David M.S. Dewhirst (MT Bar #65934132)
Solicitor General
Kathleen Smithgall (MT Bar #67323943)
Assistant Solicitor General
Office of the Attorney General
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026

Dale Schowengerdt (MT Bar #30342848)
Ian McIntosh (MT Bar #4384)
Leonard H. Smith (MT Bar #3445)
John M. Semmens (MT Bar #12467)
Mac Morris (MT Bar #13048)
David Knobel (MT Bar #212614)
E. Lars Phillips (MT Bar #42374365)
CROWLEY FLECK PLLP
P.O. Box 797
Helena, MT 59624-0797
Telephone: (406) 449-4165

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

IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

Montana Democratic Party and Mitch Bohn,

Plaintiffs,

Western Native Voice, *et al.*,

Plaintiffs,

Montana Youth Action, *et al.*,

Plaintiffs,

vs.

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

Defendant.

Consolidated Case No. DV 21-0451

Hon. Michael Moses

BRIEF IN SUPPORT OF DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Introduction

The Court should grant the Secretary's motion and enter judgment in her favor on each of Plaintiffs' claims. Plaintiffs challenge the constitutionality of four discreet pieces of legislation that strengthened Montana's election procedures—SB 169, HB 176, HB 506, and HB 530. Each law is generally applicable, nondiscriminatory, and eminently reasonable. They are precisely the type of legislation the U.S. Supreme Court and other courts consistently have affirmed. This Court should do likewise.

Like all election laws, SB 169, HB 176, HB 506, and HB 530 "invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). But Plaintiffs' argument that these laws are unconstitutional on this basis amounts to the mistaken pursuit of a partisan policy objective without a coherent legal principle capable of illuminating what Montana election laws are constitutionally permissible, and which are not.

Defendant is entitled to summary judgment under Montana law because Plaintiffs cannot produce "substantial evidence raising a genuine issue of material fact essential to one or more elements of [their] case." *Virginia City v. Est. of Olsen*, 2009 MT 3, ¶ 14, 348 Mont. 279, 201 P.3d 115. Namely, Plaintiffs lack evidence proving the laws at issue: (i) place an impermissible burden on Montanans' ability to vote; or (ii) have a disparate impact on an adequately defined class of Montanans and were motivated by discriminatory intent. Speculation, conclusory assertion, or subjective interpretation of an otherwise clear set of facts are insufficient to raise a genuine issue of material fact under M. R. Civ. P. 56. *House v. US Bank Nat'l Ass'n*, 2021 MT 45, ¶ 14, 403 Mont. 287, 481 P.3d 820 (citations omitted).

Plaintiffs' attempts to substantiate the factual allegations underpinning their legal claims failed. Initially, Plaintiffs submitted to this Court affidavits from various Montanans explaining how the laws at issue allegedly burdened their ability to vote in Montana elections. *See, e.g.,* Dkt. Nos. 43-51, 58-70. The Court relied on those affidavits when it entered its Findings of Facts, Conclusions of Law, and Order Granting Plaintiffs' Motions for Preliminary Injunctions. *See, generally,* Dkt. 124. But when Defendant tested the factual bases for those affidavits during depositions, Plaintiffs' witnesses directly contradicted their earlier affidavits in various critical ways. Defendant's Updated Statement of Undisputed Facts in Support of Renewed Motion for Summary Judgment, ¶¶ 164-171.[1] Notably, Plaintiffs have not corrected or withdrawn any affidavits contradicted by their witnesses' later deposition testimony.

Boiled down, the factual premise for Plaintiffs' complaints was disproven during discovery. Over 337,000 votes were cast in Montana's 2021 elections, which were governed by SB 169, HB 176, HB 506, and HB 530. Dkt. 91, ¶ 36. Plaintiffs have failed to identify any Montanans who were unable to vote in Montana's 2021 elections solely because of these laws. And even if Plaintiffs could produce the "substantial evidence" necessary to carry their heavy burden of proving a Montana statute unconstitutional beyond a reasonable doubt (they cannot), these laws still are constitutionally permissible because they advance Montana's legitimate and compelling interests. Those interests include: (i) imposing reasonable procedural requirements designed to ensure the integrity, reliability, and fairness of its election processes; (ii) promoting

[1] Attached to the instant Motion, Defendant has filed an Updated Statement of Undisputed Facts to supplement the original Statement of Undisputed Facts, Dkt. 80, accompanying Defendant's original Motion for Summary Judgment, Dkt. 79, for the purposes of incorporating facts learned in the course of discovery in this case.

and safeguarding voter confidence in the security of Montana's elections; (iii) deterring and detecting voter fraud; (iv) reducing administrative burdens on election officials; (v) ensuring uniform standards apply to all Montana voters, regardless of county residence; (vi) ensuring voters satisfy Montana's voter qualification standards, as established by Article IV, § 2 of the Montana Constitution; and (vii) making voting in Montana elections easier and less burdensome.

For these reasons, and those identified below, the Court should grant the Secretary's Renewed Motion for Summary Judgment[2] because there are no material facts in dispute, and she is entitled to judgment under well-settled Montana and federal law.

