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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

Montana Democratic Party and Mitch Bohn, Plaintiffs, Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe, Plaintiffs, Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group, Plaintiffs, vs. CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State, Defendant.	)	Cause No. DV 21-0451 Hon. Michael Moses **PLAINTIFF WESTERN NATIVE VOICE et al.'s REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

"Montana's strong election ecosystem encourages and supports voter participation and results in generally high turnout *and high voter confidence*." Declaration of Lonna Atkeson, Expert Witness for the State of Montana, *Driscoll et al. v. Stapleton*, Cause No. DV 20-0408, (13th Judicial District, Yellowstone County, July 24, 2020) (emphasis added).

Twenty short months ago, in defense of the Election Day deadline for receipt of absentee and mail ballots, the Montana Secretary of State asserted that overall voter confidence in Montana's electoral system was high. Now, the Secretary has pulled a complete about-face, asserting that "[t]here can be no dispute that Americans are losing faith in the electoral process." Def.'s Br. at 1. What circumstances have changed to support this remarkable reversal? For one, in the wake of the 2020 general election some have spread rumors and falsehoods that the election was "stolen" or "rigged." Those same individuals perpetuate that myth to justify draconian voting restrictions intended to disenfranchise already vulnerable members of the

voting public. The hue and cry of voter fraud, or of a crisis in voter confidence, is nothing more than an invitation to exclude voters from the franchise. As exhaustively demonstrated by the affidavits and declarations submitted in support of Plaintiffs' motion for a preliminary injunction, those targeted voters are without a doubt Native Americans living on rural reservations – the Plaintiffs in this case.

Defendant's response to Plaintiffs' motion for a preliminary injunction mischaracterizes the law and ignores the overwhelming and uncontroverted facts about the severe burdens that HB 176 and HB 530 will have on Native Americans in Montana. Throughout, Defendant attempts to import inapplicable federal standards in place of Montana constitutional law. But under the Montana Constitution, legislation that infringes upon fundamental constitutional rights receives strict scrutiny, not the federal statutory analysis under *Brnovich v. Democratic Nat'l Committee*, 141 S. Ct. 2321 (2021), a case considering only one type of claim under the federal Voting Rights Act, nor mere rational basis review. Because Plaintiffs have clearly established prima facie violations of fundamental rights, HB 176 and HB 530 should be enjoined.

ARGUMENT

A. Defendant mischaracterizes governing Montana law regarding preliminary relief.

1. Montana law requires only a prima facie showing of the violation of Plaintiffs' rights.

Under Montana's governing standard, "a party need establish only a prima facie violation of its rights to be entitled to a preliminary injunction—even if such evidence ultimately may not be sufficient to prevail at trial." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 16, 401 Mont. 405, 414, 473 P.3d 386, 392 (internal citations omitted). "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Weems v. State by & through Fox*, 2019 MT 98, ¶ 18, 395 Mont. 350, 359, 440 P.3d 4, 10 (internal citation omitted). Plaintiffs have made prima facie showings that the challenged statutes impermissibly infringe upon their constitutional rights. Contrary to Defendant's assertion, Def.'s Br. at 3-4, Plaintiffs need do no more to be entitled to preliminary relief. An applicant for a preliminary injunction "must prove only a probable right and a probable danger that such right will be denied absent injunctive relief," and "need not make a case that would entitle him or her to relief at a trial on the merits." *M.H., Jr. v. Mont. High Sch. Ass'n* (1996), 280 Mont. 123, 136, 929 P.2d 239, 247. This is true

even where, as here, constitutional rights are at stake. The presumption of constitutionality which statutes enjoy does not alter this analysis under Montana law. *See Driscoll*, ¶ 15.

2. Plaintiffs have not impermissibly delayed seeking preliminary relief.

As a factual matter, Plaintiffs' request for preliminary relief was not unnecessarily delayed. There has not been a single state-wide election held since the challenged laws were passed. Plaintiffs intentionally sought preliminary relief at this time to allow sufficient time for the Court to act in advance of the 2022 statewide primaries, recognizing that it would be unlikely that a full trial on the merits could be heard sufficiently in advance of those elections. Indeed, Defendant's counsel *stipulated* to the deadlines for briefing Plaintiff's motion for preliminary injunction. Declaration of Alex Rate, ¶ 13. That stipulation was entered following a lengthy delay in discovery of the Defendant's making. Following briefing on consolidation of Cause No. DV 21-0560 with Cause No. DV 21-0451, on September 17, 2021, Plaintiffs served their First Combined Discovery Requests on Defendant. *Id.* ¶¶ 2, 3. Those Discovery Requests were critical to Plaintiffs' case because the requested voter files and associated data were necessary for compiling expert witness reports. *Id.* ¶ 4. In turn, those expert reports provided the underpinnings for Plaintiffs' Motion for Preliminary Injunction. *Id.* ¶ 5. After seeking an extension on the date for providing discovery responses, and even then providing only partial document productions, on November 19, 2021, the State finally produced the requested materials. *Id.* ¶¶ 6-11. Upon receipt of those documents, Plaintiffs expeditiously produced expert reports supporting their Motion for Preliminary Injunction and entered into a stipulated schedule with the State.

