg. Video (Feb. 15, 2021) (discussion starting at 16:59:29); cf. McCrory, 831 F.3d at 237 (state justification of consistency and easing burdens on elections officials undermined when it disregarded recommendations of elections officials). In further refuting the unexplained and unsubstantiated claims of a need to improve election integrity, she explained that there were no existing problems with election integrity “and certainly none caused by election day registration”; she also explained that late registration is “not a novel service on election day. It’s the service we provide the month before the election and continue to provide on election day.” See Senate State Admin. Hrg. Video (Feb. 15, 2021) (discussion starting at 17:01:25). Moreover, Ms. McCue further testified as follows, emphasizing the difference between common sense election administration measures versus drastic voter suppression tactics imposed by the legislature:

[C]ontinuing this [EDR] service to the voters is important and taking it away is a disservice to them. We know the voters approved this bill on the ballot in 2014, we know they use it, and we know it’s grown in popularity with 7,547 voters using election day registration in 2008 and 12,055 voters using it in 2016 To be clear, on the context of administering an election, election day registration is certainly more work, there is no doubt about it, but let’s be realistic, anytime someone registers and votes it’s more work for us, that’s the job We don’t address that by limiting who may vote in the election, we address it by scaling to meet the demand.

See id. (discussion starting at 17:00:21).

In later testimony, Ms. McCue further explained that HB 176 does not get rid of long lines and wait times, but simply moves them to a time (the day before) when it is more difficult to accommodate those long lines. See id. (discussion starting at 17:31:58). As an example, she explained that on Election Day, the whole building is closed so her staff is able to have access to the entire building, which allows for more space to accommodate lines and assist a higher number of voters; whereas they do not have that access for their operations the day before Election Day. See id. She further testified that moving the date for closing registration to the Monday before the election will cause a greater time crunch for compiling and printing new lists of registered voters

because they would have to wait for everyone on line by noon to finish voting before printing updated lists of voters which they have to get from other counties and distribute to their polling places across the county by 6:00a.m. See id. She also testified that even if EDR were eliminated, there will inevitably be frustrated individuals who appear at the polls or the election office who did not register previously who, upon being told they could not vote, would call their political party, U.S. Senator, or attorney, and time would need to be spent dealing with such voters, including the time of important management level staff needed to attend to the election. See id.

Importantly, Ms. McCue explained that for voters who believe that they did actually register but are not on the list, the elimination of EDR would take away their failsafe option to register on Election Day. See id. (discussion starting at 17:34:31). Under the existing law, EDR served as a failsafe for issues with voter registration because if there was an error or other issue, voters could nevertheless just register to vote on Election Day. However, as a result of HB 176, now such voters who show up to vote on Election Day will be unable to vote as they can no longer register on Election Day, even if they did everything right and it is through no fault of their own. This issue was later raised to bill sponsor, Representative Sharon Greef. She was presented with a question about a voter who does everything right, goes to the DMV and registers, but for whatever reason, the clerk of the DMV fails to transmit the form or fails to do so in time, or the scenario where, due to a glitch in the system, the voter's name does not appear on the list when printed. See Senate State Admin. Hrg. Video (Feb. 15, 2021) (discussion starting at 17:37:11). Representative Greef failed to address concerns raised to her about the disenfranchisement of voters who properly completed their registration paperwork but arrived on Election Day only to find they were not listed as registered. See id. (discussions starting at 17:37:23, 17:38:27). Instead, she evaded the question, simply stating that most states do not have same day registration and it works well. See id. (discussions starting at 17:38:27, 17:39:32). This non-responsive and seemingly incoherent answer further demonstrates that HB 176 is not actually designed to ameliorate any actual problem or concern, and is not tailored in any reasonable and proportionate fashion to address such concerns.

Moreover, the Legislature appears to have ignored and/or failed to address various concerns raised by stakeholders in connection with the elimination of EDR. Numerous opponents and other witnesses testified as to the popularity of EDR. Former Senate Majority Leader Jon Ellingson testified that when EDR was first passed in 2005, it passed with overwhelming bipartisan support including from the Republican Secretary of State at the time. See House State Admin. Hrg. Video (Jan. 21, 2021) (discussion starting at 8:41:45). Other opponents of HB 176, such as Lauren Caldwell of the Montana Federation of Public Employees explained that the issue of eliminating EDR was put to the voters in 2014 and they overwhelmingly rejected the referendum, with majorities in 80 out of 100 legislative districts. See id. (discussion starting at 8:48:05). She further noted the widespread use of same day registration since its passage in Montana, and increased use of EDR and late registrations in recent election cycles. See id. (discussion starting at 8:49:30).

A myriad of witnesses testified in opposition to this bill, explaining the various voting populations that would be disproportionately impacted. Among others, Katajana Stutzer of Montana PIRG explained that students would be particularly impacted given the much higher rate

at which they move. See id. (discussion starting at 8:29:14). Rachel Schmidt from the Associated Students of Montana State University testified that eliminating EDR would place an undue burden on students, and explained that EDR is important to Montana State University students because the University is closed on Election Day which often makes it particularly convenient for them because they have that time off from other obligations and can register and vote on that one day. See Senate State Admin. Hrg. Video (Feb. 15, 2021) (discussion starting at 17:06:19). Ruthie Barbour of Forward MT testified that 3,352 Montana voters used EDR in 2020, and that this bill would have a negative impact on certain groups of voters, including youth voters. See id. (discussion starting at 17:17:44).

