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IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

Montana Democratic Party,

Plaintiff,

vs.

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

Defendant.

Cause No.: DV-56-2021-451

Hon. Michael Moses

DEFENDANT'S BRIEF IN RESPONSE TO PLAINTIFFS' PRELIMINARY INJUNCTION MOTIONS AND IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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

Cheyenne Tribe,

Plaintiffs,

vs.

Christi Jacobsen, in her official capacity as

Montana Secretary of State,

Defendant.

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

Plaintiffs,

vs.

Christi Jacobsen, in her official capacity as

Montana Secretary of State,

Defendant.

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Introduction

There can be no dispute that Americans are losing faith in the electoral process. Nearly two-thirds of Americans believe "democracy is in crisis." SUF, ¶ 2.[1] A **minority** of Americans believe their elections are free of fraud. SUF, ¶ 3. Over 40% of Americans are "not confident" in the "integrity of the U.S. electorate system overall." SUF, ¶ 4. Members of **both** major political parties have lost faith in American elections. *See* SUF, ¶ 7. Although the 2020 presidential election exacerbated Americans' lack of confidence in elections, it was not the root cause; the number of Americans who believed "in the honesty of their country's elections" declined steadily from 2006 to 2016. SUF, ¶ 5. And Montana is no different. Public confidence in Montana elections is slightly lower than most States. SUF, ¶ 14. It should be no surprise, then, that voter fraud has been documented in Montana. SUF, ¶¶ 34-41.

The systemic dangers posed by the public's lack of confidence in democratic elections is self-evident. Political scientists have concluded "if citizens believe, **for whatever reason**, that an election is deeply flawed or even stolen, doubts are likely to spread rapidly to other core political institutions" because "most people regard free and fair elections . . . as the core pillars of democracy." SUF, ¶ 8. The U.S. Supreme Court agrees. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

The Framers of Montana's Constitution similarly understood that democracy will thrive only if its citizens believed elections were free, fair, and protected from fraud. The Framers concluded the Montana Legislature was the appropriate branch of government to do just that.

[1] Citations to "SUF" refer to the corresponding paragraphs in Defendant's Statement of Undisputed Facts in Support of Summary Judgment (Exhibit 3).

Accordingly, the Framers imposed a unique constitutional obligation on the Legislature. In addition to permitting the Legislature to regulate the time, place, and manner of elections, the Montana Constitution went further and required the Legislature to "insure the purity of elections and guard against abuses of the electoral process." Mont. Const. art. IV, § 3. Delegate Robert Vermillion, who drafted that language, explained it gives the Legislature "the power to pass whatever statutes it deems necessary . . . to make sure that there are no frauds perpetrated upon the people of Montana in elections." Mont. Const. Convention, Verbatim Transcript, Feb. 17, 1972, p. 450.

The 67th Montana Legislature was keenly aware of its constitutional obligation to protect Montana elections, and Montanans' cratering confidence in election integrity. SUF, ¶¶ 56–59. It listened to concerns from various stakeholders regarding Montana election law, including: (i) voters' lack of confidence in the security and administration of Montana elections; (ii) the burden election day registration imposed on election administrators, especially in smaller counties; (iii) concerns about long lines at polling places; (iv) delays in reporting election results and concerns about their accuracy; and, (v) concerns of those who opposed changes to Montana election law. SUF, ¶ 53.

The Legislature has consistently sought to strike a balance between making voting easy while also fulfilling its duty to improve public confidence by "ensur[ing] fair and safe elections in Montana." SUF, ¶ 58. When the Legislature concluded the public interest was best served by relaxing voting laws, it did so. And when the Legislature concluded election laws needed to be strengthened to protect elections, it fulfilled its constitutional obligation. SUF, ¶ 59.

Plaintiffs object to four discreet pieces of Legislation that strengthened and improved Montana's election procedures. But that Legislation is generally applicable, nondiscriminatory, and eminently reasonable. In other words, it is precisely the type of legislation the U.S. Supreme Court consistently has affirmed on rational basis review. This Court should do likewise, especially considering there is **no** evidence the Legislature enacted the Legislation to "harm or disadvantage any particular class or group of voters." SUF, ¶ 61. And Plaintiffs offer no evidence the Legislation has prohibited any Montanans from voting.

For these reasons, and those established below, the Court should deny Plaintiffs' Motions for Preliminary Injunctions, and grant Defendant's Motion for Summary Judgment in full.

Preliminary Injunction Standard

"A preliminary injunction is an extraordinary remedy and should be granted with caution based in sound judicial discretion." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794. If a preliminary injunction "will not preserve the status quo and minimize harm to all parties pending a full trial on the merits, it should not be issued." *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 297–98 (Mont. 1995).

The party seeking a preliminary injunction bears the initial burden. *Sandrock v. DeTienne*, 2010 MT 237, ¶ 16, 358 Mont. 175, 243 P.3d 1123. "For an injunction to issue under § 27–19–201(1), MCA, an applicant must show that he 'has a legitimate cause of action, and that he is likely to succeed on the merits of that claim' . . . as well as demonstrating that an injunction is an appropriate remedy." *Id.* The applicant "must show a prima facie case that he will suffer irreparable injury before the case can be fully litigated." *Maurier*, ¶ 11. Because "statutes are presumed to be constitutional," parties challenging the constitutionality of a statute in a

preliminary injunction application "bear[] the heavy burden" of "mak[ing] out a prima facie case of unconstitutionality." *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548.

Moreover, the Court "has a duty to balance the equities and minimize potential damage," including by weighing how an injunction could affect the public interest. *Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342; *see also Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1154 (D. Mont. 2004) ("In issuing an injunction, the court must balance the equities between the parties and give due regard to the public interest.") For example, the U.S. Supreme Court held "due regard for the public interest in orderly elections supported the District Court's discretionary decision to deny a preliminary injunction[.]" *Benisek v. Lamone*, 138 S. Ct. 1942, 1944–45 (2018). "Preliminary injunctions do not resolve the merits of the case" and courts may "not express any opinion about the ultimate merits" of the underlying case." *DeTienne*, ¶ 13 (citations omitted).

Montana law also imposes a higher burden of proof when, as here, a party seeks a "mandatory injunction," as opposed to a prohibitory injunction. *Paradise Rainbows v. Fish & Game Comm'n*, 148 Mont. 412, 420, 421 P.2d 717, 721–22 (Mont. 1966). Preliminary injunctions that occur at the beginning of litigation often are referred to as "prohibitory injunctions" because they prohibit a party "from taking action" and therefore "'preserve the status quo[.]'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009). Once an action already has occurred, courts are limited to imposing "[m]andatory injunctions," which "change the status quo and require a positive action on the part of the defendant." *Split Fam. Support Grp. v. Moran*, 232 F. Supp. 2d 1133, 1135–36 (D. Mont. 2002) (citations omitted). Montana law imposes a higher burden of proof on a plaintiff seeking a "mandatory injunction."

Paradise Rainbows, 148 Mont. at 420, 421 P.2d at 721; *Moran*, 232 F. Supp. 2d at 1135-36 ("a mandatory injunction is subject to a higher scrutiny").

Summary Judgment Standard

In addition to responding to Plaintiffs' belated preliminary injunction motions, Secretary Jacobsen also moves for summary judgment. There are no *material* disputes of fact and constitutional challenges to statutes are questions of law appropriate for resolution on summary judgment.

Undoubtedly, the Supreme Court will ultimately resolve these cases. Delaying that resolution until after a June or August trial makes little sense and benefits no one. Rather, deciding these cases well in advance of the rapidly approaching elections is necessary to avoid voter confusion and facilitate the orderly administration of the elections, not to mention reasoned and orderly judicial decision making.

What's more, trial is unnecessary to resolve constitutional challenges to statutes. Whether a "challenged statutory provision substantially interferes with a fundamental right, **facially or as applied**, is a question of law." *Clark Fork Coal. v. Montana Dep't of Nat. Res. & Conservation*, 2021 MT 44, ¶ 48, 403 Mont. 225, 481 P.3d 198 (emphasis added); *see also Comm'r of Pol. Pracs. for State through Mangan v. Wittich*, 2017 MT 210, ¶ 71, 388 Mont. 347, 400 P.3d 735; *State v. Hamilton*, 2018 MT 253, ¶ 22, 393 Mont. 102, 428 P.3d 849 (analyzing constitutionality of statute "is a question of law that may be resolved before trial"). And courts consistently resolve constitutional challenges to statutes regulating elections on summary judgment. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 187–88 (2008).

"Summary judgment should be granted 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Hiland Crude, LLC v. State Dep't of Revenue*, 2018 MT 159, ¶ 7, 392 Mont. 44, 421 P.3d 275 (quoting M. R. Civ. P. 56(c)(3)). Secretary Jacobsen meets this standard and is entitled to judgment as a matter of law.

Montana law requires the Court to decide whether the statutes Plaintiffs have challenged are constitutional. *See Wittich*, ¶ 71 (quoting § 26-1-201, MCA). Statutes are "presumptively constitutional," and the challenging party must "prov[e] it unconstitutional beyond a reasonable doubt." *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 7, 354 Mont. 133, 227 P.3d 42. The Court's ultimate decision should be guided by its own legal analysis, and not expert testimony. *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748 n. 8 (5th Cir. 1983) (surveying cases establishing there "are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial").

Argument

I. Plaintiffs Lack Standing.

Defendants lack standing for the reasons stated in Secretary Jacobsen's motion to dismiss MDP's complaint (Dkt. 11, pp. 5-10; Dkt. 19, pp. 2-9), which is incorporated by reference. All Plaintiffs, except Mitch Bohn, are organizations, not voters. They cannot transform their generalized policy grievances into constitutional challenges to laws that only apply to voters. *See Driscoll v. Stapleton*, 2020 MT 247, ¶ 45, n.7, 401 Mont. 405, 373 P.3d 386 ("it is difficult to understand how the Democratic Party . . . can possibly have standing to assert an alleged infringement of the constitutional rights of persons *other than themselves*.") (Sandefur, J.,

concurring and dissenting); *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (plaintiff organizations must make "specific allegations establishing that at least one identified member had suffered or would suffer harm.")

No plaintiff has identified a single voter claiming concrete harm from these statutes, much less a voter who would be prohibited from voting.[2] That is not surprising given how easy it is to vote in Montana and the minimum burden imposed by the challenged statutes. Thus, Plaintiffs lack both organizational and associational standing. *Baxter Homeowner's Assoc., Inc. v. Angel*, 2013 MT 83, ¶¶ 15-17, 369 Mont. 398, 298 P.3d 1145 (plaintiff lacked associational and organizational standing on behalf of unidentified or hypothetical parties).