As a matter of law, Plaintiffs' have not impermissibly delayed seeking preliminary relief. The sort of delay which courts have found to be prohibitive of preliminary relief are situations with much longer delay or in which the challenged activity has already ripened past court intervention. In the elections-related cases Defendant cites, the plaintiffs sought preliminary injunctions after elections had already occurred. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018); *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976). Defendant also cites *Boyer v. Karagacin* (1978), 178 Mont. 26, 34, 582 P.2d 1173, 1178, a case in which "a period of over one and one-half years" elapsing did not cause the Court to deny preliminary relief. Defendant cherry picks two cases in which courts denied preliminary relief based upon relatively short periods of delay but ignores cases in which injunctive relief was sought and granted months after the initial filing of a Complaint. *See, e.g.*, *Indiana State Conf. of Nat'l Ass'n for Advancement of Colored*

People v. Lawson, 326 F. Supp. 3d 646, 655 (S.D. Ind. 2018), *aff'd sub nom. Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 710 (M.D. Tenn. 2019). Moreover, even in the federal cases Defendant cites—where a different test for granting preliminary relief governs—the courts do not establish a *per se* legal bar if a particular amount of time has elapsed from the filing of the complaint until the movant sought preliminary relief. Rather, the time lapse is simply one part of what those courts considered in assessing the harm to the moving party. Similarly, not a single Montana case suggests the sort of prohibition Defendant urges.

Defendant's own arguments bely the validity of her contention that Plaintiffs unduly delayed. At the same time Defendant argues that Plaintiffs have waited too long, she contends Plaintiffs did not wait long enough, because an entire category of their claims are not yet ripe. Def.'s Br. at 42-43. Defendant cannot have it both ways. The time from the filing of the Complaint to the filing of the instant motion does not prevent the grant of relief.

3. The injunction sought is prohibitory.

Defendant contorts to characterize the injunction sought as mandatory rather than prohibitory, perhaps signaling that she knows that Plaintiffs have made the required showing for the relief sought. "A mandatory injunction orders a responsible party to take action, while a prohibitory injunction prohibits a party from taking action." *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014) (internal citations and alterations omitted). Plaintiffs do not ask that Defendant be ordered to take any particular action. Rather, they seek to stop the enforcement of new laws and policies before they have governed a single statewide election. Here, the "status quo" is the state of Montana law before the challenged enactments were passed, as that is the "'last actual, peaceable, non[-]contested condition which preceded the pending controversy.'" *Driscoll*, ¶ 14 (quoting *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 14, 334 Mont. 86, 146 P.3d 714). These laws have been "contested" since their passage, with the instant suits filed shortly thereafter with not a single election passing, so Defendant's attempt to characterize the challenged laws as amounting to the "status quo" is at odds with Montana law. "Plaintiffs' requested preliminary injunction is not mandatory. Instead, like other injunctions that prohibit enforcement of a new law or policy, Plaintiffs' requested injunction is prohibitory." *Ariz. Dream Act Coalition*, 757 F.3d at 1061.

B. This Court has jurisdiction to remedy all of Plaintiffs' claims.

1. Plaintiffs have standing.

Defendant ignores the concept of organizational standing, which is well-established under Montana law, and was applied by this Court in denying Defendant's motion to dismiss of the *Montana Democratic Party* action. Under Montana law, "[a]n organization may assert standing either as an entity or by the associational standing of its members. As an entity, an organization may 'file suit on its own behalf to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the [organization] itself may enjoy.'" *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 2014 MT 69, ¶ 27, 374 Mont. 229, 236, 328 P.3d 586, 593 (citing and quoting *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 42, 360 Mont. 207, 255 P.3d 80) *overruled on other grounds, Warrington v. Great Falls Clinic, LLP*, 2020 MT 174, 400 Mont. 360, 467 P.3d 567. Organizational standing, as distinct from associational standing, provides an organization an independent basis for standing whereby the organization need only show an injury to the organization itself. *Heffernan*, ¶ 42-45.

Non-Profit Plaintiffs have incurred and continue to incur several injuries directly caused by the challenged statutes. "Economic harm caused by, or likely to be caused by, an alleged illegality is sufficient to establish standing to assert an otherwise cognizable claim for relief." *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241. Non-Profit Plaintiffs have alleged that HB 176 forces them to "spend additional resources to hire organizers earlier in the election cycle in order to mobilize turnout." Compl. ¶ 30; Affidavit of Ronnie Jo Horse (attached to Plaintiffs' Brief in Support of Motion for Preliminary Injunction), ¶¶ 20-30 ("Horse Aff."). Moreover, HB 530 "outlaws all ballot collection efforts by Non-Profit Plaintiffs" which are "core to their GOTV work and could not be replaced by other measures." Compl. ¶ 33; Horse Aff. ¶¶ 31-35. Just as in *Larson*, these allegations "evince[] a direct causal connection in fact between the alleged illegality and definite, specific, and substantial resulting harm to . . ." the Non-Profit Plaintiffs. *Larson*, ¶ 47. That harm is "clearly of a type effectively diminished, curable, or preventable by the available and requested declaratory and injunctive relief." *Id.* Thus, the financial costs Plaintiffs would be forced to undertake in an attempt to offset the burdens caused by the challenged statutes confers standing.