Nevertheless, Montana legislators supporting the bill demonstrated clear animus toward students, including Representative Jedediah Hinkle who spoke with disdain toward non-profit groups assisting college students with transportation to the polls, as if their participation in the voting process was offensive. See House Floor Session Video, Second Reading (Feb. 4, 2021) (discussion starting at 13:48:47); see also infra at p. 43-44. This further demonstrates that it is not registration, but rather turnout by a particular group of voters that appears to underlie the motivation behind HB 176.

In essence, the Montana Legislature eliminated EDR, which is a type of registration/voting mechanism used disproportionately by youth and student voters among others, and which was a widely popular program that passed with near unanimous bipartisan support in 2005. HB 176 passed against the will of the voters, as expressed in their rejection of a similar measure put forth to them by referendum in 2014. Despite evidence of the impact this has on voters, including particular burdens on youth and student voters, the Montana Legislature relied on weak and unsubstantiated justifications which suffer from a severe lack of any concrete evidence of any real problem in Montana. Moreover, legislators appear to be grasping at straws and vacillating back and forth between broad notions of open-ended concepts such as fraud, integrity, and efficiency. When pressed on the justifications and specifics, legislators were unable to provide examples, evaded direct responses, provided nonsensical answers, and made statements contradicted by informational witnesses and other testimony in the record. Cf. Veasey, 830 F.3d at 240-41 (court found the fact that there were “many rationales . . . given for a voter identification law, which shifted as they were challenged or disproven by opponents,” to be relevant and suggestive of pretext for racial discrimination).

Thus, elimination of EDR appears to be an extreme and disproportionate solution in search of a problem. Notwithstanding the alleged justifications, the only thing that HB 176 seems to accomplish is to suppress voter turnout among vulnerable voting populations, including youth and student voters, and/or otherwise make it more difficult for those voters by placing another roadblock in the path of their franchise.

5. Cumulative Effects and Context of Cumulative Actions

While SB 169, HB 506, and HB 176 are individually aimed at characteristics uniquely and/or disproportionately held by youth and student voters, the combination of the passage of all three laws within a month makes implicit that which is not explicit – that there is no way to understand these measures as anything but a collective attack on youth and student voting rights. Individually, each creates hurdles that young and student voters must navigate, both by erecting unnecessary walls which will make it more difficult to vote and by tearing down bridges which have historically provided secure and reliable channels to facilitate their exercise of the franchise. While each barrier presents its own set of challenges, youth and student voters must experience this stripped election administration system as a whole, the combination of which severely restricts their access to the ballot. Cf. McCrory, 831 F.3d at 231 (holding that the district court erred by finding that the cumulative impact of North Carolina’s voter ID law, reduced early voting provisions, and other election measures did not “bear more heavily on African Americans,” and holding that the cumulative effect of such provisions working in combination “result[ed] in greater disenfranchisement than any of the law’s provisions individually”) (citing Clingman v. Beaver, 544 U.S. 581, 607-08 (2005) (O’Connor J., concurring) (“A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition.”)).

To provide but one hypothetical example, one can take the case of a 17-year-old freshman who moved from another state to attend college at a Montana University System school who (1) will turn 18 by Election Day; and (2) has a student photo ID, but no passport (or has not brought it to school with her) or other photo ID issued by the state (e.g., Montana driver’s license, state ID card, military ID, tribal ID, or concealed carry permit). In 2020, she could register to vote and receive a ballot upon the presentment of her Student Photo ID. She could do so in advance of Election Day, or on Election Day when MSU courses are canceled for the holiday. Alternatively, she could show up on Election Day and both register to vote and actually vote upon the presentation of her Student Photo ID.

However, after the simultaneous passage of SB 169, HB 506, and HB 176 in Spring 2021, she can no longer use her Student Photo ID as a standalone form of identification to register or vote. Instead, she must present an additional secondary form of ID to accompany her Student Photo ID, which she may not have and which may be burdensome to obtain – and which no other specific classification of voter is required to produce. Even if she obtains one of the permissible forms of secondary ID, she cannot receive her ballot when other voters can, but must wait until she turns 18. Imagine if she and her slightly older classmate decide to go together to vote or to apply for an absentee ballot. Her slightly-older classmate could exercise the franchise, but she could not because she turns 18 on Election Day. Additionally, she is altogether precluded from voting by mail on account of her age. She is also now precluded from registering and voting on Election Day when MSU courses are off for the holiday.

Thus, this young, first-time voter is subject to various unique hurdles at every step of the process from registration, to providing identification, to receiving a ballot, to the timeframe in which she can vote, to the process for casting a vote. Each of the above hurdles represents an

instance where an issue could arise and/or where it generally makes it more difficult for youth and student voters to actually vote. The more roadblocks presented, the more difficult it will be for first-time voters to participate. In turn, the more difficult the process to vote, the more likely a voter will be deterred or otherwise prevented from voting, be it due to confusion, abridgment, or outright denial.