The only individual Plaintiff is Mitch Bohn, who is challenging HB 530's prohibition on paid ballot collection. But Mr. Bohn has suffered no concrete harm because, like most Montanans, he votes absentee in every election and has always successfully mailed his ballot. Bohn Decl. ¶ 6 (Dkt. 63). Without identifying an individual who has suffered or will suffer concrete harm, Plaintiffs lack standing. Dkt. 11, pp. 5-10; Dkt. 19, pp. 2-9.

II. Plaintiffs' inexplicable delay in requesting a preliminary injunction undercuts their claim of irreparable harm and—standing alone—warrants denying their motions.

This consolidated case was initiated in May 2021. Plaintiffs waited nine months to seek injunctive relief on SB 169, over seven months to seek injunctive relief on HB 176 and HB 530, and over four months to seek injunctive relief regarding HB 506. During this time, the Secretary uniformly implemented the legislation Plaintiffs now seek to enjoin—and educated the Montana

[2] The WNV plaintiffs, when asked to identify individuals with concrete harms refused to identify anyone based on claimed privacy interests. Plaintiffs cannot make claims for voters but then refuse to identify them. Declaration of Dale Schowengerdt, Ex. 1–23, Answer to Interrogatory No. 11.

public about how these legislative changes apply—in various ways, including by: (i) adopting new administrative rules; (ii) broadcasting public service announcements across various media describing the changes; (iii) training Montana election administrators; (iv) creating and implementing new components of Montana's voting infrastructure, such as new voting software, new voting forms, etc.; (v) ensuring compliance with Montana law during elections that took place on May 4, 2021, September 14, 2021, and November 2, 2021; and (vi) preparing for upcoming elections scheduled for May 3, 2022, June 7, 2022, and November 8, 2022. SUF ¶¶ 118–124. Plaintiffs now seek to undo Defendant's efforts and fundamentally change the status quo of Montana's election infrastructure. The "mandatory injunction" Plaintiffs seek is subject to a high burden. *Paradise Rainbows*, 148 Mont. at 420.

Preliminary injunctions typically are only "granted at the **commencement of an action** before there can be a determination of the rights of the parties to preserve the subject in controversy in its existing condition pending a determination," and not well after the status quo has changed. *Boyer v. Karagacin*, 178 Mont. 26, 34, 582 P.2d 1173, 1178 (Mont. 1978) (emphasis added); *see also Flint v. Dennison*, 336 F. Supp. 2d 1065, 1070 (D. Mont. 2004) (denying preliminary injunction in school election case because a "'preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights" and "'by sleeping on its rights a plaintiff demonstrates the lack of need for speedy action'") (citations omitted). A "long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction." 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1 (3d ed. 2021).

In election law cases, courts routinely deny such requests when plaintiffs' delay in seeking injunctive relief has permitted the alleged "irreparable harm" at issue to occur. For example, the U.S. Supreme Court affirmed the denial of a preliminary injunction when plaintiffs challenged elections laws **after** they had been implemented and **after** several elections already had occurred. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("a party requesting a preliminary injunction must generally show reasonable diligence," a principle that "is as true in election law cases as elsewhere"); *see also Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (denying application for preliminary injunction when plaintiffs "delayed unnecessarily" in seeking relief from election laws). The Supreme Court has reasoned that "due regard for the public interest in orderly elections" weighs against granting injunctive relief, i.e. election officials should be permitted to proceed under existing election laws pending ultimate review on the merits so as not to inject chaos and uncertainty into upcoming elections. *Burdick*, 138 S. Ct. at 1944-45.

Courts consistently have concluded that delay of as few as 36 days after learning of an alleged "irreparable harm" compelled denial of a preliminary injunction. *See Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90–91 (D.D.C. 2014) (delay of "thirty-six days" not permitted and surveying supporting cases); *see also Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1221–22 (D. Utah 2004), *aff'd*, 425 F.3d 1249 (10th Cir. 2005) (delay in seeking preliminary injunction of "a full three months after their Complaint was filed . . . belies any irreparable injury to their rights"). Denial also is required here in response to Plaintiffs' far greater delays.

Granting a preliminary injunction at this late stage, before the merits of the dispute are resolved, would significantly harm the State's significant efforts to finish implementing the laws,

would confuse voters, and would further undermine public confidence in the electoral process. The unexplained delay in this case is reason enough to deny Plaintiffs' motions in their entirety.

This Court should apply well-settled law, reject Plaintiffs' untimely request to fundamentally alter the current structure election officials have worked hard to establish following the 2021 Legislative session, and permit the Secretary to fulfill her constitutional duty of ensuring uniformity in the administration of Montana election laws, pending the Court's final adjudication of Plaintiffs' claims.

III. SB 169's minor changes to voter ID requirements do not violate equal protection or the right to vote.

A. Background of Montana's Voter ID Law and SB 169.

Montana adopted the current voter identification process in 2003 to comply with federal mandates requiring all states to enact voter identification laws. 2003 Montana Laws Ch. 475 (HB 190). SB 169 amended these existing regulations. SUF 98–117. The Governor signed the bill on April 19, 2021.

Montana's voter identification laws (both before and after SB 169) split acceptable forms of ID into two types, primary and non-primary. Primary IDs are sufficient by themselves to establish voter identification, and include government-issued IDs such as a driver's license, passport, or tribal identification card. Non-primary IDs may be used in conjunction with a supporting document such as a utility bill, bank statement, paycheck, voter registration, government check, or another government document that shows the voter's name and address. § 13-13-114 (1)(a)(i-ii), MCA; *see* SUF ¶¶ 106–107; *see* Declaration of Austin Markus James, ¶¶ 39–46 (Exhibit 2).

SB 169 made modest changes to acceptable primary identification. *See* James Decl, ¶¶ 17–22. First, SB 169 removed the requirement that the primary ID be "current and valid," so an expired driver's license or other expired qualifying ID is now sufficient. Defendant requested that legislative change after listening to several Tribes, who stated the "current and valid" language interfered with Native voting because it was sometimes unclear whether Tribal IDs were current. In response to Defendant's request, the Legislature eliminated the "current and valid" requirement. James Decl., ¶ 21, 58–64. SB 169 also expanded the categories of primary identification. § 13-13-114(1)(a)(i), MCA.

SB 169 also provides a neutral, clear method for voting with non-primary ID, treating all forms of non-primary identification equally. *Id.* (1)(a)(ii). Student IDs are one form of non-primary identification, and are acceptable when presented with a utility bill, bank statement or any "government document that shows the elector's name and current address," including a voter registration card. Contrary to Plaintiffs' consistent misconstruction of the statute, a student ID combined with a voter registration card is sufficient. James Decl., ¶¶ 42–45. Indeed, Montana voter registration cards explicitly state: "This card paired with a photo ID containing your name may be used as identification when you vote." James Decl., ¶ 33.

Even if a voter is unable to comply with these requirements, there are additional protections for voters in uncommon situations. The voter may cast a provisional ballot and has until 5:00 p.m. the day after the election to verify their identity by submitting valid identification, either in person, or by fax, email, or mail postmarked the day after the election. Additionally, if there is an impediment to the voter's ability to present a photo ID, the vote still may be counted if the voter submits: (i) a qualifying document that shows the voter's name and address like a

utility statement, paycheck, or voter registration card; and (ii) an affidavit on a readily available form stating there is a reasonable impediment to meeting the photo identification requirements. § 13-15-107(3), MCA. And even if an elector cannot utilize the reasonable impediment process, the elector may use the Polling Place Elector Identification Form process set forth by administrative rule. *See* ARM 44.3.2102(7); ARM 44.3.2103(1)(f).

B. SB 169 does not violate Equal Protection because it treats all voters alike and MYA and MDP fail to show the law was enacted with discriminatory intent.

1. SB 169 is facially neutral and there is no evidence of a discriminatory purpose.

MDP and MYA fail to present a specific argument showing how SB 169 violates Montana's Equal Protection Clause. MDP argues "young Montanans are unduly affected because the Restrictions constrict identification[.]" MDP Brief at 18 (Dkt. 57). The entirety of MYA's argument is that "young voters . . . can no longer rely on the most readily accessible form of ID (SB169)." MYA Brief at 15–16 (Dkt. 73). These conclusory statements fall far short of the requirement that MDP and MYA establish a "prima facie" case showing SB 169 violates Montana's Equal Protection Clause. *See Weems v. State by & through Fox*, 2019 MT 98, ¶ 18, 395 Mont. 350, 440 P.3d 4.

SB 169 is facially neutral—it subjects all voters to the same requirements. A facially neutral law may only be subject to an equal protection claim if plaintiffs establish (1) a disparate impact on a specific class of persons and; (2) substantial evidence of discriminatory intent towards that class. *See Gazelka*, ¶ 16; *Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002, 1010 (Mont. 1981). This is because the "the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose." *Roe v. City of Missoula, ex*

rel. Missoula City Council, 2009 MT 417, ¶ 38, 354 Mont. 1, 221 P.3d 1200. MDP and MYA cannot establish either element of their equal protection claim.

MYA and MDP fail to establish a disparate impact to an identifiable class. MDP and MYA do not adequately define a class, but instead vaguely refer to "young voters." MDP and MYA also fail to offer sufficient evidence of a disparate impact to this purported class. MDP simply argues, with virtually no supporting evidence, that a *student* is more likely to have a student identification card than a driver's license, a utility bill, or a bank statement. *See* MDP Brief at 8–9 (Dkt. 57). But neither MYA nor MDP present any evidence to support the necessary next step in the analysis: establishing a disparate impact on "young voters." Nor could they, because not all, nor even most, "young voters": (i) have student identification cards; and/or (ii) lack other acceptable forms of identification. Plaintiffs offer no evidence to suggest otherwise.

Essentially, then, MYA and MDP's argument is that SB 169 violates Montana's Equal Protection Clause because it might prevent some "young voters" from using an identification method that might be available to some of them and might be preferrable to those who have it. A central problem with MDP and MYA's argument is that they ask this Court to view a student ID as a proxy for all "young voters." But possession of a student ID means nothing more than—at one time or another—the individual was (ostensibly) enrolled in an educational institution. Mere possession of a student ID does not entitle an individual to preferential treatment under Montana's election laws.

Plaintiffs also fail to present competent evidence that a qualified elector in possession of a student ID is less likely to have another form of primary or secondary identification. Ultimately, SB 169 gives such voters **additional** access to the ballot that is not constitutionally required.

Because only students (and former students) possess this form of identification, they have a tool not available to the general population (including other young Montanans).