Defendant also fails to acknowledge the unique status of Tribal Plaintiffs as sovereign nations. Sovereign nations, including Native American tribes, can bring actions as *parens*

patriae. *See, e.g., Quapaw Tribe of Okla. v. Blue Tree Corp.*, 653 F. Supp. 2d 1166, 1181 (N.D. Okla. 2009). To assert *parens patriae* standing a sovereign must establish a quasi-sovereign interest on behalf of a substantial portion of the sovereign's population. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607-608 (1982). Quasi-sovereign interests can include a sovereign's interest in protecting the health and welfare of its citizens or protecting the sovereign's place in the federal system. *Id.* In determining how many citizens are affected, a sovereign must examine both the direct and indirect effects of the alleged actions. *Id.*

Here, Plaintiff Tribes assert *parens patriae* both on behalf of their citizens as well as their own interests in protecting their place in the federal system. Courts have recognized a quasi-sovereign interest impacting a sufficient population to justify *parens patriae* standing when sovereigns seek to protect the health and welfare of their citizens through the prevention of future violations of the constitutional rights of their citizens. *Id.*; *State Dep't of Health & Soc. Servs., Div. of Family & Youth Servs. v. Native Vill of Curyung*, 151 P.3d 388, 399 (Alaska 2006); *see also Pennsylvania v. Porter*, 659 F.2d 306, 314 (3d Cir. 1981). Likewise, Tribal Plaintiffs seek to protect their members' constitutional right to vote from HB 530 and HB 176's disenfranchising effects and therefore have asserted a sufficient quasi-sovereign interest to justify *parens patriae* standing. Compl. ¶¶ 49, 59, 69, 78; Affidavit of Dawn Gray ¶ 22 ("Gray Affidavit"); Affidavit of Lane Spotted Elk ¶ 18 ("Spotted Elk Affidavit"); Affidavit of Robert McDonald, Exhibit A, Resolution of the Governing Body of the Confederate Salish and Kootenai Tribes of the Flathead Reservation ("CSKT Tribal Resolution") (affidavits attached to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction). Additionally, Tribal Plaintiffs assert HB 530 and HB 176 violate the Tribes' status within the federal system because their political power may be diminished through the disenfranchisement of their members through the laws' discriminating effects. *Id.* Accordingly, Tribal Plaintiffs have *parens patriae* standing sufficient to vindicate the voting rights of their tribal citizens.

2. Plaintiffs' claims regarding the injuries caused by HB 530 are ripe.

Defendant incorrectly contends that Plaintiffs' claims regarding HB 530 are not ripe. Plaintiffs are already injured by HB 530. The ballot collection activities of Plaintiffs require advanced planning, and HB 530's glaring ambiguities are already harming Plaintiffs' work ahead of the upcoming election this year. *See generally* Horse Aff. ¶¶ 32, 33; *Western Native Voice v.* Stapleton, No. DV 20-0377, 2020 WL 8970685, at *26 (Mont. 13th Jud. Dist. Sept. 25, 2020)

("*Western Native Voice I"*); *see also infra*. Simply put, Defendant is asking Plaintiffs to wait several more months when HB 530 is already chilling Plaintiffs' work every day.

Even were the parties to ignore the present injuries to Plaintiffs, ripeness "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*, 2012 MT 111, ¶ 55, 365 Mont. 92, 278 P.3d 455. It is plain that the violative impacts of any administrative rule under HB 530 are highly likely to occur. It is mandatory that the Secretary implement the administrative rule under HB 530 by July 1, 2022, and the statutory text requires the rule to reach the activity of Plaintiffs, using numerous terms to capture all manner of prohibited activity related to absentee ballot assistance. *See* Horse Aff. ¶¶ 31-34.

C. HB 176 and HB 530 infringe upon Plaintiffs' fundamental rights and should be reviewed under strict scrutiny.

Defendant devotes much of her opposition to mischaracterizing the legal standard around the fundamental right to vote. As Plaintiffs' opening brief made clear, *see* Pls.' Br. at 9-10, the Montana Supreme Court has repeatedly held that "strict scrutiny [is] used when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights." *Driscoll*, ¶ 18; *see also Mont. Cannabis Indus. Ass'n v. State* ("*MCIA*"), 2012 MT 201, ¶ 16 (similar); *State v. Riggs*, 2005 MT 124, ¶ 47 ("A right is 'fundamental' under Montana's Constitution if the right . . . is found in the Declaration of Rights."); *Wadsworth v. State* (1996), 275 Mont. 287, 302, 911 P.2d 1165, 1174. Defendant does not contest that "[t]he right of suffrage is a fundamental right," *Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, 352, 325 P.3d 1204, 1210; *see also Oberg v. City of Billings* (1983), 207 Mont. 277, 280, 674 P.2d 494 ("Examples of fundamental rights include . . . right to vote"); Mont. Const. art. II, § 13. As such, given that HB 176 and HB 530 affect Plaintiffs' fundamental right to vote, *see infra*, strict scrutiny applies under binding Montana Supreme Court precedent.