It simply cannot be a coincidence that the Montana Legislature passed three laws which constitute three of the most effective ways to suppress youth and student voter turnout – targeting their ability to register, prove identification to register and vote, and vote absentee. When viewed in this context, and the close proximity of the passage of all three laws, the clear indication is that such measures were enacted with surgical precision to achieve that result. When a series of measures are taken, all of which single out characteristics uniquely or disproportionately held by a particular subset or group of voters, it is hard to ignore the cumulative impact and the inevitable inference that the laws were targeted at a group of voters to suppress their turnout. Cf. McCrory, 831 F.3d at 234 (concluding that the North Carolina omnibus election law is intentionally discriminatory on the basis of race, and explaining that while states may articulate a rational justification in the fair administration of elections, courts “must be mindful of the number, character, and scope of the modification enacted together” to determine if that law would have been enacted regardless of its racially disparate impact).

It is impossible to ignore that these laws come as a response to a tremendous rise in youth voting nationally, and specifically in the state of Montana, where youth voting is booming and where youth voters rank highest in the nation for their electoral influence. See supra at p. 19-20. These laws are not a coincidence. They are a response. Cf. McCrory, 831 F.3d at 214-15 (finding that the timing of the North Carolina Legislature’s omnibus election law, which included numerous measures that would disproportionately affect African Americans, when their recent increased registration and turnout rates “were poised to act as a major electoral force,” was evidence indicative of an intent to discriminate against such voters); Veasey, 830 F.3d at 241 (“Further supporting the district court’s finding is the fact that the extraordinary measures accompanying the passage of SB 14 occurred in the wake of a ‘seismic demographic shift,’ as minority populations rapidly increased in Texas, such that the district court found that the party currently in power is ‘facing a declining voter base and can gain partisan advantage’ through a strict voter ID law.”) (citations omitted). Moreover, each of the Montana laws represents a rollback to various protections and programs that were already in place and designed to make voting accessible for youth and student voters. See Tex. Democratic Party v. Abbott, 978 F.3d at 190-91 (noting that for purposes of the Twenty-Sixth Amendment, a person’s right to vote is considered “abridged” when the law “makes voting *more difficult* for that person than it was before the law was enacted or enforced” and “applies to laws that place a barrier or prerequisite to voting, or otherwise make it more difficult to vote, relative to the baseline”) (emphasis in original).

It is further impossible to ignore that the three laws fall within a recent pattern of targeted adverse measures by the Montana Legislature aimed at youth and student voters. Cf. Veasey, 830 F.3d at 239-40 (finding claim of racial discriminatory intent to be supported by contemporary examples of discrimination, including the passage of two other laws which were found to have had

a discriminatory purpose). Here, that these measures should be viewed collectively is further obviated by the fact that the bill sponsors and proponents refer to them as a “package” of election integrity bills. See, e.g., Senate Floor Session Video (Feb. 10, 2021) (discussion starting at 13:05:04) (bill sponsor, Senator Mike Cuffe referring to SB 169, the Voter ID law, as part of an “election integrity package of bills”); House State Admin. Hrg. Video (Jan. 21, 2021) (discussion starting at 8:03:14) (bill sponsor, Representative Sharon Greef referring to HB 176, eliminating EDR, as “the first in election integrity bills”).

Notably, the Montana Legislature passed SB 319 (enacted May 12, 2021), a bill to ban election-related speech in highly-frequented areas on Montana University System campuses. This bill was enacted within the same one-month-period that the three laws at issue here were enacted. Fortunately, that measure has been preliminarily enjoined. See Preliminary Inj. Or., *Forward Mont. et al. v. Montana et al.*, Cause No. ADV-2021-611, at 5-6 (Mont. First Jud. Dist. Ct. July 1, 2021). While SB 319 originally dealt with campaign finance issues, an amendment to the bill was sponsored by Montana Senator Steve Fitzpatrick to prohibit door-to-door canvassing, get out the vote drives, and other political activities inside a dormitory, dining hall, or athletic facility on college campuses. In introducing the amendment, its sponsor exhibited disdain and distrust for youth and student voters, referring to them as “kids” and exclaiming a need for the amendment due to their susceptibility to exploitation for “really activist causes.” See Free Conf. Comm. Hrg. on HB319 (April 27, 2021) (discussion starting at 15:03:01), available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/43496?agendaID=215509>. SB 319 and the statement by its amendment sponsor provide further insight into underlying motivations animating a recent pattern of measures to limit youth and student participation in the democratic process. The three laws at issue fit the pattern and must be considered in light of that context.

Indeed, similar animus toward youth and student voters was exhibited in testimony on the three bills at issue here. For example, speaking in support of the amendment to SB 169 (the Voter ID law) to remove a Montana College ID from the list of acceptable standalone forms of identification, House Speaker Wylie Galt stated, “[I]f you are 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 anyways. So this just clears it up that they have a little stake in the game.” See House Floor Session (Mar. 24, 2021) (discussion starting at 13:51:52). Likewise, speaking in support of HB 176 (Elimination of EDR), Representative Jedediah Hinkle stated as follows:

What I come to find out was that there was a few non-profit groups working the college and they were busing students down all day. These lines went all the way down from the second floor of the courthouse all the way down the steps all the way through the lobby outside the courthouse outside the steps all the way around the corner and around the block. That’s how long that line was that day. And what those non-profit groups—and they were not on our [Republican] side of the aisle—what they were doing was when they were, you know, 30 feet from the building they were working all of

those people with literature, pizza, heat lamps, and everything else. So this is what we're seeing on election day, alright, and this is a stress and strain that's being put on our election department to make sure that we have elections with integrity

See House Floor Session Video, Second Reading (Feb. 4, 2021) (discussion starting at 13:48:47).