MDP or MYA also present nothing more than conclusory allegations of discriminatory intent. Their equal protection claim fails for this reason as well. Alleging discriminatory intent requires **facts** that show specific and purposeful action "because of, not merely in spite of, [the] adverse effects upon an identifiable group." *Rack Room Shoes v. United States*, 718 F.3d 1370, 1376 (Fed. Cir. 2013) ("mere awareness" of consequences of law not discriminatory intent). Fatally, Plaintiffs have not shown **any** facts establishing the Legislature intended to harm "young voters" by establishing a uniform standard requiring government-issued IDs as primary identification. *See Fitzpatrick*, 194 Mont. at 323, 638 P.2d at 1010. Instead, the record reflects that Legislators supported SB 169 because it removed a barrier to voting faced by tribal members, added clarity for election administrators, and gave appropriate deference to government issued IDs. Hertz Decl. ¶¶ 13–16.

MYA and MDP provide no evidence to counter these facts and have not made a prima facie case of an equal protection violation. Consequently, the Court should deny Plaintiffs' request for injunctive relief and enter summary judgment in favor of the Secretary on Plaintiffs' Equal Protection claim regarding SB 169.

2. SB 169 does not impose a substantial burden, and Plaintiffs' equal protection and right to vote claims are subject to rational basis review.

Even if MYA and MDP alleged facts sufficient to state a prima facie equal protection claim, Plaintiffs' argument that SB 169 is subject to strict scrutiny because it "implicates" the right to vote is wrong. Their theory, if accepted, would obliterate the Legislature's constitutional duty to regulate elections to prevent fraud and increase voter confidence in the electoral process.

Plaintiffs erroneously assume "**[a]ny** governmental infringement" on the right to vote is unconstitutional "unless strict scrutiny is satisfied." *See* WNV Brief at 15–16 (Dkt. 42) (citations omitted) (emphasis added). Plaintiffs make this flawed argument with each of the challenged laws and, as explained below, it is wrong in every case.

If Plaintiffs were correct, each and every Montana statute and regulation affecting elections—including statutes Plaintiffs ostensibly support—would be rendered unconstitutional unless the State could prove the law passed strict scrutiny.[3] Montana courts would become consumed with determining whether thoroughly banal statutes could survive the most exacting constitutional review. *See, e.g.,* § 13–13–241(1)(a), MCA (law requiring election administrators to examine signatures on absentee ballots); §13–15–107(1) (law providing a 5 p.m. deadline for an elector to provide valid eligibility information after casting a ballot as a provisional registered individual). It is unsurprising, then, that Plaintiffs cannot cite to a single federal or state court opinion requiring "any" statute regulating elections be subjected to strict scrutiny.

The Court should reject Plaintiffs' argument that the Court must rigidly apply strict scrutiny in **all** voting cases. The Court should instead apply the "more flexible standard" adopted by federal courts (the "*Anderson-Burdick* standard"). *See Burdick v. Takushi*, 504 U.S. 428, 433–35 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)) (it is an "erroneous

[3] As discussed below, Article IV, § 3 directs the Montana Legislature to regulate Montana elections. The Montana Legislature has done so by creating an election infrastructure consisting of hundreds of distinct statutes. *See* §§ 13-1-101 to 13-38-205, MCA. The Montana Legislature also has delegated authority to the Montana Secretary of State to adopt numerous rules and regulations regarding elections. *See* §§ 13-1-201, et seq, MCA; *see also* Admin. R. Mont. 44.3.101, et seq.

assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold.").

The *Anderson-Burdick* standard balances individual voting rights against States' interests in administering elections. When voting rights are subjected to a "severe" restriction, courts apply strict scrutiny. *Burdick*, 504 U.S. at 434. But when an election law imposes "'reasonable, nondiscriminatory restrictions'" on voting rights, as most election statutes do, rational basis review applies. *Id.*

While acknowledging voting is a fundamental right, the *Anderson-Burdick* standard also recognizes the practical reality that, for citizens to exercise that right, States must be permitted to regulate elections to ensure they are legitimate, efficient, and fair:

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.' **Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently**.

Burdick, 504 U.S. at 433 (internal citations omitted) (emphasis added). Thus, the "general rule" is "evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious" and, thus, easily satisfy rational basis review. *Crawford*, 553 U.S. at 189–91 (plurality) (rejecting equal protection challenge to voter ID) (citations omitted); *Cf. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021) (under the federal Voting Rights Act, "the size of the burden imposed by a challenged voting rule is highly relevant.").

The *Anderson-Burdick* standard fits well within the Montana Supreme Court's election law jurisprudence. When litigation implicates competing constitutional interests, the Montana Supreme Court directs district courts to balance those interests. Although the right to vote is fundamental, the United States Constitution delegates the power to regulate the time, place, and manner of holding elections to state legislatures, U.S. Const. art. I, § 4, and the Montana Constitution places an independent duty on the Legislature to regulate the State's electoral process, Mont. Const. art. IV, § 2–3. Indeed, the Montana Constitution imbues the Montana Legislature with "very broad" authority to "pass whatever statutes it deems necessary" to keep Montana elections "free of fraud." *See* Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, p. 450.

Plaintiffs' argument fails because it disregards the Montana Constitution's explicit delegation of authority to the Legislature to regulate elections. Strict scrutiny is inappropriate because the Court must balance the Legislature's express constitutional authority to regulate elections and protect the right to vote against an individual's ability to exercise that right. *See, e.g., Montana Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶¶ 17–24, 366 Mont. 224, 286 P.3d 1161 (surveying opinions concluding even "fundamental rights" may be "circumscribed by the State's police power to protect the public[]"). Applying strict scrutiny's inflexible standard disregards the State's constitutional duty to regulate elections.

The Montana Supreme Court has used constitutional balancing tests, like the *Anderson-Burdick* standard, in various contexts, including when weighing fundamental rights against other constitutional interests. *See Willems v. State*, 2014 MT 82, ¶ 33 n. 3, 374 Mont. 343, 325 P.3d 1204 (Article II, § 13 "right of suffrage" outweighed by Article V, § 14, which requires the

creation of legislative districts); *Nelson v. City of Billings*, 2018 MT 36, ¶¶ 19-29, 390 Mont. 290, 412 P.3d 1058 (concluding Montana Supreme Court's constitutional "authority to set procedural rules to perpetuate and maintain the legal system of this state" established by Article VII, § 2 outweighed the fundamental "right to know" guaranteed by Article II, § 9).

Indeed, contrary to Plaintiffs' demand that this Court apply strict scrutiny because the challenged laws implicate a fundamental right, the Montana Supreme Court has explicitly applied rational basis review to non-discriminatory laws regulating fundamental rights. *See, e.g., Mont. Cannabis Indus. Ass'n*, ¶¶ 23-24 ("District Court erred when it applied a strict scrutiny analysis" to law regulating "fundamental right to obtain and reject medical treatment"); *see also Montana Shooting Sports Ass'n, Inc. v. State*, 2010 MT 8, ¶¶ 1, 13–20, 355 Mont. 49, 224 P.3d 1240 (following federal precedent in applying rational basis review to allegation that legislation "unconstitutionally infringe[d] on the fundamental right of privacy" guaranteed by Article II, § 10 of Montana Constitution); *see also Wiser v. Mont. Dept. of Commerce*, 2006 MT 20, ¶ 25, 331 Mont. 28, 129 P.3d 133 ("disagree[ing]" that Montana law restricting "fundamental right" to pursue employment "had to be reviewed with strict scrutiny").[4]

[4] Montana law is replete with examples of the Montana Supreme Court concluding rights guaranteed by Article II of the Montana Constitution are **not absolute**. *See State ex rel. Zander v. Dist. Ct. of Fourth Jud. Dist., In & For Missoula Cty.*, 180 Mont. 548, 555–56, 591 P.2d 656, 660 (Mont. 1979) (Article II, § 10 "guarantee of individual privacy is not absolute" and "must yield to a compelling state interest"); *see Krakauer v. State by & through Christian*, 2016 MT 230, ¶ 36, 384 Mont. 527, 381 P.3d 524 (Article II, § 9 "right to know is not absolute" and instead must be balanced against "competing constitutional interests"); *see State v. Weik*, 2018 MT 213, ¶ 13, 392 Mont. 415, 427 P.3d 52 (Article II, § 24 "right to confrontation . . . is not . . . absolute"); *see In re Est. of C.K.O.*, 2013 MT 72, ¶ 21, 369 Mont. 297, 297 P.3d 1217 ("while parents have a fundamental right to parent their children, that right is not absolute"). As Justice Sandefur recently articulated, there is simply no "credible support for the legal proposition that the fundamental right to vote necessarily includes the most convenient or most preferable way to vote[.]" *Driscoll*, ¶ 45 (Sandefur and Rice, JJ., concurring in part and dissenting in part); *see also*

Although the Montana Supreme Court has not explicitly endorsed the *Anderson-Burdick* standard, it implicitly has done so in recent voting cases. For example, in *Driscoll v. Stapleton*, the Montana Supreme Court reasoned that "'[s]trict scrutiny of a statute is required **only when [it] impermissibly interferes** with the exercise of a fundamental right,'" i.e., the right to vote. 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386 (citations omitted) (emphasis added). The necessary implication of that statement is that the Montana Constitution contemplates some degree of **permissible** "interference" with the right to vote before strict scrutiny is triggered. The *Anderson-Burdick* standard provides the Court with an established framework to distinguish permissible regulation from impermissible interference.[5]

For these reasons, Montana law requires that this Court balance competing constitutional interests and the burden imposed by modest election regulations, and reject Plaintiffs' request to reflexively apply strict scrutiny based solely on the fact that the laws at issue relate to a fundamental right. In election law litigation, the *Anderson-Burdick* standard is the most appropriate framework. Pursuant to the *Anderson-Burdick* standard, the Court should analyze the challenged laws by applying rational basis review.

Burdick, 504 U.S. at 433 (although right to vote is fundamental, it "does not follow . . . that the right to vote in any manner" is "absolute").

[5] The U.S. Constitution and Montana Constitution are equivalent in that both recognize the fundamental nature of the right to vote. *See Burdick*, 504 U.S. at 433 ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure'") (citations omitted); *see also Willems*, ¶ 32 ("[t]he right of suffrage is a fundamental right"). The U.S. Constitution and the Montana Constitution are distinct in that the Montana Constitution explicitly grants the Montana Legislature greater authority to regulate elections. *Cf.* Mont. Const. Art. IV, § 3 *with* U.S. Const. Art. 1, § 4, cl. 1. It logically follows that, under a constitutional balancing test like *Anderson-Burdick*, Montana law should afford the Montana Legislature with more discretion to regulate elections, not less.

3. SB 169 easily passes the Anderson-Burdick balancing test

Under the *Anderson-Burdick* standard, this Court must first determine whether SB 169 imposes a severe restriction on the right to vote, or whether the regulation contains a reasonable, nondiscriminatory restriction. *Burdick*, 504 U.S. at 434. Plaintiffs' argument boils down to a complaint that student IDs can no longer be used as a form of primary ID. MYA Brief at 16 (Dkt. 73). As a factual matter, under SB 169, if a voter does not have a primary, government-issued ID, that voter may use any document containing their picture and their name, including a student ID, in conjunction with a myriad of other documents in order to vote. James Decl., ¶ 45 (noting a ski pass and voter registration confirmation qualifies). Thus, SB 169 imposes, at most, a minimum burden by elevating government issued IDs over non-governmental issued IDs.