Defendant deliberately overlooks this precedent and argues instead that the federal *Anderson-Burdick* balancing test should apply to Plaintiffs' claim, rather than strict scrutiny. Defendant ignores the fact that, in all cases decided after the U.S. Supreme Court formalized the *Anderson-Burdick* test in 1992, *see Burdick v. Takushi*, 504 U.S. 428 (1992), the Montana Supreme Court has affirmed that strict scrutiny, and not the *Anderson-Burdick* test, applies to the right to vote challenges. *See Johnson v. Killingsworth* (1995), 271 Mont. 1, 894 P.2d 272; *Finke*

v. State ex rel. McGrath, 2003 MT 48, 314 Mont. 314, 65 P.3d 576. Defendant claims that that the Montana Supreme Court has "applied rational-basis review to non-discriminatory laws regulating fundamental rights." Def.'s Br. at 18. Yet in all the cases Defendant cites for this proposition, the Montana Supreme Court applied lower scrutiny only because the challenged laws in question did not implicate the fundamental right in question, *not* because lower scrutiny should apply to laws that implicate those fundamental rights. *See MCIA*, ¶ 24 ("Because the fundamental right to seek one's own health is not implicated, the District Court erred when it applied a strict scrutiny analysis."); *Montana Shooting Sports Ass'n, Inc. v. State*, 2010 MT 8, ¶ 20, 355 Mont. 49, 224 P.3d 1240 ("we conclude that the requirement . . . does not implicate the MSSA plaintiffs' fundamental right of privacy. Accordingly, rational basis review—rather than strict scrutiny—applies."); *Wiser v. Mt. Dep't of Commerce*, 2006 MT 20, ¶ 20, 331 Mont. 28, 129 P.3d 133 (finding plaintiffs' claim was too attenuated to implicate the fundamental right in question).

Defendant's claim that the Montana Supreme Court has "implicitly" endorsed the *Anderson-Burdick* test is plainly incorrect. Def.'s Br. at 19. In the very case Defendant cites for that proposition, the Montana Supreme Court acknowledged the decades of precedent setting out that strict scrutiny applies to laws that burden fundamental rights like the right to vote. *Driscoll*, ¶ 18. The Court then *declined* to adopt the Secretary's request to adopt the *Anderson-Burdick* standard, which the Court said would "set forth a *new* level of scrutiny" for right to vote cases. *Id.* ¶ 20 (emphasis added). Decades of Montana Supreme Court precedent make clear that strict scrutiny applies to Plaintiffs' claims.

Even if this Court ignored binding precedent and applied *Anderson-Burdick*, Plaintiffs' claims satisfy this standard too. Defendant does not contest any of Plaintiffs' detailed factual record—for example, that HB 176 and HB 530 dramatically and disproportionately increase voter costs for Native American voters in Montana, that Native American voters consistently rely on EDR at higher rates than non-Native American voters, and that Native Americans living on reservations live much farther away from registration sites and county seats while also having less access to vehicles and money for gas and car insurance. *See, e.g.*, Pls.' Br. at 4, 12. These burdens—backed by unrebutted expert testimony—"are severe [because] they go beyond the merely inconvenient." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 205 (Scalia, J.,

concurring in the judgment). As noted *infra*, Defendant cannot point to any state interest that could possibly justify even rational-basis review, let alone more rigorous scrutiny.

D. For each of their claims, Plaintiffs have made a prima facie showing that HB 176 and HB 530 infringe on their fundamental rights.

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

Defendant seems to be under the misapprehension that Plaintiffs argue that there is a freestanding constitutional right to absentee voting or a particular form of voter registration. *See* Def.'s Br. at 30, 45. Not so. Plaintiffs simply argue that the repeal of EDR and paid ballot collection "*implicate*[] [the] fundamental right" to vote under Montana's Constitution because of the significant and disparate burdens they impose on Native voters. *Driscoll*, ¶ 18 (emphasis added). Defendant should understand this clearly, given that the Montana Supreme Court less than two years ago upheld an injunction finding that BIPA—a substantially similar law to HB 530—constituted a "disproportionate burden to Native American voters' right against 'interfere[nce with] . . . the free exercise of the right of suffrage.'" *Id.* ¶ 23 (quoting Mont. Const. art. II, § 13).

Little, if anything, has changed in the intervening months since BIPA was struck down. Once again, Plaintiffs have put forth uncontroverted evidence—which Defendant does not even try to contest—that HB 176 and HB 530 "will disproportionately affect the right of suffrage for . . . Native Americans" and that "unequal access to the polls for Native American voters would be exacerbated by" these statutes. *Id.* ¶ 21. Once again, "the Secretary has pointed to no evidence in the preliminary injunction record that would rebut . . . a disproportionate impact on Native American voters." *Id.* ¶ 22. And once again, the Secretary's claim that the statutes "appl[y] to all electors equally," Def.'s Br. at 32; *see also id.* at 45, must "fail[]" because it "does not address [Plaintiffs'] evidence that the burden on Native American communities is disproportionate," *Driscoll*, ¶ 22. Try as she might, Defendant cannot run from the clear factual record about the severe burdens HB 176 and HB 530 impose on Native voters.