At the conclusion of his testimony, Representative Hinkle acknowledges that one of the election machines at the site had broken down, see id. (discussion starting at 13:50:11). Nevertheless, Montana legislators scapegoated youth and students for simply exercising their right to vote, and implemented solutions that would make it more difficult for this unique class of voters to register and to vote.

In sum, in light of the collective nature in which the “package” of supposed election integrity bills must be viewed, the burdens of the laws at issue on youth and student voters become exponentially greater while the justifications become inversely weaker. In the name of protecting against nonexistent voter fraud, the Montana Legislature (1) implemented a Voter ID law to surgically remove Student Photo ID as standalone identification although it had served as such for almost twenty years; (2) prohibited election officials from issuing ballots to young voters on the cusp of turning 18 before or on Election Day, thereby narrowing the window in which they can avail themselves of vote-by-mail, and increasing the likelihood of disenfranchisement the closer Election Day approaches; and (3) eliminated an Election Day Registration program in existence since 2005 that disproportionately benefits youth and student voters. Each of these measures rolled back and/or eliminated programs/criteria that were already in existence, thereby making it harder for youth and student voters to register and vote. At the same time, the Montana Legislature passed a measure (which has since been enjoined) to ban election-related speech in highly-frequented areas on Montana University System campuses. The Montana Legislature took all of these actions essentially simultaneously, and has done so just as youth voter turnout and electoral significance in the state is booming and on the rise. By viewing not only the sum of the parts, but the whole of the actions taken by the Montana Legislature, it is impossible to understand the laws at issue without recognizing a clear motivation and intent to single out and discriminate against youth and student voters. Cf. McCrory, 831 F.3d at 227 (finding intentional racial discrimination) (finding it noteworthy for purposes of determining intentional discrimination that “[t]he new bill – now fifty-seven pages in length – targeted four voting and registration mechanisms, which had previously expanded access to the franchise, and provided a much more stringent photo ID provision [which] retained only those types of photo ID disproportionately held by whites and excluded those disproportionately held by African Americans.”) (internal citations omitted).

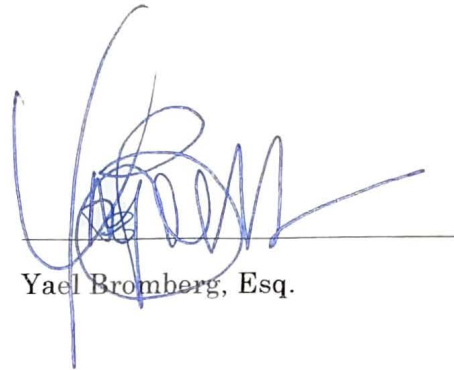
V. CONCLUSION

The three laws at issue are: (1) SB 169, enacted on April 19, 2021, which eliminates the ability to use a student photo ID as a standalone form of identification for registration or voting; (2) HB 506, enacted on May 14, 2021, which prohibits election officials from issuing ballots to registered voters who have not yet met age or residency requirements, but will by Election Day, until such time as they meet such age or residency requirements; and (3) HB 176, enacted April 19, 2021, which eliminates election day registration (“EDR”) and rolls back the late registration period to noon on the day before the election.

I conclude:

1. Montana was at the forefront of youth voting rights both with respect to federal legislation and the passage and ratification of the 26th Amendment, as well as with respect to the adoption of expansive youth voting rights provisions at the state level, predating and including those adopted at Montana’s Constitutional Convention and approved of by the 1972 electorate.
2. Each of the laws at issue are the types of measures which are known to disproportionately impact youth and student voters and/or single out characteristics which are uniquely or disproportionately held by youth and student voters, even as less burdensome versions of the laws were not only possible, but temporarily added and then removed from the proposed bill text.
3. The alleged justifications proffered by the sponsors and proponents of each of the laws at issue bear all the hallmarks of pretext for discrimination in voting on account of age, and are undermined by evidence, testimony, and other statements in the legislative history of each bill.
4. The cumulative effects of and burdens these laws place on youth and student voters; the near simultaneous passage of the three laws; their passage along with other recent laws designed to diminish youth and student political engagement; and the timing of their passage in the midst of increased youth voter registration, turnout, and electoral influence both in Montana and nationally evidence a clear intent to discriminate against youth and student voters, and can only be understood as a collective effort to deny or abridge the protected rights of young voters.

I declare under penalty of perjury and under the laws of the state of Montana that the foregoing is true and correct.



Yael Bromberg, Esq.

Dated: January 14, 2022

Yael Bromberg, Esq.

Bromberg Law LLC, 43 West 43rd Street, Suite 32

New York, NY 10036-7424

ybromberg@bromberglawllc.com | Office: (212) 859-5083

CURRENT WORK

Bromberg Law LLC, Principal

Representing and counseling local, state and national democracy and political organizations and unions, in addition to individual clients, on a range of cases and projects, mostly related to constitutional law, civil rights, election law, voting rights, and free speech.

Chief Counsel, Strategic Advisor, The Andrew Goodman Foundation (outside counsel). (Previously Chief Counsel for Voting Rights, January 2019-March 2021). Developing legal and advocacy support for organization's civic engagement and organizing-centered efforts in 25+ states and 100 campuses. Developing a youth voting rights jurisprudence through main party and amicus litigation, civics trainings, advocacy, and public education. Facilitated election protection for the 2020 general and run-off election, including the only youth-focused Vote by Mail Cure program in the country.