And this minimal burden is reasonable and nondiscriminatory. Substantial evidence establishes that voter ID increases voter confidence in elections and does not impact voter turnout. SUF ¶¶ 25–27. This point was established almost two-decades ago when the Commission on Federal Election Reform chaired by former President Jimmy Carter and Secretary of State James Baker issued the Carter-Baker Report and recommended states adopt strict photo-ID laws to prevent voter fraud and restore public confidence in the election process. SUF ¶¶ 15–24. The Carter-Baker Report found that robust voter identification laws were the "bedrocks of a modern election system" and "essential to guarantee the free exercise of the vote by all U.S. citizens." SUF ¶ 23. In fact, the Carter-Baker Report recommended the use of REAL ID cards, created under the then-recently enacted REAL ID Act, for voting purposes. SUF ¶ 28.

The United States Supreme Court also recognizes that requiring certain identifying documentation to vote, like a photo ID does not "raise any question about the constitutionality" of an election integrity law. *Crawford*, 553 U.S. at 197. As the Court noted in Crawford, "[f]or most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 197–200. And to the extent it may not be quite as convenient to comply with the voter ID law, "[i]nconvenience alone does not qualify as a substantial burden on the right to vote." *Id.* at 198.

The minimal restriction presented by SB 169 is eminently reasonable, and as the Montana Supreme Court has noted the State has "a compelling interest in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes." *Larson v. State*, 2019 MT 28, ¶ 40, 394 Mont. 167, 434 P.3d 241; *see also Crawford*, 553 U.S. at 191.

To that end, requiring uniform, government-issued ID is directly related to preventing fraud from occurring, ensuring compliance with residency requirements, and promoting public confidence that elections are secure and worthy of public participation. *See generally* Defendant's Expert Report of Sean P. Trende (Exhibit 12); Expert Declaration of Scott E. Gessler (Exhibit 13). It is certainly rational for the Legislature to conclude student IDs do not have the same level (or perception) of security or reliability as a government-issued ID. SUF ¶ 106; Hertz Decl., ¶¶ 13-15 (Exhibit 8); Fitzpatrick Decl., ¶¶ 15-16 (Exhibit 8). As a Wisconsin federal court recently recognized when rejecting a challenge to its voter ID law affecting student ID's:

> Unlike other IDs used for voting, student IDs aren't otherwise regulated by federal, state, or tribal law, so any school's ID may be different from another's.

> The content of nearly all of the other voter IDs is regulated by another state or federal statute, making them more recognizable and uniform, and potentially making them harder to fake. That's not the case for student IDs. [Plaintiff] doesn't identify any uniform standards that Wisconsin colleges and universities have adopted, which other courts have found to be a reason to treat student IDs differently.

Common Cause v. Thomsen, 2021 WL 5833971, at *6 (W.D. Wis. Dec. 9, 2021) (citing *N. Carolina State Conf. of the NAAC v. McCrory*, 182 F.Supp.3d 320, 523 (M.D.N.C. 2016)) (noting that "inconsistency in the way colleges issued IDs provided a plausible reason for declining to permit student IDs to be used for voting"); *Nashville Student Organizing Committee v. Hargett*, 155 F.Supp.3d 749, 756 (M.D. Tenn. 2015) (concluding it was rational to believe student IDs are more likely to be falsified).

In *Crawford*, the Supreme Court noted a State's interest in protecting the integrity of its electoral process exists even without a record "of any such fraud actually occurring[.]" *Crawford*, 553 U.S. at 194; *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2345–46 (2021). Nor must the Legislature wait for fraud to occur before it enacts safeguards to prevent it. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively").

Contrary to Plaintiffs' claims, Montana has well-documented and publicized instances of voter fraud, and the Legislature was aware of other instances of fraud in other states, most notably North Carolina. SUF ¶¶ 36–40; *Brnovich*, 141 S. Ct. at 2348 n.20 (citing Alan Blinder, Election Fraud in North Carolina Leads to New Charges for Republican Operative, N. Y. Times,

July 30, 2019[6]; Graham, North Carolina Had No Choice, The Atlantic, Feb. 22, 2019).[7] Indeed, two non-citizens recently illegally voted in a mayoral election in Dodson, Montana where the outcome was decided by two votes. *See* Exhibit 1–14; Exhibit 1–15. There can be no doubt that, actual instances of fraud aside, lack of public confidence in the integrity of elections is an urgent problem in the United States, including Montana. SUF ¶¶ 34–40; *see generally* Defendant's Expert Report of Sean P. Trende (Exhibit 12); Expert Declaration of Scott E. Gessler (Exhibit 13). As noted by the Carter-Baker Report, "the perception of possible fraud contributes to low confidence in the [electoral] system." SUF ¶ 19.

SB 169's requirements are nondiscriminatory and reasonable—in fact, the record reflects SB 169 was tailored to relieve barriers to voting faced by Native Americans. Hertz Decl. ¶¶ 13–16; James Decl., ¶¶ 58–64. Participation in American life routinely requires personal identification. Government-issued ID is required to board a plane or enter a federal building. *Crawford*, 533 U.S. at 194. The TSA explicitly prohibits passengers using student ID as primary identification to board a plane.[8] Likewise, Montana colleges require government-issued ID to register.[9] As noted above, the Carter-Baker Commission recommended requiring REAL ID for voting. SUF ¶ 28.

Contrary to Plaintiffs' claims, SB 169 does not "ban" or otherwise prohibit use of student IDs to vote. It simply puts these IDs in the same category as other non-government issued IDs.

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[6] https://www.nytimes.com/2019/07/30/us/mccrae-dowless-indictment.html.
[7] https://www.theatlantic.com/politics/archive/2019/02/north-carolina-9thfraud-board-orders-new-election/583369/.
[8] https://www.tsa.gov/travel/security-screening/identification.
[9] *See* Montana State University, *Get Your CatCard*, available at https://www.montana.edu/catcard/students.html (last accessed Feb. 14, 2022).

For the few qualified voters who do not have a Montana driver's license, state ID, passport, tribal ID, military ID card, or one of the other primary forms of ID listed in SB 169 (statistics of which are not presented by Plaintiffs), such voter may still use a student ID in conjunction with a host of other document options, including a voter registration card, utility bill, bank statement, or other government document with name and address. Plaintiffs present no evidence to show how many voters or potential voters in Montana have *only* a student ID, nor do they identify a single college student who falls in that category. Plaintiffs fail to show SB 169 presents a substantial burden on "young voters" and fail to overcome the State's showing of a legitimate interest in passing SB 169.

In short, limiting acceptable primary voting identification to government-issued IDs is hardly surprising and not controversial in a host of important contexts. "Voting is equally important." *Crawford*, 533 U.S. at 194. The Legislature's decision to allow only government-issued ID as primary ID is not an unconstitutional burden on the right to vote. Plaintiffs are not entitled to injunctive relief and Secretary Jacobsen is entitled to judgment as a matter of law.

IV. The Legislature is vested with explicit constitutional authority to modify late voter registration; exercise of that discretion does not violate the Constitution.

A. The history of late voter registration and HB 176's effort to relieve the distinct burdens of election day registration on election administrators.

HB 176 modified § 13–2–304, MCA, and ended the recent practice of allowing election day voter registration. Now, an individual must register to vote before noon the day before the election. The challenged statute states in its entirety: "An elector may register or change the elector's voter registration information after the close of regular registration as provided in 13-2-301 and vote in the election if the election administrator in the county **where the elector resides**

receives and verifies the elector's voter registration information prior to noon the day before the election." § 13–2–304(1)(a), MCA (emphasis added).

The purpose of HB 176 was, in part, to ease the burden on election staff, especially in small counties. As the sponsor Representative Sharon Greef stated:

> The intent of HB176 is to provide a solution for citizens discouraged from registering to vote and casting a ballot due to long lines and extended wait times by making the process more efficient for the benefit of all Montanan's. And it will reduce the opportunity for mistakes. Current laws places election officials in between handling new voter registration, issuing replacement ballots, accepting deposited ballots, and even counting ballots, all at the same time. The focus of 176 is not to burden, it's not to disenfranchise, and it's not to provide a forum for a historical debate. But it is important to administer an election with complete fairness for all voters.

SUF ¶ 72; *see* Declaration of Steve Fitzpatrick, ¶¶ 6–9 (Exhibit 7); Declaration of Greg Hertz, ¶¶ 6–10 (Exhibit 8).

The concern with delays, burdens on staff, and long lines stemming from election day registration is especially acute in smaller counties, but exists in larger counties as well. Declaration of Janel Tucek, ¶¶ 8–11 (Exhibit 6); Declaration of Monica Eisenzimer, ¶¶ 5–12 (Exhibit 5); Declaration of Doug Ellis, ¶¶ 15–27 (Exhibit 4). Broadwater County Election Administrator Doug Ellis, who worked in the Broadwater County Election's Office for 19 years, testified in favor of HB 176. Ellis Decl., ¶ 29. Mr. Ellis estimates that it can take approximately an hour to register twelve individuals on election day. Ellis Decl., ¶ 18. Thus, election day registration has resulted in long lines at the polls, even in Broadwater County. Ellis Decl. ¶¶ 19–20. Based on his experience, Mr. Ellis believes that ending election day registration eases the burden on election administrators, particularly in small counties. Ellis Decl., ¶ 25; *see* SUF ¶¶ 43–55.

And Mr. Ellis's experience is shared by Janel Tucek, the Fergus County Clerk and Recorder, who manages all Clerk and Recorder duties, along with administering all elections, with the help of only a single staff member. Tucek Decl., ¶ 4. Ms. Tucek describes administering elections as a year-round and continual process. Tucek Decl., ¶ 5. Having to register individuals to vote on election day takes time away from all the other work, both election-related and non-election related, that Ms. Tucek is required to complete on election day. Tucek Decl., ¶ 11. Based on her experience, Ms. Tucek believes that ending election day registration "makes it easier to administer elections by allowing us to focus on processing votes, and managing issues from the various polling locations. This is particularly important because, due to the increased scrutiny facing my office and our poll workers, many individuals who have worked on elections for years are retiring due to the added stress." Tucek Decl., ¶ 11.

But even larger counties face increased burdens caused by election day registration. Monica Eisenzimer has managed the Flathead County Election Office since 2005. Eisenzimer Decl., ¶ 2. Based on her experience, Ms. Eisenzimer finds that ending voter registration at noon the day before an election helps election administration because "it will give [her] and [her] staff time to focus on the actual election and process ballots." Eisenzimer Decl., ¶ 11. Additionally, Ms. Eisenzimer believes ending election day registration will allow her staff to spend more time assisting individuals who have special circumstances that prevent them from being able to vote in person on election day. Eisenzimer Decl., ¶ 12. The Secretary of State's Office stated that it had heard similar concerns from multiple election administrators, which is why it recommended the bill. *See* SUF ¶¶ 72–73.