Defendant claims that the Montana Constitution "grants the Legislature explicit discretion" as it pertains to whether or not to enact EDR. Def.'s Br. at 27. Even were this true, the Legislature may only exercise that discretion "subject . . . to constitutional limitations." *State v. Savaria* (1997), 284 Mont. 216, 223, 945 P.2d 24, 29; *see also Wheat v. Brown*, 2004 MT 33, ¶ 27, 320 Mont. 15, 22-23, 85 P.3d 765, 770 ("the people, through the legislature, have plenary

power, except in so far as inhibited by the Constitution") (internal quotation marks and citations omitted); *Plath v. Hi-Ball Contractors, Inc.* (1961), 139 Mont. 263, 267, 362 P.2d 1021, 1023 ("The Montana Constitution is not a grant but a limitation on legislative power, so that the Legislature may enact any law not expressly or inferentially prohibited by the Constitution."). Defendant claims that this purported grant of discretion somehow shields HB 530 from meaningful constitutional review and "controls over Article II, § 13's very general right to suffrage," Def.'s Br. at 28—as if the most fundamental rights enshrined in the Montana Constitution simply can be overridden. The correct interpretation, however, is that to the extent the Legislature has discretion related to voter registration, it must exercise that discretion in a way that comports with the fundamental right to vote guaranteed in the state constitution. As the Montana Supreme Court has held, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 261, 109 P.3d 219, 222. Given the unrefuted findings that the repeal of EDR will severely and disproportionately harm the voting rights of Native Americans living on rural reservations, that is the case here.

Finally, Defendant quotes heavily from *Brnovich* for the apparent proposition HB 530 does not violate the right to vote because Plaintiffs have not satisfied a disparate impact standard. *See* Def.'s Br. at 45-48. Setting aside the fact that Defendant has failed to contest Plaintiffs' significant evidence that HB 176 and HB 530 will disproportionately harm Native American voters, *Brnovich* was a case brought under Section 2 of the Voting Rights Act of 1965 ("VRA"). 141 S. Ct. at 2347. The legal standard set out to establish a violation of this federal statute has absolutely nothing to do with the legal standard to establish a violation under the Montana Constitution's fundamental right to vote. *Brnovich* is thus plainly inapposite here. Defendant also cites *Brnovich* for the proposition that voting in Montana is "very easy," Def.'s Br. at 46—a bizarre choice given that *Brnovich* never says anything about whether it is easy or difficult to vote in Montana. Regardless, whether or not Defendant finds voting to be easy in Montana is irrelevant. The central and only question is whether HB 176 and HB 530 burden the fundamental right to vote for Native voters by eliminating EDR and paid ballot collection. On this key issue, Defendant fails to cite anything in the factual record or in relevant precedent to the contrary.

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

As with her opposition to Plaintiffs' right to vote claim, Defendant's principal opposition to Plaintiffs' equal protection claim is based on a complete misreading of the prevailing legal standard. Defendant attempts to collapse review of HB 176 and 530 into a disparate impact analysis under § 2 of the VRA on the basis that the laws are facially neutral. *See* Def.'s Br. at 32 (citing *Brnovich*, 141 S. Ct. at 2346-47). Doing so ignores the controlling law in this case—the broader grant of equal protection as defined by the Montana Constitution and interpreted by the Montana Supreme Court, on which *Brnovich* and the VRA have no bearing. *See Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 153, 104 P.3d 445, 449.

Defendant appears to argue that a facially neutral law cannot violate equal protection if it was not passed with discriminatory intent. *See* Def.'s Br. at 33. Yet, binding Montana Supreme Court precedent says precisely the opposite. Under Montana law, a facially neutral classification may still constitute an equal protection violation where "in reality [it] constitut[es] a device designed to impose different burdens on different classes of persons." *Snetsinger*, ¶ 16 (internal citations omitted); *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 9-10, 420 P.3d 528, 535. When analyzing a facially neutral statute under equal protection, courts must first "identify the classes involved and determine whether they are similarly situated" despite differing burdens. *See Snetsinger*, ¶ 16 (internal citation omitted). Then, courts must "determine the appropriate level of scrutiny." *Id.* ¶ 17.

As to this first step of the equal protection inquiry, Native voters and non-Native voters are otherwise similarly situated, but HB 176 and 530 levy disproportionate burdens on Native American voters compared to non-Native voters. *See generally* Pls.' Br. at 12. As noted *supra*, Defendant does not meaningfully contest Plaintiffs' voluminous evidence on this score. Instead, she argues that the "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." *See* Def.'s Br. at 32. Yet, the early voting period (or the scant few days of satellite election services on reservations) do not mitigate HB 176's burden on Native voters on rural reservations for several reasons. Permitting registration for parts of the early voting period does not address the significant and disproportionate voter costs facing Native voters in remote locations—among them, high poverty rates; lack of residential mail; poor roads; long distances to post offices and

county seats; lack of access to vehicles, gasoline, and car insurance; housing instability; and poor internet access.