Weissman & Mintz LLC, Of Counsel

Representing unions and union members in civil rights and pay equity claims and in labor arbitrations.

Adjunct Law Professor, Rutgers School of Law

Designing curriculum and teaching upper-level seminar, "Election Law and the Political Process."

Faculty Advisor, Rutgers University Law Review Symposium, "Voting Rights Reform: the 26th Amendment, Youth Power, and the Potential for a Third Reconstruction."

PRIOR TEACHING EXPERIENCE

Georgetown University Law Center, Washington, D.C. 2016 – 2018

Supervising Attorney and Clinical Teaching Fellow, Civil Rights Clinic and Voting Rights Institute

The Clinic litigates in federal and state courts on voting rights and a range of other civil rights matters, including, but not limited to, employment and housing discrimination, police brutality, Title IX, and unfair procedural barriers to the courts. Taught law students the materials, expectations, strategies, and methods of public interest lawyering. Designed and taught two weekly seminar classes with Clinical Director Aderson Francois dedicated to civil rights, voting rights, and practical skills of lawyering. Participated in year-long Clinical Pedagogy class taught by the Georgetown Law clinical faculty.

EDUCATION

Georgetown University Law Center, 2018

Degree: L.L.M., advocacy

Honors: with distinction

Rutgers School of Law – Newark, 2011

Degree: J.D.

Journal: Women's Rights Law Reporter, submissions editor

Honors: 2015 Recipient of the Neisser Alumni Achievement Award, "in recognition of her outstanding achievements in carrying forward the law school's mission of providing liberty and justice for all."
Youngest recipient of the Neisser alumni award.

Graduation, Eli Jarmel Memorial Award for Greatest Interest & Proficiency in Public Interest Law

Pro-Bono Award

Mark J. Lopez Civil Liberties Scholar

Levin Scholar, Academic Achievement and Public Service

David Haber Environmental Law Scholar

Douglass College, Rutgers University, 2005

Degrees: B.A.s in Applied Environmental Science and Political Science

Honors: Golden Key Honor Society, Phi Beta Kappa

Extracurricular: Vice President of statewide Student Executive Board of NJPIRG

Yael Bromberg, Esq.

Bromberg Law LLC, 43 West 43rd Street, Suite 32

New York, NY 10036-7424

ybromberg@bromberglawllc.com | Office: (212) 859-5083

ADMITTED TO PRACTICE

New Jersey, 2011 – Present

New York, 2015 – Present

Seventh Circuit Court of Appeals, 2016 – Present

Sixth Circuit Court of Appeals, 2021 – Present

United States District Court for the District of Columbia, 2017 – Present

PUBLICATIONS

Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. Penn. J. Const. Law, 1105, 1138 (2019).

- Ranked top 10 election law download upon publication on SSRN; Ranked top 10 download in various SSRN eJournals related to constitutional interpretation, judicial review, election law and voting rights, political institutions, conflict studies, political behavior, legislation, and social movements.
- This scholarship benefited from presentations with the Georgetown Law faculty writing workshop, the American Association of Law Schools Clinical Conference intensive paper workshop in Chicago, and the Stephen Ellmann Clinical Theory Workshop hosted by New York Law School.
- Providing ongoing news commentary and presentations on this topic: Wisconsin Public Radio; Slate (which called my legal scholarship a “groundbreaking study”); WBAI Pacifica Radio; CBS News; The Hill; Washington Post; Inside Higher Ed; University Business Magazine.
- Cited in:

Court Decisions & Filings

- *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. June 4, 2020), *vacated*, 978 F.3d 168 (5th Cir. Oct. 14, 2020), *cert den.* 141 S.Ct. 1124 (Jan. 11, 2021).
- Amicus Brief in support of Petitioners, *Garvia v. Abbott*, No. 19-1389 (U.S. Oct. 22, 2020) (I served as co-counsel).
- Pls.’ Appellate Brief, *Disability Law Center of Alaska v. Meyer*, No. 20-cv-173 (9th Cir. Dec. 1, 2020).
- Pls.’ Opposition Brief to Motion to Dismiss, *New Georgia Project v. Raffensperger*, 976 F.3d 1278 (N.D. Ga. July 10, 2020).
- Pls.’ Motion for Preliminary Injunction, *The Andrew Goodman Foundation v Bostelmann* (W.D. Wisc. Jan. 22, 2020) (I served as co-counsel).

Scholarship

- Jennifer Frost, *LET US VOTE! YOUTH VOTING RIGHTS AND THE 26TH AMENDMENT* (New York University Press, 2021).
- Nancy MacLean, *The Koch Network: Property Supremacist Ideology and Politics in the Twenty-First Century*, in *CAPITALISM CONTESTED: THE NEW DEAL AND ITS LEGACIES* (Romain Huret, Nelson Lichtenstein, Jean-Christian Vinel, eds., University of Pennsylvania Press, 2020).
- RL Hasen, L Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress’s Power to Enforce it*, Georgetown L. J. (2020).
- RL Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure them*, UC Irvine School of Law Research Paper (2020).
- CW Dunn et al., *Legal Theories to Compel Vote-by-Mail in Federal Court*, 11 Calif. L. Rev. Online 166 (2020).
- Louis Cholden-Brown, *Local Poll Site, National Implications*, Elon L. Rev. (2020).
- Steve Kolbert, *Does the Woman Suffrage Amendment Protect the Voting Rights of Men?* 43 Seattle U. L. Rev. 1147 (2020).
- Kristen Shaw, *Texas Democratic Party v. Abbott: Fifth Circuit Narrowly Interprets Twenty-Sixth Amendment, Putting Life and Liberty on the Ballot for Young Texas Voters*, 95 Tul. L. Rev. Online 71 (2021).
- Clement, Kristina, “More than Free Speech: Politics, Higher Education, and the First Amendment.” Dissertation, Georgia State University, 2020.
- Student Note, Ryan D’Ercole, *Fighting a New Wave of Voter Suppression: Securing College Students’ Right to Vote Through the Twenty-Sixth Amendment’s Enforcement Clause*, 78 Wash & Lee L. Rev. 1659 (2021).