The Governor signed HB 176 on April 4, 2021, and it was effective immediately. Now, all voters are required to register before noon the day before the election, which furthers the legitimate state interest of easing the election day burden for election administrators. *See* HB 176, § 2 (Exhibit 1–19).

B. HB 176 does not violate the Right to Vote.

Plaintiffs claim HB 176 violates the right to vote, but the plain language of the Constitution undermines the argument. The Constitution grants the Legislature explicit **discretion** to enact election day registration in Article IV, § 3; no reasonable argument supports MDP's claim that the Constitution can, at the same time, compel it to do so in Article II, § 13. The plain text of the Constitution provides that allowing (or disallowing) election day registration is a matter of legislative discretion:

> 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** ensure the purity of elections and guard against abuses of the electoral process.

Mont. Const. art. IV, § 3 (emphasis added). In construing this provision, the Court must use the same rules of construction used in construing statutes. *Nelson*, ¶ 14.

First, "[t]he intent of the framers of a constitutional provision is **controlling**. The intent should be determined from the plain meaning of the words used." *Great Falls Trib. Co. v. Great Falls Pub. Sch., Bd. of Trs.*, 255 Mont. 125, 128–29, 841 P.2d 502, 504 (Mont. 1992) (emphasis added). The plain language of Article IV, § 3 leaves no room for debate: the Framers intended to and did make election day registration a matter of the Legislature's choice. The Framers **required** the Legislature to develop a system of registration, absentee voting, and residency. And they **required** the Legislature to develop systems to ensure election integrity and prevent fraud.

But they **allowed** the Legislature to provide for election day registration, if it so chose. Plaintiffs' argument that the Constitution requires registration on election day is directly at odds with the Framers' unambiguous intent.

Second, constitutional provisions must be read in "coordination with other sections" so that they form a consistent whole. *Howell v. State*, 263 Mont. 275, 286–87, 868 P.2d 568, 575 (Mont. 1994). To accomplish that, "the specific controls over the general. When two provisions deal with a subject, one in general and comprehensive terms and the other in minute and more definite terms, the more definite provision will prevail to the extent of any opposition between them." *Ditton v. Dep't of Just. Motor Vehicle Div.*, 2014 MT 54, ¶ 22, 374 Mont. 122, 319 P.3d 1268. Thus, Article IV, § 3's specific grant of Legislative discretion to enact election day registration controls over Article II, § 13's very general right to suffrage. Read in "coordination," these provisions clarify that the right to suffrage does not encompass the claimed right to election day registration. *Howell*, 263 Mont. at 286–87, 868 P.2d at 575.

Third, and finally, the argument that Montana's Constitution requires election day registration makes even less sense in historical context. The Court must construe the Constitution "in light of the historical and surrounding circumstances under which the Framers drafted the Constitution" which "assumes the existence of a well understood system of law which is still to remain in force." *Nelson*, ¶¶ 14–15. Here, it is an indisputable fact that election day registration did not exist until 2005.

In 1973, voters were not allowed to register on election day. Rev. Code Mont. §§ 23-3016, 23-3724 (1971) (Registration closed 30 days before federal elections, 40 days for other elections). Delegates to Montana's 1972 Constitutional Convention considered—and expressly rejected—

proposals that would have required the Montana Legislature to allow election day registration.[10] Although many Delegates supported election day registration, they did not want to limit the Montana Legislature's flexibility by elevating their own individual policy preferences to a constitutional mandate. The Court should reject Plaintiffs' invitation to interpret the Montana Constitution contrary to its plain language and the Delegates' intent. *See Nelson*, ¶ 14 ("intent of the Framers controls the Court's interpretation of a constitutional provision").

At the 1972 Constitutional Convention, the General Government and Constitutional Amendment Committee drafted a report summarizing constitutional proposals affecting "Suffrage and Elections." *See* Montana Constitutional Proposals, February 12, 1972, pp. 333-47. The Majority members of the Committee proposed to give the Montana Legislature broad authorization to regulate elections. *Id.*, pp. 336-38 (proposal "allows the legislature to determine the voting residency and registration requirements"). Conversely, the Minority members of the Committee proposed to "constitutionalize" voter registration by requiring election day registration. *Id.*, p. 342 (proposing system of "poll booth registration" based on North Dakota law that would guarantee voters the right to "register at the time and place of voting").

Like the Committee, the 100 Delegates were sharply conflicted on whether election day registration should be required by Montana's Constitution. *See* Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, Vol. III, pp. 400-13, 429-452. Ultimately, the Delegates reached a compromise. *Id.*, pp. 450-51. To reflect certain Delegates' support for election day registration as a policy, the Montana Constitution would permit the Montana

[10] In 1972, election day registration colloquially was referred to as "poll booth registration." *See, e.g.,* Montana Constitutional Proposals, February 12, 1972, pp. 342-343. The terms are used interchangeably in this section.

Legislature to enact election day registration legislation, but it would not require the Montana Legislature to do so. *Id.* That compromise was summarized by Delegate Cedor B. Aronow:

> Mr. Chairman, I take it to be the sense of a great many people at this Convention that **we do want to liberalize the registration process, but on the other hand, we don't want to lock in a system into the Constitution** and this will give to the Legislature the consensus of this convention and it will also make it not mandatory for the Legislature. **In other words, if the Legislature provides for a system of poll booth registration, they're not locked in,** because the word "shall" has been removed to the permissive word "may," but the Legislature is mandated, also, that they shall insure the purity of elections[.]

Id., p. 450 (emphasis added); *see also Id.* p. 402 (Delegate Brown noting that provision does not mandate or prohibit election day registration, but rather "leaves it all to the Legislature. We're not trying to constitutionalize it.").

The Delegates could not have been more clear: Article IV, § 3 of the Montana Constitution is permissive, and states the Legislature "**may** provide for a system of poll booth registration." (Emphasis added). The Court should follow the Montana Constitution's plain language—as confirmed by the Framers' intent, reject Plaintiffs' contrary interpretation that the constitution requires election day registration, and grant the Secretary's requested relief.

C. HB 176 is facially neutral and does not violate equal protection.

All Plaintiffs allege HB 176 violates the right to equal protection under Mont. Const. art. II, § 4. MYA speculates HB 176 is unconstitutionally burdensome because it is too confusing for "[y]oung voters who are trying to navigate voting for the first time." Dkt. 73 at 15. MDP similarly argues HB 176 violates Montana's Equal Protection Clause because it "constrict[s]" a "voting method disproportionately used by [young voters.]" Dkt. 57 at 24. These arguments do not state a viable equal protection claim: both laws are facially neutral and the pleadings and discovery

responses are void of any evidence that would support a claim of intentional age-based discrimination.

Instead, Plaintiffs seek to have the Court adopt "disparate impact" theory—the idea that a classification exists where an otherwise neutral law has different effects on different groups of individuals. But the Montana Supreme Court has definitively rejected this theory in the absence of established discriminatory intent towards the effected class. *Fitzpatrick*, 194 Mont. at 323, 638 P.2d at 1010. Plaintiffs' disparate impact theory fails as a matter of law because they cite no competent evidence establishing the Legislature intended to discriminate against "young voters" by enacting HB 176.

As a threshold issue, neither MYA nor MDP adequately define the contours of the class they allege is disproportionately impacted by HB 176. Both parties leave it to this Court to define exactly what they mean by "young voters." Does the class only include first-time voters who are 18 years old? Or, does it include first-time voters who are college-aged? Or does the class not just include first-time voters but all voters in their later teens to mid-twenties? Without first establishing a class, Plaintiffs cannot show that this "class" is disproportionately impacted. Both MYA and MDP must establish a prima facie case that a constitutional violation has occurred—and a failure to establish this critical element of their claim with the requisite detail is fatal to their request for injunctive relief.

But even if MYA and MDP had adequately set the stage to allow this Court to analyze their claim, HB 176's modest changes to Montana's late registration deadline must treat "young voters" differently than all other voters in order for MDP and MYA to establish a prima facie case of a constitutional violation. In the context of an equal protection analysis, "[d]iscrimination

cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Goble v. Montana State Fund*, 2014 MT 99, ¶ 29, 374 Mont. 453, 325 P.3d 1211 (citation omitted). Thus, even under a disparate impact theory, MYA and MDP must establish both that "young voters": (i) are treated differently than other voters; and (ii) the Legislature passed the law with discriminatory intent. MYA and MDP cannot satisfy either burden.

The plain language of HB 176 demonstrates the statute applies to all electors equally, regardless of age or any other distinguishing factor. This conclusion is inescapable, and neither MYA nor MDP offers any evidence to establish discriminatory intent. The failure to do so is fatal to their claim and the Secretary is entitled to judgment as a matter of law.

WNV argues HB 176 violates Montana's Equal Protection Clause by disproportionately burdening "Native Americans living on rural reservations in Montana" due, first, to Native Americans needing to "travel further to register at their county seats than non-Natives across the state and have less access to vehicles and money for gas and car insurance," and, second, to Native Americans using election day registration at higher rates than the general population. WNV Brief at 12 (Dkt. 42). The United States Supreme Court recently rejected similar claims, finding that simply because certain groups may be more likely to use a particular method of voting is not a cognizable claim. *Brnovich*, 141 S. Ct. at 2346–47. As here, the Court noted that potential burdens on Natives and others in remote locations are minimized by long periods of early voting in which voters may vote in person or by mail. *Id.*, n. 21. And, like here, in *Brnovich* "no individual voter testified that [the law] would make it significantly more difficult for him or her to vote." *Id.*

And, in fact, WNV's own documents indicate that long lines at polling places in remote locations impact Native Americans' exercise of the right to vote. Schowengerdt Decl., Exhibit 1–24. Late registrations were the cause of long lines at the polls that prevented Tribal voters from registering and voting because they could not afford to wait. Schowengerdt Decl., Exhibit 1–24. WNV's evidence reflects what the State knows to be true: allowing late registrations up to the close of the polls on election day undermines voting rights and the purpose of HB 176 was to alleviate these burdens on the right to vote. Election administrators' experience with election day registration shows that it often causes longer lines at the polls. HB 176 is designed to alleviate that problem, which will ease the burdens facing Native Americans at the polls. Under these facts, WNV simply cannot establish that HB 176 was enacted with discriminatory intent towards Native Americans. In the absence of competent evidence of discriminatory intent, Plaintiffs' claim can go no further. *Gazelka*, ¶ 16; *Fitzpatrick,* 194 Mont. at 323, 638 P.2d at 1010.