Further, EDR provides its own unique benefit, even beyond what non-Election Day same day registration ("SDR") provides. As Defendant's own expert testified in another case, "there is a vast body of literature on Election Day registration, less so on same-day registration."[1] And studies have determined that EDR has the most consistent positive impact on voter turnout, even when compared to SDR.[2] This is in large part because "much of the late interest in registering is concentrated at the very end of the campaign period"; the 2012 election, for example, saw a huge surge of internet search activity about how to register to vote "on and immediately before Election Day."[3] "This suggests that many Americans were interested in registering at the last minute, but were unable to do so"[4]—a clear example of the disenfranchising impact of repealing EDR. Indeed, by way of example, for the 2020 General Election, the State's own late registrant data demonstrates that over half of all late registrants relied on EDR, while slightly less than half spread out their registrations across the 29 other days.[5] Defendant's suggestion that SDR alone can mitigate the burdens imposed by the repeal of EDR is thus pure conjecture and unsupported by the evidence.

As to the second step of the equal protection analysis, the Montana Supreme Court makes clear that even for purposes of a facially neutral law, "[s]trict scrutiny applies if a suspect class or fundamental right is affected." *Snetsinger*, ¶ 17. Given that HB 176 and 530 impose different burdens on similarly situated Native and non-Native voters as it pertains to the fundamental right to vote, and given that Defendant offers no compelling interest justifying these laws under strict

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[1] Trial Transcript, *N.C. State Conf. of the NAACP v. McCrory*, No. 1:13CV660, (M.D.N.C. July 27, 2015), 188:16-17.

[2] Barry C. Burden et al., *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 Am. J. Pol. Sci. 95, 108 (2014) ("The only consistent way to increase turnout is to permit Election Day registration.").

[3] Alex Street et al., *Estimating Voter Registration Deadline Effects with Web Searches*, 23 Pol. Analysis 225, 288 (2015); *see also id.* at 227 ("we find substantial last-minute interest" in registering to vote).

[4] *Id.*

[5] *See* Total Late Voter Registration Activities By Election, Mont. Sec'y of State, https://sosmt.gov/elections/latereg/ (last accessed Mar. 1, 2022) (Of 15,962 voters who made use of the late registration period, 8,172—that is, 51.2%—relied upon EDR).

scrutiny, *see infra*, HB 176 and HB 530 violate Plaintiffs' right to equal protection, *see Snetsinger*, ¶ 16.

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

As with Plaintiffs' other claims, Defendant ignores the decisions of Montana courts and instead relies only upon non-binding decisions of federal courts to contend that Plaintiffs' state constitutional right to free speech has not been violated. *See* Def.'s Br. at 51-52; *City of Billings v. Ladeke* (1991), 247 Mont. 151, 158, 805 P.2d 1348, 1352. Montana's right to free speech encompasses "the opportunity to persuade to action, not merely to describe facts." *Mont. Auto Ass'n v. Greely* (1981), 193 Mont. 378, 387, 632 P.2d 300, 305. This includes communication and coordination with voters for ballot collection purposes. When Non-Profit Plaintiffs collect and convey ballots, they engage in protected speech. When Plaintiffs Blackfeet Nation and CSKT promote the work of Non-Profit Plaintiffs' organizers or hire their own ballot collectors, they likewise engage in protected speech. Because HB 530 infringes Plaintiffs' fundamental right to speech, it should be enjoined.

Montana courts have recently held ballot collection activity to be protected under the Montana constitution because such "interactive communication concerning political change" constitutes core political speech. *Western Native Voice I*, 2020 WL 8970685, at *23 (quoting *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988)); *see also Driscoll*, Cause No. DV 20-0408, slip op. at 24, ¶ 9. Here, as in *Western Native Voice I* and *Driscoll*, the Montana Constitution protects the core political speech involved in ballot collection efforts. When Non-Profit Plaintiffs endeavor "to collect and convey ballots for individual Native American voters living on rural reservations[,]" they send a "message that the Native American vote should be encouraged and protected and that voting is important as a manner of civic engagement." *Western Native Voice I*, 2020 WL 8970685, at *23. They seek to "communicat[e] [their] belief in the importance of civic engagement and voter participation to the Native American community." Pls.' Br. at 13. Such "unfettered interchange of ideas for the bringing about of political and social changes desired by the people" forms the core of activity the Montana Constitution protects. *Dorn v. Bd of Trs. of Billings Sch. Dist. No. 2* (1983), 203 Mont. 136, 145, 661 P.2d 426, 431 (internal quotation marks omitted).