Standard of Review

The purpose of summary judgment "is to dispose of those actions which do not raise genuine issues of material fact and to eliminate the expense and burden of unnecessary trials." *Hajenga v. Schwein*, 2007 MT 80, ¶ 11, 336 Mont. 507, 155 P.3d 1241. Summary judgment "serves to encourage judicial economy" and eliminate delay. *Silvestrone v. Park Cnty.*, 2007 MT 261, ¶ 9, 339 Mont. 299, 170 P.3d 950. "[S]ummary judgment should be granted when the pleadings, discovery, and affidavits show 'that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.'" *Gourneau ex rel. Gourneau v. Hamill*, 2013 MT 300, ¶ 8, 372 Mont. 182, 311 P.3d 760 (quoting Mont. R. Civ. P. 56).

[2] The Secretary initially filed a motion for summary judgment on each of Plaintiffs' claims on February 16, 2022. Dkt. 78 and 79. The Parties subsequently asked the Court to amend certain pretrial deadlines, including the deadline for filing dispositive motions. Dkt. 146. The Court granted that request (Dkt. 147), and the Parties agreed pending dispositive motions should be filed anew once discovery closed.

"Once the party moving for summary judgment meets its burden of establishing an absence of genuine issues of material fact, the opposing party must present substantial evidence to raise a genuine issue of material fact," i.e., "more than 'speculative, fanciful, or conclusory statements.'" *BNSF Ry. Co. v. Eddy*, 2020 MT 59, ¶ 7, 399 Mont. 180, 459 P.3d 857 (citations omitted). "Whether a fact is 'material' depends on the substantive law, i.e., the elements of the cause of action or defenses at issue" and "[o]nly genuine disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Broadwater Dev., L.L.C. v. Nelson*, 2009 MT 317, ¶ 15, 352 Mont. 401, 219 P.3d 492. Montana law does not permit "parties opposing summary judgment to create genuine issues of material fact by means of sworn statements or testimony totally contradicting their earlier sworn statements." *Bowen v. McDonald*, 276 Mont. 193, 199-200, 915 P.2d 201, 205 (1996) (citing *Stott v. Fox*, 246 Mont. 301, 309, 805 P.2d 1305, 1309-10 (1990)). "'[W]hen statements in an affidavit submitted pursuant to Rule 56(e), M.R.Civ.P., are repudiated in a later deposition, the affidavit statements do not raise a genuine issue of material fact'" and the "witness's later deposition controls[.]" *Ray v. Connell*, 2016 MT 95, ¶ 13, 383 Mont. 221, 371 P.3d 391 (citations omitted).

Summary judgment is appropriate here because there are no *material* factual disputes and constitutional challenges to statutes are questions of law appropriate for resolution on summary judgment. 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).

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. "It is the duty of [this Court], if possible, to construe statutes in a manner that avoids an unconstitutional interpretation." *Montana Indep. Living Project v. Dep't of Transp.*, 2019 MT 298, ¶ 14, 398 Mont. 204, 454 P.3d 1216; *see also Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877. The Court's ultimate decision should be guided by its own legal analysis. *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").

Secretary Jacobsen meets these standards and is entitled to judgment as a matter of law.

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). All Plaintiffs—except Mitch Bohn—are organizations, not voters. Organizational plaintiffs 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 & Rice, JJ., concurring and dissenting) (emphasis in original; *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (to establish organizational standing, plaintiffs must make "specific allegations establishing that at least one identified member had suffered or would suffer harm.")

No plaintiff has identified a single voter who experienced actual concrete harm, much less a voter who has been prohibited from voting, solely due to these statutes.[3] That is not surprising given how easy it is to vote in Montana and the minimal 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); *see also* Bohn Depo. Transcr., 37:12-21, 39:2-6 (Bohn has never "asked a third party other than [his] parents to deliver [his] absentee ballot directly to the election office"). Further, Mr. Bohn admitted, during his deposition, that he has never asked a representative of the Montana Democratic Party to return his ballot for him and, further, that it was "not important to him" whether a person collecting his ballot was paid or not. Bohn. Depo.

[3] 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. Dkt. 82, Ex. 1-23 (WNV's Answer to Interrogatory No. 11).

Transcr., 37:12-38:8, 40:4-15, 41:9-13. 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. SB 169's minor changes to Montana's voter ID laws are constitutionally permitted.

A. Overview of Montana's voter ID laws, including SB 169.

Montana has required voter identification since at least 2003. 2003 Montana Laws Ch. 475 (HB 190). Montana's voter identification laws (both before and after SB 169) split acceptable forms of ID into two categories, primary and non-primary. Primary photo IDs are sufficient by themselves to establish voter identification, while non-primary IDs are acceptable when presented with another document showing name and address. Before SB 169, student IDs were primary ID. § 13-13-114 (1)(a)(i-ii), MCA; *see* Dkt. 91, ¶¶ 17-28; Dkt. 84, ¶¶ 10-16; Dkt. 83, ¶¶ 11-19. SB 169 amended the primary ID requirement by making government-issued federal or Montana ID primary, and all other ID non-primary. Currently, a voter must show an election judge:

> (i) A Montana driver's license, Montana state identification card issued pursuant to 61-12-501, military identification card, tribal photo identification card, United States passport, or Montana concealed carry permit; or
>
> (ii) (A) a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address; and
>
> (B) photo identification that shows the elector's name, including but not limited to a school district or postsecondary education photo identification.