Yael Bromberg, Esq.

Bromberg Law LLC, 43 West 43rd Street, Suite 32

New York, NY 10036-7424

ybromberg@bromberglawllc.com | Office: (212) 859-5083

Other Writings by Issue:

Voting Rights

- Yael Bromberg, forthcoming legal scholarship, *Youth Political Power and the Case for On-Campus Polling Sites: Intertwining Youth, Racial, and Disability Rights* (working title) (national analysis on the state of on-campus polling stations with legal, policy, and quantitative analysis).
- Yael Bromberg, Forthcoming article by invitation in The Atlantic's "Battle for the Constitution" project, on the Twenty-Sixth Amendment.
- Jennifer Frost and Yael Bromberg, *Can Manchin answer his predecessor's call on voting rights?*, The Hill (June 23, 2021), available at: <https://thehill.com/opinion/civil-rights/559907-can-manchin-answer-his-predecessors-call-on-voting-rights>
- Yael Bromberg, *Voting Rights are under siege – the 26th Amendment could be their salvation*, The Hill (March 26, 2021), available at: <https://thehill.com/opinion/campaign/545070-voting-rights-are-under-siege-the-26th-amendment-could-be-their-salvation>
- Yael Bromberg, 2021 State of Civil Society Report, *United States: The 2020 election is a political and moral mandate against fascism*, CIVICUS, Dec. 16, 2020 (international human rights annual report).
- Yael Bromberg, Jason Harrow and Joshua Douglas, *There is no place for age discrimination in voting*, The Hill (June 9, 2020), available at: <https://thehill.com/blogs/congress-blog/politics/501946-there-is-no-place-for-age-discrimination-in-voting>
- Report by Jason Harrow, Yael Bromberg, Joshua Douglas, Michael Donofrio, Tye Rush, *Age Discrimination in Voting* (June 4, 2020), released by coalition of The Andrew Goodman Foundation; Equal Citizens; Vote at Home Institute; UCLA Voting Rights Project; Stris Maher LLP, available at: www.andrewgoodman.org/vote-at-home-26
- Yael Bromberg, Allegra Chapman & Dale Eisman, *Tuning In & Turning Out: Millennials are active but not voting: what's stopping them & how can we make their voices count?* Common Cause (2016), available at: www.youthvoting.net
- Blog, Yael Bromberg, Huffington Post, "As Voting War Shifts to Carolina Courtroom, Thousands March for Voting Rights," July 16, 2015.
- Blog, Yael Bromberg, Huffington Post, "Campaign Preview? Clinton and Christie Spar Over Early Voting in New Jersey," June 10, 2015.
- Frank Askin and Yael Bromberg, "Ballot or Placebo? – The Provisional Ballot Scam," Opinion Editorial, New Jersey Law Journal, May 2011.
- Frank Askin and Yael Bromberg, "The Youth Vote," Noted Section, The Nation, May 30, 2011.
- Frank Askin and Yael Bromberg, "N.J. Voters Need to be Able to Register at Polls," Opinion Editorial, Star-Ledger, June 7, 2011, available at: https://www.nj.com/njv_guest_blog/2011/06/nj_voters_need_to_be_able_to_r.html

Good Government

- Yael Bromberg and Eirik Cheverud, *Anti-Trump Protesters Risk 60 years in Jail. Is Dissent a Crime?*, THE GUARDIAN, Nov. 22, 2017. Article promoted by [Flipboard](#) (26K shares).
- Blog, Yael Bromberg, Huffington Post, "ALEC Losing Clout, Legitimacy amid Ongoing Controversy and Tax Fraud," May 20, 2015.
- Blog, Yael Bromberg, Huffington Post, "Why America Needs to Pay Attention to Chris Christie's Terrible, Horrible, No Good, Very Bad Week," Feb. 7, 2015. Article promoted by [Flipboard](#).
- Blog, Yael Bromberg, Huffington Post, "*Williams-Yulee* Is Not About Free Speech, It's About Judicial Integrity," Jan. 19, 2015.

Employment Misclassification

- Report, David Bensman and Yael Bromberg, "Truck Drivers' Survey at the New Jersey Ports," January 2009.
- David Bensman and Yael Bromberg, "Deregulation has Wrecked Port Trucking Systems," Special Opinion Editorial, Bergen Record, Sunday March 29, 2009.

Yael Bromberg, Esq.