D. Because Plaintiffs fail to establish discriminatory intent, their equal protection claim fails. But even setting these dispositive issues aside, Plaintiffs claim fails because HB 176 easily passes the Anderson-Burdick standard.

As discussed above, this Court should reject Plaintiffs' attempt to apply strict scrutiny and instead utilize the *Anderson-Burdick* standard to balance the State's compelling regulatory interests and the low burden HB 176 imposes. HB 176's modest change to late voter registration is reasonable and it is a legislative function specifically commanded by the Constitution. Mont. Const. art. IV, §§ 2–3. And it furthers the State's compelling interest in "imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes," *see* Larson, ¶ 40, by reducing the burden on election administrators and long wait times for voters.

HB 176 is rationally related to each of the State's core interests in ensuring the integrity, reliability, and fairness of its electoral process. First, ending election day registration furthers the State's interest in ensuring the integrity and reliability of election processes by allowing local election staff to focus their resources on processing votes on an election day. Ellis Decl., ¶ 25; Tucek Decl., ¶¶ 10–11; Eisenzimer Decl., ¶ 11. This alleviates the potential for error due to the increased burden on election staff caused by having to process new voter registrations and process and count votes at the same time. Second, ending election day registration furthers the State's interest in ensuring the fairness of the electoral processes by ensuring voters are treated the same whether they vote in large counties that might be able to effectively manage processing new voter registrations while in-person voting occurs due to more resources being available or small counties with limited resources. For example, election officials from Flathead, Broadwater, and Fergus County all indicate that election day registration poses a serious burden on their staff due to lack of resources. Eisenzimer Decl., ¶ 11; Tucek Decl., ¶ 11; Ellis Decl., ¶ 25. That election administrators in Missoula and Gallatin counties have not experienced the same problems does not undermine that interest. *See, e.g.,* Declaration of Eric Semerad, ¶ 5 (Dkt. 66). The Legislature is authorized to address specific problems and regulate for the whole, not the idiosyncratic. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488-89 (1955). Simply because a particular problem may not be as acute in Montana's largest counties does not mean the Legislature must ignore those problems in other counties, especially Montana's many smaller counties.

The Montana Constitution was designed to allow the Legislature to experiment with election day registration. Roughly 30 years after the Constitution was ratified, it did so. But that

experiment resulted in an excessive administrative burden on election staff, especially in rural locations. At the same time, the Legislature has also greatly liberalized registration by mail, and increasingly made it easier to vote in various ways. SUF ¶ 64; *see generally* Defendant's Expert Report of Sean P. Trende (Exhibit 12); Expert Declaration of Scott E. Gessler (Exhibit 13).. Rather than return to the late registration deadlines that existed when the Constitution was ratified, the Legislature moved the deadline back one day to ease the burdens election day registration had created, while retaining a long late registration period that permits late registration up until noon the day before the election to encourage voter participation.

For these reasons, HB 176 easily survives scrutiny under the *Anderson-Burdick* standard.

V. MYA's challenge to HB 506 fails as a matter of law; HB 506 is clearly constitutional.

HB 506 amended § 13–2–205, MCA, to add the following clause: "[u]ntil the individual meets residence and age requirements, a ballot may not be issued to the individual and the individual may not cast a ballot." § 13–2–205(2), MCA. The Legislature enacted HB 506 to address a lack of uniformity regarding when to mail ballots to registered voters who do not yet meet Montana's residency or age requirements. SUF ¶¶ 83–88. The Secretary of State proposed the law after receiving multiple reports that: (i) some county election administrators were providing absentee ballots to individuals who did not yet meet Montana's age or residency requirements; and (ii) county election administrators who sent ballots to voters before the voter met age or residency requirements were in some cases "holding" returned ballots of underage voters until election day or the day the voter turned 18. SUF ¶¶ 85–86; McLarnon Decl., ¶ 6. The Secretary requested the Legislature resolve this conflict to ensure all individuals in these circumstances were treated equally, regardless of what county they lived in. SUF ¶ 87.

MYA is the sole challenger to HB 506. MYA argues HB 506 violates the right to vote under Article II, § 13, by restricting certain individuals' ability to vote absentee. But the right of suffrage granted by Mont. Const. art. II, § 13, does not guarantee the right to vote in a particular manner (absentee), nor the right to receive an absentee ballot before a voter meets age and residency requirements to vote. MYA's claim fails because it fails to establish constitutional injury.

MYA also argues HB 506 violates Article II, § 15, by burdening "a minor's right to exercise the same rights as adults," MYA Brief at 14–15 (Dkt. 73). But minors do not have the same rights as adults, including in voting. Minors are not "qualified electors" and do not have the right to vote. Mont. Const. art. IV, §2. MYA's challenge fails for this reason as well.

MYA's equal protection challenge fails for several reasons, including because the distinguishing factor between the two purported classes plainly relates to the underlying justification of the statute, i.e. qualified versus unqualified electors.

A. MYA cannot establish an injury caused by HB 506 because the right of suffrage under Article II, § 13, does not include the right to vote absentee.

MYA's claim fails at the outset because the right to vote does not include the right to vote absentee. Federal courts consistently hold the right to vote does not include the right to vote absentee and view absentee voting as "an indulgence—not a constitutional imperative that falls short of what is required." *Crawford*, 553 U.S. at 209 (Scalia, J., concurring). *See, e.g., McDonald*, 394 U.S. at 803–804; *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *Common Cause Indiana v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (citing *Tully v. Okeson*, 977 F.3d 608 (7th Cir. Oct. 6, 2020)); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020); *Texas Democratic Party v. Abbott*, 978 F.3d 168, 188 (5th Cir. 2020).

While the Montana Supreme Court has not specifically addressed absentee voting, it has consistently held that even fundamental rights—and absentee voting is not a fundamental right—have limitations. *See State v. Maine*, 2011 MT 90, ¶ 29, 360 Mont. 182, 255 P.3d 64 ("most constitutional rights are not absolute."). The right to vote under Article II, Section 13 is explicitly limited by the Constitutional mandate that the Legislature set the "requirements for residence, registration, *absentee voting*, and administration of elections." Mont. Const. art. IV, § 3 (emphasis added). Accordingly, despite Article II, § 13, a voter is not free to cast her vote at any time, place, or in any manner she chooses. *See Driscoll*, ¶ 45 (there is no "credible support for the legal proposition that the fundamental right to vote necessarily includes the most convenient or most preferable way to vote") (Sandefur and Rice, JJ., concurring in part and dissenting in part). The Legislature is instead expressly authorized to set the requirements for voting, including absentee voting.

HB 506 does precisely that, to clarify and ensure uniformity in application of Montana's absentee voting laws and prevent unqualified electors from voting through Montana's absentee voting process. MYA's focus on a tiny sliver of the potential voting population whose ability to vote absentee theoretically may be affected by HB 506 is insufficient to show a constitutional violation of the right to vote afforded under Article II, § 13.

Justices Leaphart, Gray, Regnier, and Chief Justice Turnage warned against precisely the type of selective interpretation of Article II, § 13 offered by MYA, when they wrote "[i]f other parts of Montana's Constitution were also interpreted without regard for and independent of the structure of Montana's Constitution, we would have surprising results . . . Individuals could read the phrase 'shall [not] at any time interfere' [of Article II, § 13] to provide that they are free to

vote whenever their consciences dictate, in November or in August, and at any time of the day or night. I submit that Montana's Constitution must be construed as a coherent integrated structure[.]" Order, *In re Selection of A Fifth Member to Montana Districting*, 1999 WL 608661, at *18 (Mont. Aug. 3, 1999).

MYA's interpretation of the Constitution—proposing that Article II, § 13, grants a nebulous right to vote absentee in all circumstances for all voters—ignores Article IV, § 3's delegation of authority to the Legislature to set requirements regarding absentee voting. MYA's Constitutional challenge to HB 506 based on Article II, § 13 fails as aresult.

MYA's challenge based on Article II, § 15 fails for similar reasons. Article II, § 15 states "[t]he rights of persons under 18 years of age shall include… all the fundamental rights of this Article." MYA argues HB 506 burdens "a minor's right to exercise the same rights as adults" because it requires an individual meet age and residency criteria before being issued a ballot. MYA Brief at 14. Article II, § 15 is limited to "the fundamental rights of [Article II]." But, as discussed above, the ability to vote absentee is not a fundamental right. More importantly, minors do not have the right to vote. Article II, § 15 is therefore wholly inapplicable. MYA's challenge to HB 506 based on Article II, § 15 accordingly fails.

Even if Article II, § 13, did grant *adults* the right to vote absentee, MYA's claims would still fail because, as stated above, even fundamental rights are not absolute, *see Maine*, ¶ 29. As explained in more detail below, HB 506 is a reasonable, non-discriminatory law tailored to ease administrative problems with absentee voting, ensure the uniformity of application of such laws, and protect against unqualified voters casting votes in Montana elections.

B. HB 506 does not violate Equal Protection.

The first step in evaluating MYA's equal protection claim is to determine whether HB 506 creates "classes of similarly situated individuals." *Gazelka*, ¶ 15 (citation omitted). If it does not, the Court's analysis must end and MYA's equal protection claim fails. *Gazelka*, ¶ 15.

MYA alleges HB 506 creates an unconstitutional age-based class because it treats those who turn eighteen during the late registration period differently from those who are already qualified electors during that same period. MYA Brief at 14 (Dkt. 73). MYA's argument fails. When, as here, the single distinguishing factor between the two classes constitutes a "fundamental difference" relative to the underlying purpose of the statute, the classes are not similarly situated. *Montana Cannabis Indus. Ass'n*, ¶¶ 17–18; *see also Wilkes v. Montana State Fund*, 2008 MT 29, ¶¶ 15–20, 341 Mont. 292, 297, 177 P.3d 483, 487; *Reesor v. Montana State Fund*, 2004 MT 370, ¶ 12, 325 Mont. 1, 5, 103 P.3d 1019, 1022 (finding two age-based classes similarly situated because age was "unrelated to a person's ability to engage in meaningful employment").

MYA cannot establish that age is **unrelated** to the underlying purpose of the statute. HB 506 is expressly based on a fundamental difference between the two classes—the individual's qualifications as an elector under Mont. Const. art. IV, § 2, which declares that an individual shall not be granted the franchise until they are eighteen years of age or older.

Thus, "[t]he distinguishing factor between the two classes, [their age], plainly relates to the underlying justification of the statute." *Montana Cannabis Indus. Ass'n*, ¶ 18. For this reason, the distinction of whether an individual is entitled to receive an absentee ballot "does not create two legitimate classes for an equal protection challenge because the single identifying factor—

[the age of the individual]—is a fundamental difference that sufficiently distinguishes the two classes to render them dissimilar." *Montana Cannabis Indus. Ass'n*, ¶ 18; *cf. Caldwell v. MACo Workers' Compensation Trust*, 2011 MT 162, ¶ 19, 361 Mont. 140, 256 P.3d 923.