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

Defendant all but concedes that HB 530 is ambiguous as written. Defendant acknowledges that the Secretary will "resolve" statutory ambiguities "during the rulemaking

process." Def.'s Br. at 44. Defendant further acknowledges that this administrative rulemaking "process designed to provide [statutory] clarity has yet to occur." *Id.* In other words, Defendant recognizes that HB 530 has ambiguities that remain unresolved in the absence of administrative rulemaking, and that she has "not yet even begun" any sort of rulemaking process, for which there is no concrete timeline. *Id.* at 43 (citing Defendant's Statement of Undisputed Facts in Support of Motion for Summary Judgment ("Def.'s SUF") ¶ 97). Hypothesizing a future rulemaking process within the statute does not absolve the Legislature of its legal obligation to provide clarity in the statute itself to satisfy Plaintiffs' fundamental right of due process.

Defendant also failed to resolve the three specific statutory ambiguities in HB 530 noted in Plaintiffs' opening brief. *See* Pls.' Br. at 14-15. Defendant instead merely restates those ambiguities and asserts that the "Secretary is well within her power to resolve [them] in the course of the administrative rule making process." Def.'s Br. at 43-44. If HB 530's text were clear on its face, Defendant in her opposition would have been able to resolve the statutory ambiguities Plaintiffs have raised and provided them "sufficient notice of what conduct is proscribed." *State v. Dugan*, 2013 MT 38, ¶ 69, 369 Mont. 39, 63-64, 303 P.3d 755, 773. Defendant could not do so because the statute is vague. Indeed, the CSKT tribal council has already expressed confusion about the scope of HB 530's governmental exemption. *See* CSKT Tribal Resolution.

Lastly, Defendant ignores the concrete harm that HB 530 *currently* inflicts on Plaintiffs in claiming that any harm posed by HB 530 before the adoption of an administrative role is "entirely speculative." Def.'s Br. at 44. Yet, the ambiguities within HB 530 do not provide fair warning of what conduct related to ballot collection will trigger its penalties. HB 530's ambiguities around the bounds of prohibited conduct and which entities are exempt "operates to inhibit the exercise of [First Amendment] freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation marks omitted). To ensure they incur no penalties under the vague statute, Plaintiffs are forced to "steer far wider of the unlawful zone" than they would if HB 530 provided explicit standards. *Id.* (internal quotation marks omitted); *see also State v. Stanko*, 1998 MT 321, ¶¶ 23-24, 292 Mont. 192, 974 P.2d 1132, 1136.

As written, HB 530 already chills Non-Profit Plaintiffs' political organizing and activity. Western Native Voice ("WNV") delivers and collects ballots to voters on all seven of Montana's reservations in addition to urban Indian centers. Horse Aff. ¶ 31. Because of HB 530, WNV is

now forced to either subject itself and its members to the risk of substantial fines or significantly scale back its Get Out the Vote activities by terminating ballot collection operations. *Id.* ¶¶ 32, 34. As there is no organized ballot collection group that provides a comparable scale of ballot collection services, the organization would also be forced to "spend additional resources on education and messaging" to Native American communities about the new law, which does not impose clear standards for them to follow. *Id.* ¶ 33. WNV does not have capacity to recruit, hire, and train additional organizers for this purpose for the 2022 cycle with their current resources and staff, diminishing the expressive conduct central to their organizational mission. *Id.* ¶¶ 35-36. In other words, harms to Plaintiffs are not speculative. HB 530's ambiguities are harming Plaintiffs *right now*, as these organizations prepare for elections fast approaching later this year. HB 530 poses a present and ongoing harm to Plaintiffs that cannot wait for administrative rulemaking by Defendant.

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

None of the state interests that Defendant identifies justify the burdens imposed by HB 176 and HB 530 under even the *Anderson-Burdick* standard, let alone the proper strict scrutiny framework. First, Defendant states that HB 530 serves the state's interest in preserving election integrity and protecting against voter fraud—the only claimed interest during the legislative session. *See*, Def.'s Br. at 48-49. Defendant does not contest Plaintiffs' evidence that the rate of voter fraud is infinitesimally small; that only one or two people in Montana have ever been convicted of voter fraud, and none in connection with ballot collection or EDR; and that while barely any voter fraud exists in the United States, more fraud exists in states that ban ballot assistance than in those that permit ballot assistance. *See* Pls.' Br. at 16-18; Def.'s SUF ¶¶ 36-41. Defendant asserts that "Montana has well-documented and publicized instances of voter fraud," Def.'s Br. at 22, but then proceed to provide just *two* examples of any voter fraud convictions in Montana's history, neither of which implicate ballot collection or EDR, *see* Def.'s SUF ¶¶ 36-41. As such, Defendant has failed to show essentially any evidence of voter fraud in Montana, let alone any fraud that HB 176 or HB 530 specifically would remedy.

Relatedly, Defendant suggests that HB 530 serves election integrity by "regulating [the] connection between money and ballot collection." Def.'s Br. at 50. But Defendant nowhere—including in the two declarations submitted by her purported experts—provides any studies, analysis, or quantitative data indicating that paid ballot collection results in increased fraud or

voter coercion. *See* Def.'s SUF ¶¶ 93-95. Defendant offers only innuendo and say-so, claiming without evidence or analysis that paid ballot collection "creates a temptation" for collectors to risk criminal prosecution by committing voter fraud. Expert Declaration of Scott E. Gessler ¶ 48. This Court should not credit this evidence-free speculation.