Bromberg Law LLC, 43 West 43rd Street, Suite 32

New York, NY 10036-7424

ybromberg@bromberglawllc.com | Office: (212) 859-5083

Immigrant Rights

- Yael Bromberg, Legal Memorandum for Statement for the Record at the Hearing: “President Obama’s Executive Overreach on Immigration,” United States House of Representatives Committee on the Judiciary (Dec. 2, 2014), *available at*: <http://www.commoncause.org/policy-and-litigation/testimony/testimony-to-house-judiciary-immigration-executive-actions.pdf>

SELECTED PRESENTATIONS

Popular News

- Interview, Youth Voting Rights, CSPAN TV and CSPAN Live Radio (Dec. 22-30, 2021 rebroadcasts). Interviewed by Morley Winograd, in discussion with Mike Hais, for America At a Crossroads, a virtual series by Jews United for Democracy & Justice (5K monthly listeners).
- Guest, We the People Podcast, National Constitution Center, *Story of the Twenty-Sixth Amendment* (Aug. 26, 2021), *available at*: <https://constitutioncenter.org/interactive-constitution/podcast/the-story-of-the-26th-amendment> (150K monthly listeners) (my co-guest is Jay Berman, former chief of staff for Senator Birch Bayh, chairman of Senate Subcommittee on Constitutional Amendments).

Academic

- Moderator, *Constitution Day 2021: Fulfilling the Promise of the 26th Amendment*, Eagleton Institute of Politics Center for Youth Political Participation (Sept. 17, 2021) (joined by youth leaders across the country and then-youth organizer behind the successful push for ratification) (widely co-sponsored by national and state voting groups and academic centers).
- Special Event Lecturer, *Student Rights Under Attack: The 26th Amendment and You*, Duke University Sanford School of Public Policy (Feb. 2020).
- Speaker, *What Happens Next? A post-election analysis*, Georgetown Law Students for Democratic Reform (Nov. 6, 2020) (all co-panelists are current and former commissioners of the Federal Elections Commission and the U.S. Commission of Civil Rights).
- Speaker, Close Up Washington D.C., *The 26th Amendment & the 18 Year Old Vote: 50 Years Later* (March 25, 2021).
- Speaker, *Gen Z Votes: Fight for Youth Vote*, NYU Skirball Center (Sept. 22, 2020).
- Tedx Talk, *Youth Power, Youth Voting, & The Twenty-Sixth Amendment*, Hamilton College (Feb. 2020).
- Panelist, *Whose Speech? A Post-Charlottesville Discussion*, Georgetown Law (March 2018).
- Discussant on Panel moderated by Ari Berman, *Tuning In and Turning Out: Millennials are active but not voting; what's stopping them and how can we make their voices count?* George Washington University (2016).
- Panelist, *Annual First Monday Program: The Voting Rights Act at 50*, Rutgers School of Law Eric R. Neisser Public Interest Program (Oct. 7, 2015).
- Special Event Guest, *National Voter Rights Panel*, Bard College (forthcoming November 2021).

Legal

- Accredited CLE Session Speaker, *Youth Voting Rights, Election Protection, and the Twenty-Sixth Amendment*, D.C. Bar Association 2020 Conference: 100 years of the 19th Amendment (Oct. 20, 2020).
- Accredited CLE Seminar Speaker, *Twenty-Sixth Amendment*, Vermont Bar Association Annual Meeting (Oct. 9, 2020).
- Speaker, *Lifting our voices: Importance of 2020 Elections, 2020 Census & Gender Equity*, NJ Hispanic Bar Association: 2020 Women’s Empowerment Leadership & Law Conference (June 25, 2020).
- Speaker and Faculty Advisor, Rutgers Law Review Symposium (forthcoming Spring 2022).

Conferences & Field Engagements

- Keynote Speaker, Virginia Student Democracy Summit (Sept. 25, 2021).

Yael Bromberg, Esq.

Bromberg Law LLC, 43 West 43rd Street, Suite 32

New York, NY 10036-7424

ybromberg@bromberglawllc.com | Office: (212) 859-5083

- Keynote Speaker, North Carolina College Voter Summit (Sept. 17, 2021).
- Keynote Speaker, The Andrew Goodman Foundation's *National Civic Leadership Training* (2019).
- Guest Speaker, League of Women Voters of Fair Lawn, NJ, Annual Holiday Meeting (December 2019).
- Three-time panelist, annual cross-partisan American Promise's *National Citizenship Leadership Conference*, Washington, D.C. (2016-2020).
- Panelist, The Andrew Goodman Foundation's *Take Your Power Back Weekend*, National Civic Leadership virtual conference with athletes, celebrities, organizers, and experts (Aug. 2020).
- Lecturer, Sacramento Renaissance Society (June 29, 2021).
- Lecturer, Osher Lifelong Learning Institute, Berkshire Community College (Oct. 2021).

PRIOR LAW PRACTICE & RELATED EXPERIENCE

COMMON CAUSE – *HOLDING POWER ACCOUNTABLE*, Washington, D.C.

Legal Associate, 2014 – 2016

Worked with legal, program, communications, and state staff to identify and manage legal and legislative research, litigation and policy analysis needs to support Common Cause's issue campaigns and strategic priorities, including campaign finance reform, voting rights, elections, redistricting, judicial ethics and other good government issues. Analyzed and evaluated data and evidence such as demographic and geographic data, election records, historical evidence, statistical studies, and general document review. Researched factual and legal issues for federal and state litigation docket.