Because HB 506 does not create classes of similarly situated persons, MYA's equal protection claim fails. *See Gazelka*, ¶ 15. For this reason alone, MYA's equal protection claim fails as a matter of law.

C. HB 506 is plainly constitutional.

Even assuming a regulation affecting only absentee voting options of a small sliver of potential voters before they reach the age of majority could rise to the level of a constitutional violation, HB 506 clearly passes constitutional scrutiny. HB 506 is reasonable, non-discrimnatory and imposes no severe burden. HB 506 applies equally to all persons: "until the individual meets residence and age requirements, a ballot may not be issued to the individual and the individual may not cast a ballot." HB 506, § 2. And, providing ballots only to those individuals that meet the constitutional prerequisites to vote is clearly reasonable. The burden imposed by HB 506 is not severe. Absentee voting is not a constitutional right, but an "indulgence," *Crawford*, 553 U.S. at 209 (Scalia, J., concurring), and MYA concedes HB 506 does not prevent anyone from voting in person. Indeed, MYA's evidence supports this: Isaac Nehring, the 17-year old whose declaration is attached to MYA's application, agrees he will be able to vote. Exhibit I, at 2 ("Of course, because of House Bill 506, I will have to vote in person to participate in the June 2022 primary election.").

Further, as a result, HB 506 need only pass rational basis review. *Burdick*, 504 U.S. at 434. It easily does. The State has a compelling interest, "in imposing reasonable procedural

requirements tailored to ensure the integrity, reliability, and fairness of its election processes." *Larson*, ¶ 40. HB 506 advances the State's interests in ensuring integrity, fairness, and reliability in the electoral process in several ways:

- It ensures all voters who turn 18 during the late-registration period are treated the same;
- It provides clarity to election administrators and the Secretary regarding the handling of absentee ballots for voters turning 18 during the late registration period;
- It ensures election administrators will follow consistent practices respecting mailing absentee ballots to voters turning 18 during the late registration period;
- It prevents election administrators from having to separately hold voted absentee ballots received from underage voters until the time the voter turns 18;
- It allows the Secretary to finalize election administration software coding for Montana's election system software; and
- It helps ensure only qualified voters are voting in Montana elections.

SUF ¶¶ 83–88; *see generally* McLarnon Decl. (Exhibit 9).

Prior to passage of HB 506, some counties were sending ballots out to voters before they met age or residency requirements and some were not. James Decl., ¶ 131; McLarnon Decl., ¶¶ 4–7. Those counties that were sending ballots out before voters met age requirements were then receiving voted absentee ballots and having to hold them separately until election day or the day the voter turned 18. McLarnon Decl., ¶ 6. HB 506 resolved these problems, clarified the law, and addressed a lack of uniformity in how to treat individuals who become eligible to vote by turning eighteen during the late registration period preceding an election. SUF ¶¶ 85–87. Passage of HB

506 was also critical to allowing the Secretary to finalize coding for its election software. Finally, HB 506 addressed a potential voter fraud issue, whereby underage voters were voting absentee ballots and having them counted once they turned 18. James Decl., ¶¶ 128–132; SUF ¶ 85; *see also* § 13–1–101(54) (defining a "voted ballot" to include those received at the election administrator's office).

HB 506 addresses compelling State interests and meets and exceeds the "important regulatory interests" required under the *Anderson-Burdick* standard. Accordingly, MYA's claims should be denied and the Secretary is entitled to judgment on this claim.

V. Plaintiffs' challenge to HB 530's narrow prohibition of paid ballot collection fail.

A. Plaintiffs' challenge to HB 530 is not yet ripe as the administrative rule contemplated by the statute has not yet been adopted.

WNV asks this Court to enjoin "the enforcement" of HB 530 "pending resolution of their claims that [this] statute[] violate[s] their constitutional rights." WNV Motion at 2 (Dkt. 41). MDP asks this Court to enjoin "the changes House Bill 530 (2021) has made in § 2021 Montana Laws CH. 534, Sec. 2 (H.B. 530)." Dkt. 71 at 2. But, HB 530 § 2(1) merely directs the Secretary to adopt an administrative rule in "substantially" the provided form. The Secretary has not done so and is not required to do so until July 1, 2022. HB 530, § 2(1). Moreover, by its plain language, HB 530 § 2 limits application of the penalty it contemplates to violations of the rule the Secretary has yet to adopt. HB § 530, § 2(2). Given that the administrative rule required in order to animate HB 530 has not yet been adopted, the claims made by WNV and MDP cannot be ripe.

As a component of justiciability, ripeness is a threshold requirement to a court's adjudication of a dispute. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 18, 333 Mont.

331, 142 P.3d 864. Ripeness is a temporal dimension of standing, and "asks whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication." *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 55, 365 Mont. 92, 278 P.3d 455 (citation omitted). Cases are unripe where the parties can only point to "hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Reichert*, ¶ 54 (citation omitted).

At present, HB 530, § 2, is not "enforceable." It simply directs the Secretary to adopt an administrative rule in "substantially" the provided form by July 1, 2022. The Secretary has not yet adopted the Rule contemplated by HB 530, § 2. SUF ¶ 97. In fact, the Secretary has not yet even begun the administrative rulemaking process that will lead to the adoption of such a rule. SUF ¶ 97. Thus, the parties' request that this Court enjoin HB 530 is a request to enjoin a rule before it has even been noticed for public comment and target purported deficiencies that the Secretary is well within her power to resolve in the course of the administrative rule making process.

For example, MDP targets alleged ambiguity in HB 530, § 2, arguing "organizations and individuals are left to guess about the scope of [HB 530, § 2's] prohibition and whether it will prevent someone like an aid who is paid to assist elderly or disabled voters, or even a volunteer who receives reimbursements for costs, from helping their patients request, receive, or complete their absentee ballots." MDP Brief at 15–16, Dkt. 57 at 20. And WNV also targets alleged vagueness issues with § 2, arguing HB 530, § 2 is "unconstitutionally vague as to when and to whom it applies[,]" that the terms "pecuniary benefit" and "governmental entity" are unconstitutionally vague, and that the "statute" is unclear as to whether delivery of a single

ballot for pecuniary gain might render the individual subject to multiple fines. WNV Brief at 14–15, Dkt. 42 at 15–16. Plaintiffs fault HB 530, § 2, for not providing sufficient clarity while ignoring that the process designed to provide that clarity has yet to occur.

These arguments are based on the speculative assumption the Secretary will not resolve such issues during the rulemaking process that HB 530, § 2, requires her to conduct. James Decl., ¶¶ 67–71. The entirety of argument from both parties is focused on the injury they speculate the provisions of HB 530, § 2 may cause. But, because HB 530, § 2(2) specifically limits any enforcement to a violation of the forthcoming administrative rule, and because the Secretary has not yet adopted such an administrative rule, this alleged harm is entirely speculative. Further, both MDP and WNV will be able to voice their concerns during the administrative rulemaking process contemplated by HB 530, § 2, and thus may be able to resolve their attendant concerns through direct engagement with the Secretary, rather than by judicial decree.

Because the Secretary has not yet adopted the administrative rule contemplated by HB 530, the claims asserted by Plaintiffs are not ripe. Accordingly, this controversy is not justiciable and the request for a preliminary injunction should denied.

B. HB 530's Reasonable Restrictions are Constitutional.

To the extent Plaintiffs argue any rules promulgated under HB 530 would be unconstitutional, they are wrong. HB 530's reasonable directives are part of an "electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick*, 504 U.S. at 441. HB 530 satisfies any level of scrutiny due to the State's compelling interest in preventing mail-in-ballot fraud as well as coercion and intimidation of voters. The U.S. Supreme

Court's recent decision in *Brnovich v. Democratic Nat'l Comm.*, which upheld Arizona's election law limiting ballot collection practices, provides this Court helpful guidance.

In *Brnovich*, the Supreme Court applied § 2 of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. § 10301 *et seq.*—which enforces § 2 of the Fifteenth Amendment—to a similar Arizona law restricting ballot collection. 141 S. Ct. at 2330. Arizona's ballot collection law mandated that mail-in ballots could not be collected by anyone other than an election official, a mail carrier, or a voter's family member, household member, or caregiver. *Id.* As in this case, the *Brnovich* plaintiffs alleged that the restriction "adversely and disparately" affected American Indian, Hispanic, and African American citizens. *Id.* at 2335. But the Supreme Court upheld the law, finding that "modest evidence of racially disparate burdens … in light of the State's justifications, leads us to the conclusion that the law does not violate §2 of the VRA." *Id.* at 2349. Importantly, the Court noted the VRA "does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive means would not adequately serve the State's objectives." *Brnovich*, 141 S. Ct. at 2345–46.

C. HB 530 Does Not Infringe the Right to Vote.

HB 530 does not burden the right to vote—much less infringe it. It contains reasonable "requirements respecting when and where we vote" that are "generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson*, 460 U.S. at 788 n.9.

There is no state or federal constitutional right to vote by absentee ballot, or have that ballot collected in a particular manner. *See State ex rel. Cashmore v. Anderson*, 160 Mont. 175, 190, 500 P.2d 921, 929 (1972) ("The word 'voting' means the affirmative act of marking one's ballot

properly and depositing it in the ballot box in conformity with the election laws.") (citations omitted); *McDonald v. Bd. of Election Comm'rs of Chi.,* 394 U.S. 802, 807-08 (1969); *Crawford*, 553 U.S. at 209 (Scalia, J., concurring).

Montana's election system, like Arizona's, "generally makes it very easy to vote." *Brnovich*, 141 S. at 2330. Arizonans may cast an early ballot by mail up to 27 days before an election and they also may vote in person at an early voting location in each county. *Id.* at 2330. Likewise, any Montana voter may request an absentee ballot. § 13-13-201, MCA. Absentee ballots are mailed to eligible voters 25 days before election day. § 13-13-205(a)(ii), MCA. Voters may request an absentee ballot up until noon the day before election day. § 13-13-211, MCA. Absentee ballots may be delivered via mail or in person to: (i) the election office; (ii) a polling place within the elector's county; or (iii) the absentee election board or authorized election official. § 13-13-201(2)(e), MCA.

When absentee ballots become available (25 days before the election), Montana voters may apply for, receive, mark, and submit an absentee ballot in person at the election office or by mail to the election office. § 13-13-222, MCA; *see Brnovich*, 141 S. Ct. at 2356 (Arizona voters who receive early ballots "can submit them by going to a mailbox, a post office, an early ballot drop box, or an authorized election official's office" within the early voting period or drop off their ballots at any polling place or voting center on election day.").