Defendant insists that it is "irrelevant" that she fails to provide any proof of substantial voter fraud in Montana or the broader U.S., Def.'s Br. at 49, noting that in *Crawford*, the U.S. Supreme Court upheld the challenged law under *Anderson-Burdick* despite the fact that there was limited evidence of voter fraud in Indiana, *id.* at 22. Yet in *Crawford*, the Court found that the challenged law "imposes only a limited burden on voters' rights," 553 U.S. at 203 (internal quotation marks omitted)—meaning that the state interest did not need to be at all significant to outweigh the burden on voters. Here, as noted *supra*, Plaintiffs have provided unrebutted evidence that both HB 176 and HB 530 constitute a severe burden on Native Americans in Montana.

Perhaps more importantly, in 2020, the Montana Supreme Court found that the Secretary could not justify BIPA under any standard because "he did not present evidence in the preliminary injunction proceedings of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana." *Driscoll*, ¶ 22. In other words, the Montana Supreme Court has already found that, absent meaningful evidence of voter fraud or voter coercion in Montana, the State cannot appeal to general concerns of election security.

Second, Defendant states HB 530 is important to "promot[e] voter confidence in Montana elections." Def.'s Br. at 48. Yet Defendant provides no evidence that HB 176 and HB 530 would have any effect on voter confidence, positive or negative. *See* Def.'s SUF ¶¶ 1-24. Defendant similarly provides no evidence that Montana's purported loss of confidence in elections is related to EDR or paid ballot collection. *See id.* Without a shred of evidence, Defendant cannot show that HB 530 serves the state's interest in preserving public confidence in elections or is narrowly tailored to achieve that interest.

Third, Defendant claims that HB 176 will alleviate "long lines at the polls that prevented Tribal voters from registering and voting because they could not afford to wait." Def.'s Br. at 33. Here, Defendant mischaracterizes the operation of Montana elections. EDR cannot occur at the polls. And for the potential lines at the county seat, Defendant's own declarant admits that registering a new voter on Election Day takes just 5-10 minutes, Eisenzimer Decl. ¶ 9.

Regardless, HB 176 cannot possibly be narrowly tailored to reduce wait times and thus allow "Tribal voters [to] register[] and vot[e]" because it is uncontested that the law dramatically and disproportionately increases Native Americans' voter costs. In this way, HB 176 is entirely self-defeating as to its stated purpose. It is uncontested that Native Americans living on reservations disproportionately use EDR as compared to other Montanans, Street Aff. ¶ 4 (attached to Plaintiffs' Brief in Support of Motion for Preliminary Injunction), and Defendant does not challenge the fact that Native Americans face unique voter costs that make the repeal of EDR particularly damaging for them. There are myriad ways to reduce wait times at polls—including hiring more poll workers, modernizing voting machines, or expanding early voting—that would benefit Native American voters, and not harm them as HB 176 does.[6]

Fourth, and finally, Defendant claims that HB 176 will "reduc[e] the burden on election administrators." Def.'s Br. at 33. As with the state's interest in reducing wait times, this presents a tailoring problem: there are ways to reduce the burden on election administrators, such as increasing the number of poll workers or modernizing election equipment, without increasing voter costs on Native Americans. And even if such administrative burdens were actual and not speculative, the state's interest in easing administrative burdens on some election officials cannot outweigh the fundamental right to vote. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) ("[t]here is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by [the Secretary of State's] office and other state and local offices involved in elections."); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2018) (finding that administrative, time, and financial burdens on the state are "minor when balanced against the right to vote, a right that is essential to an effective democracy"); *Georgia State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1348 (N.D. Ga. 2015) (granting injunction under Section 2 of VRA, even though county board of commissioners ("BOC") would face administrative burdens from an injunction, because "the harm [plaintiffs] would suffer by way of vote dilution outweighs the harm to the BOC.").

E. Defendant mostly does not contest the other preliminary injunction factors.

In their opening brief, Plaintiffs argue that the other preliminary injunction factors weigh

[6] *See generally* Joint Ctr. for Policy & Econ. Studies, *How to Reduce Long Lines to Vote*, (Aug. 10, 2016) https://jointcenter.org/how-to-reduce-long-lines-to-vote-joint-center-policy-brief-2/.

strongly in their favor—that Plaintiffs will suffer irreparable harm absent an injunction, that "[t]he balance of equities tips sharply in Plaintiffs' favor," and "[i]njunctive relief serves the public interest in this case." Pls.' Br. at 18-20. Defendant does not include anything in her opposition on the balance of the equities or the public interest, and contests irreparable harm only on grounds that Plaintiffs' improperly delayed bringing their preliminary injunction motion. *See* Def.'s Br. at 7-10. As such, Defendant has waived opposition to Plaintiffs' argument on the balance of the equities and public interest factors, and has waived any argument on irreparable harm other than delay.

CONCLUSION

For these reasons and all those in Plaintiffs' initial Memorandum in support of their Motion for a Preliminary Injunction, this Court should enjoin the operation of HB 176 and HB 530.

DATED THIS 2nd day of March, 2022.

Respectfully submitted,

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