HON. DICKINSON R. DEBEVOISE, UNITED STATES DISTRICT COURT JUDGE, Newark, NJ

Judicial Clerk, United States District Court for the District of New Jersey, Jan. 2012 – Aug. 2014

Prepared draft opinions and bench memoranda for dispositive motion practice in a variety of civil matters. Regularly communicated with litigants concerning case management. Assisted with trial preparation and conduct of trials. Attended court proceedings including oral argument, settlement negotiation, arraignment, sentencing, and trial.

RUTGERS CONSTITUTIONAL LITIGATION CLINIC, Newark, New Jersey

Kinoy/Stavis Public Interest Fellow, & Rutgers Research Fellow, 2009 – 2011

Developed state constitutional rights challenge for Election Day Registration on behalf of youth class. Lead initiative to register eligible county inmates to vote and vote-by-mail. Protected provisional ballots before county boards of elections cast primarily by student-voters. Analyzed state legislation affecting developmentally-disabled population. Assisted in drafting petition for certiorari to U.S. Supreme Court challenging the Declaration of the War in Iraq.

Research Assistant for Clinic Co-Director Penny Venetis, 2010 – 2011

Assisted in writing legal article on U.S. jurisprudence of customary international law human rights claims, published in Temple Political & Civil Rights Law Review. "The Broad Jurisprudential Significance of *Sosa v. Alvarez-Marcain*: An Assessment of the Role of Federal Judges and Why Customary International Law is More Effective for Redressing Serious Abuses than Constitutional Law." One of four papers selected for presentation at International Human Rights Section of the Association of American Law Schools (AALS) Conference.

NY/NJ PORT SUSTAINABILITY PROJECT:

RUTGERS SCHOOL OF MANAGEMENT & LABOR RELATIONS, New Brunswick, New Jersey

Principal Researcher, NY-NJ Port Project, 2008

Co-wrote and distributed 50+ question quantitative and qualitative survey, and co-wrote Survey Report with Prof. David Bensman, funded by NJ Department of Labor and the National Science Foundation. Study of working conditions of 300 randomly-selected container truck drivers at Port of New Jersey, which indicated widespread employment-misclassification of independent contractors in a deregulated transportation logistics industry. Report findings widely covered in Huffington Post, New York Times, Journal of Commerce, etc.

Yael Bromberg, Esq.

Bromberg Law LLC, 43 West 43rd Street, Suite 32

New York, NY 10036-7424

ybromberg@bromberglawllc.com | Office: (212) 859-5083

LEADERSHIP

Visiting Associate, Eagleton Institute of Politics, Rutgers University (incoming)

Strategic Advisor, Represent Women (incoming) – a national organization dedicated to achieving parity for women in politics and strengthening our democracy by advancing reforms that break down barriers to ensure women can run, win, serve, and lead.

Advisory Council, American Promise (2019 to present) – a national cross-partisan citizen-led organization to ratify the Twenty-Eighth Amendment for lasting reform to re-balance our politics and government by putting the rights of individual citizens before the privileges of concentrated money, corporations, unions, political parties, and superPACs.

Advisory Committee, *Voting: a documentary series* (2020 to present) – a four-part series being pitched to Netflix, Hulu etc., produced by Charles Koppelman and various organizers behind the Twenty-Sixth Amendment ratification effort.

Founding Committee, Rutgers Law School Alumnae Network (2021)

National Working Group, Writing the 28th Amendment, an 18-month program facilitated by American Promise (2017 – 2019) – Contributing constitutional expertise with legal scholars and practitioners, committed citizens, and members of Congress and state legislatures, to study, deliberate, and report on the most effective language for ratification of a 28th Amendment to curb the role of money in politics and overturn *Citizens United*.

CERTIFICATE OF SERVICE

I, Rylee Sommers-Flanagan, hereby certify that I have served true and accurate copies of the foregoing Affidavit - Affidavit in Support to the following on 01-14-2022:

Ryan Ward Aikin (Attorney)
1018 Hawthorne St.
Missoula MT 59802
Representing: Blackfeet Nation
Service Method: eService

Matthew Prairie Gordon (Attorney)
1201 Third Ave
Seattle WA 98101
Representing: Montana Democratic Party
Service Method: eService

John C. Heenan (Attorney)
1631 Zimmerman Trail, Suite 1
Billings MT 59102
Representing: Montana Democratic Party
Service Method: eService

Peter M. Meloy (Attorney)
2601 E. Broadway
2601 E. Broadway, P.O. Box 1241
Helena MT 59624
Representing: Montana Democratic Party
Service Method: eService

Austin Markus James (Attorney)
1301 E 6th Ave
Helena MT 59601
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

David Francis Knobel (Attorney)
490 N. 31st St., Ste 500
Billings MT 59101
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

Dale Schowengerdt (Attorney)
900 N. Last Chance Gulch
Suite 200
Helena MT 59624
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: Western Native Voice
Service Method: eService

Confederated Salish And Kootenai Tribes (Plaintiff)
Service Method: Email

Fort Belknap Indian Community (Plaintiff)
Service Method: Email

Northern Cheyenne Tribe (Plaintiff)
P.O. Box 128
Lame Deer 59043
Service Method: Email

David M.S. Dewhirst (Attorney)
P.O. Box 201401
Helena 59620
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: Email

Kathleen Lynn Smithgall (Attorney)
P.O. Box 201401
Helena 59620
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: Email

Electronically Signed By: Rylee Sommers-Flanagan
Dated: 01-14-2022