The Supreme Court pointed out the obvious in *Brnovich*: "Making any of these trips—much like traveling to an assigned polling place—falls squarely within the heartland of the 'usual burdens of voting.'" *Brnovich*, 141 S. Ct. at 2356 (quoting *Crawford*, 553 U.S. at 198); *cf. Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 20, 366 Mont. 224, 286 P.3d 1161 (holding

"although individuals have a fundamental right to pursue employment, they do not have a fundamental right to pursue a particular employment or employment free of state regulation."); *see also Driscoll*, ¶ 45 (there is no "credible support for the legal proposition that the fundamental right to vote necessarily includes the most convenient or most preferable way to vote") (Sandefur and Rice, JJ., concurring in part and dissenting in part).

Montana's ballot collection law is actually less restrictive than Arizona's. While Arizona bans ballot collection by *anyone* other than an election official, a mail carrier, or a voter's family member, household member, or caregiver, *Brnovich*, 141 S. Ct. at 2330, HB 530 allows anyone to collect a ballot provided they don't "accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots."[11]

D. Plaintiffs Cannot Establish a Disparate Impact Claim

The entirety of Plaintiffs' Article II, § 13 challenge to HB 530 can be boiled down to a disparate impact claim. First, this theory has little basis in Montana voting rights law and should not be a basis for declaring such a law unconstitutional. Second, Plaintiffs have not satisfied their prima facie burden to establish a disparate impact claim. *See Mont. Rail Link v. Byard*, 260 Mont. 331, 346, 860 P.2d 121, 130 (Mont. 1993).

Plaintiffs merely offer generalized testimony regarding the alleged disparate impact of Montana's ballot-collection law on minority voters. *See* MDP Brief at 11–12; WNV Brief at 2–3, 10–11. The *Brnovich* plaintiffs provided similar evidence. *See Brnovich*, 141 S. Ct. at 2347. This

[11] HB 530 exempts a government entities, state agencies, local governments, an election administrator, an election judge, a person authorized by an election administrator to prepare or distribute ballots, or a public or private mail service or its employees acting in the course and scope of the mail service's duties to carry and deliver mail.

included "witnesses who testified that third-party ballot collection tends to be used most heavily in disadvantaged communities and that minorities in Arizona—especially Native Americans—are disproportionately disadvantaged." *Id.* at 2346–47. The Court, however, made clear that it's simply not enough that "minorities generically [are] more likely than non-minorities to return their early ballots with the assistance of third parties." *Id.* at 2347. Plaintiffs, similarly, have not carried their burden.

E. HB 530's compelling interests satisfy rational basis review.

HB 530 is rationally related to the State's interests in preventing fraud, preventing potential voter intimidation, and promoting voter confidence in Montana elections. Even though inapplicable, HB 530 would also survive strict scrutiny analyses. And HB 530 is rationally related to the State's interests in ensuring the integrity and purity of elections because it reduces the appearance of corruption that may be caused by the confluence of money and politics. SUF ¶ 95.

First, the Montana Legislature "indisputably has a compelling interest in preserving the integrity of its election process" because "[c]onfidence in the integrity of [the] processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). In *Brnovich*, the Supreme Court determined that "[e]ven if the plaintiffs had shown a disparate burden … the State's justifications would suffice to avoid § 2 liability." 141 S. Ct. at 2347.

The Court recognized that "[l]imiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence." *Id.* It noted that a bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker found that

"[a]bsentee balloting is vulnerable to abuse in several ways: … Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* (quoting Report of the Comm'n on Fed. Election Reform, Building Confidence in U. S. Elections 46 (Sept. 2005)). Because "[v]ote buying schemes are far more difficult to detect when citizens vote by mail," the Commission recommended that: (i) "States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots"; and (ii) States limit the classes of persons who may handle absentee ballots to "the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials." *Id.*

The Supreme Court, as well as the Carter-Baker Commission, also recognized a second interest served by ballot collection restrictions: pressure and intimidation of voters. *Id.* at 2348.

Plaintiffs' arguments regarding the alleged lack of fraud related to ballot collection are irrelevant to the analysis. *See* MDP Brief at 12–13, 18. As the Court said in *Brnovich*, "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." 141 S. Ct. at 2348; *cf. Munro*, 479 U.S. at 194–95 ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access."). "Fraud is a real risk that accompanies mail-in voting" even if Montana "has had the good fortune to avoid it." *Brnovich*, 141 S. Ct. at 2348.[12] Thus,

[12] The Supreme Court noted that the North Carolina Board of Elections invalidated the results of a 2018 race for a seat in the House of Representatives for evidence of fraudulent mail-in ballots. *See Brnovich*, 141 S. Ct. at 2348 n. 20; *see also* SUF ¶ 32; *see also Griffin v. Roupas*, 385 F.3d 1128,

"[l]egislatures … should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro*, 479 U.S. at 195–96. And they are: restrictions on ballot collection are common in states across the country. *Brnovich*, 141 S. Ct. at 2348 (citing *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1068–69, 1088–1143 (9th Cir. 2020) (Bybee, J., dissenting) (collecting state laws)).

Second, the State has "a compelling interest in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes." *Larson*, ¶ 40 (citations omitted). HB 530 furthers this interest by regulating the connection between money and ballot collection. Montana's history is a crucible that has formed a firm belief that the State has a compelling interest in regulating expenditures of money made in connection with the electoral process. *See generally W. Tradition P'ship, Inc. v. Att'y Gen. of State*, 2011 MT 328, ¶ 25, 363 Mont. 220, 271 P.3d 1, cert. granted, judgment rev'd sub nom. *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012).

As noted by Sponsor Rep. McKamey during debate over HB 530 on the House floor, one of the purposes of the legislation was to keep the electoral process as "uninfluenced by money as much as possible." SUF ¶ 94. And documents produced by WNV highlight the reality behind this concern because they reflect that WNV coordinated with a partisan political committee—Montanans for Tester—to provide transportation to voters on Election Day and recruit volunteer

1130-31 (7th Cir. 2004) ("Voting fraud is a serious problem in U.S. elections generally … and it is facilitated by absentee voting …. [A]bsentee voting is to voting in person as a take-home exam is to a proctored one.").

drivers; WNV also received funds from the Montana Democratic Party. Schowengerdt Decl., Exhibit 1–24.

The Legislature is constitutionally obligated to insure the purity of elections and HB 530 is directly related to this compelling interest because it regulates the flow of money from third parties in connection with an individual's exercise of the right to vote. For these reasons, HB 530 easily survives rational basis review and, indeed, would survive application of any level of scrutiny.

F. HB 530 Does Not Implicate the Right to Free Speech.

Plaintiffs' free speech claim also falls flat. Collecting and returning ballots of other voters does not communicate any particular message. For that reason, a variety of federal courts—including both the Ninth and Fifth Circuits—have held that ballot collection does not qualify as expressive conduct protected by the First Amendment and that rational basis review applies. *See Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (finding the collection of absentee ballots is not expressive conduct); *Feldman v. Ariz. Sec'y. of State's Office*, 843 F.3d 366, 372 (9th Cir. 2016) (holding that collecting ballots is not expressive conduct "[e]ven if ballot collectors intend to communicate that voting is important"); *Voting for Am. Inc. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013) (finding the collection and delivering of voter-registration applications are not expressive conduct); *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1300 (N.D. Ga. 2020); *DCCC v. Ziriax*, 487 F. Supp. 3d 1207, 1235 (N.D. Okla. 2020); *Middleton v. Andino*, 488 F. Supp. 3d 261, 306 (D.S.C. 2020); *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, No. 1:20CV457, 2020 U.S. Dist. LEXIS 138492 (M.D. N.C. Aug. 4, 2020); *League of Women Voters v. Browning*, 575 F. Supp. 2d 1298 (S.D. Fla. 2008). Indeed, the rejected First Amendment

challenge in *Knox* concerned HB 2023—the same Arizona ballot collection law at issue in *Brnovich*. *Knox*, 907 F.3d at 1181.

HB 530 is rationally related to the government's interest in preserving the integrity of elections, preventing voter fraud, and promoting voter confidence in elections. *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 18, 353 Mont. 265, 222 P.3d 566 (statute must bear a rational relationship to a legitimate governmental interest); *FCC v. Beach Commc'ns*, 508 U.S. 307, 314–15 (1993) (statutes carry a strong presumption of validity on rational basis review). As discussed, HB 530 was designed to prevent voter fraud, coercion, and intimidation in the collection of absentee ballots. The Supreme Court, moreover, has recognized that the State has a *compelling interest* in preventing voter fraud in collection of absentee ballots. *See Brnovich*, 141 S. Ct. at 2347; *Purcell*, 549 U.S. at 4; *see also Larson*, ¶ 40.

G. HB 530 is Not Unconstitutionally Vague.

As discussed in Section V.A, Plaintiffs' claims are not yet ripe. Plaintiffs' vagueness arguments are based on pure speculation that the Secretary will not resolve any alleged vagueness issues during the rulemaking process that HB 530, § 2, requires her to conduct. The Secretary's rulemaking will provide "fair warning" so that Plaintiffs have a "reasonable opportunity" to know what is prohibited and may act accordingly. WNV Brief at 14. Indeed, the administrative rulemaking process allows Plaintiffs to participate in the Secretary's HB 530 process and gives them the opportunity to voice their concerns.

Plaintiffs erroneously contend that HB 530 implicates constitutional rights. WNV Brief at 15. As discussed, numerous federal courts have held that ballot collection is not expressive First Amendment conduct. *See* Section V.F supra. Because HB 530 does not touch constitutionally

protected conduct, this Court "should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *State v. Dixon,* 2000 MT 82, ¶ 18, 299 Mont. 165, 998 P.2d 544. A "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.* Therefore, because courts "examine the complainant's conduct before analyzing other hypothetical applications of the law," Plaintiffs' vagueness claim is entirely premature. *Id.*

Finally, Plaintiffs' concerns regarding the lack of definitions for certain terms in HB 530 are of no import. *See Dixon*, ¶ 21 ("[T]he Legislature need not define every term it employs when constructing a statute. The failure to include exhaustive definitions will not automatically render a statute vague on its face, so long as the meaning of the statute is clear and provides a defendant with adequate notice of what conduct is proscribed.") (citations omitted). Once again, even if HB 530 triggers vagueness analysis, no prohibitions are in effect and the Secretary will have the opportunity to define terms through the administrative rulemaking process.

Conclusion

For the foregoing reasons, the Court should: (i) deny Plaintiffs' Motions for Preliminary Injunctions; and (ii) grant Defendant's Motion for Summary Judgment in full, and dismiss with prejudice all of Plaintiffs' claims against Defendant in this consolidated docket.

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Dated this 16th day of February, 2022.

By _*Dale Schowengerdt*_____

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

CERTIFICATE OF SERVICE

I, Dale Schowengerdt, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 02-17-2022:

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