§ 13-13-114 (i-ii), MCA.

Because student IDs are not government-issued IDs, they are no longer primary, but still can be used with another qualifying document showing name and address, such as the voter registration card the Secretary's office sends to each registered voter. Dkt. 91, ¶¶ 23-27, 40-45;

Dkt. 91, Ex. 2-2 (sample "Voter Confirmation Card"). Contrary to Plaintiffs' consistent misconstruction of the statute, a student ID combined with a voter registration card is sufficient. Dkt. 91, ¶¶ 42-45. Montana voter registration cards explicitly state: "This card paired with a photo ID containing your name may be used as identification when you vote." *Id.* ¶ 33. The Legislature enacted SB 169 to "help prevent[] illegal voting," "increase[] voter confidence in elections"; and "make[] it easier for election administrators and workers to administer and understand what constitutes proper voter ID." Dkt. 87, ¶¶ 40-41; Dkt. 84, ¶¶ 10-16; Dkt. 83, ¶¶ 11-19.

At the same time, the Legislature made complying with Montana's voter ID laws easier. First, SB 169 removed the requirement that primary ID be "current," so an expired driver's license or other expired qualifying ID is now sufficient. Dkt. 82, Ex. 1-22; Dkt. 91, ¶¶ 58-64. The Secretary recommended that change after hearing from several Tribes that the "current" requirement interfered with Native voting because it was sometimes unclear whether Tribal IDs were current. Dkt. 91, ¶¶ 58-64. That change also removed potential barriers to older/disabled voters with expired licenses. SB 169 also expanded the categories of primary ID. § 13-13-114(1)(a)(i), MCA.

Second, the Legislature adopted a failsafe for voters unable to comply with the voter ID requirements by allowing them to submit a "Declaration of Impediment for an Elector" affidavit, which is available at elections offices. Dkt. 91, ¶¶ 26, 48-53; *see also* § 13-15-107(3), MCA; ARM 44.3.2110. Using the "Declaration of Impediment" form, which did not exist prior to enactment of SB 169, voters who lack required photo ID still can submit a provisional ballot by attesting they have one of several qualifying impediments, including: (1) "lack of transportation"; (2) "lack of birth certificate or other documents needed to obtain identification"; (3) "work schedule"; (4)

"lost or stolen identification"; (5) "disability or illness"; (6) "family responsibilities"; or (7) "photo identification has been applied for but not received." § 13-15-107(4), MCA; Dkt. 91, ¶¶ 26, 48-53; Dkt. 91, Ex. 2-4 (sample form). And even if an elector cannot utilize the reasonable impediment process, the elector may use the Polling Place Identification Form process set forth by administrative rule. *See* ARM 44.3.2102(7); ARM 44.3.2103(1)(f); Dkt. 91, ¶ 26 and Ex. 2-1 (sample form). SB 169 imposes only minimal burdens, if any, on voters.

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

1. Because SB 169 is facially neutral, Plaintiffs must prove disparate impact on a defined class and substantial evidence of a discriminatory purpose.

MDP and MYA have failed to carry their heavy burden of proving SB 169 violates Montana's Equal Protection Clause. MDP argues "young Montanans are unduly affected because the Restrictions constrict identification[.]" Dkt. 57, p. 18. The entirety of MYA's argument is "young voters . . . can no longer rely on the most readily accessible form of ID (SB169)." Dkt. 73, pp. 15-16. Montana law demands far more than Plaintiffs' conclusory statements. *See Rohlfs*,, ¶ 7 (party asserting equal protection challenge to statute "bears the burden of proving it unconstitutional beyond a reasonable doubt").

SB 169 is facially neutral—it subjects all voters to the same requirements. A facially neutral law only may be subject to an equal protection claim if Plaintiffs prove: (i) a disparate impact on a specific class of persons and; (ii) substantial evidence of discriminatory intent

towards that class.[4] *See Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 420 P.3d 528; *Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002, 1010 (Mont. 1981); *Hensley v. Montana State Fund*, 2020 MT 317, ¶ 121, 402 Mont. 277, 477 P.3d 1065 (for "facially neutral" law to violate equal protection clause, it must have "a discriminatory purpose **and** effect on otherwise similarly situated classes") (Sandefur, Gustafson, and Fehr, JJ., dissenting) (emphasis added). 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 (citation omitted). MDP and MYA cannot establish either element of their equal protection challenge to SB 169.

a. No evidence supports Plaintiffs' disparate impact theory.

MYA and MDP cannot establish a disparate impact to an identifiable class. Plaintiffs do not adequately define a class, but instead vaguely refer to "young voters." MDP and MYA also fail to offer sufficient evidence of disparate impact to this purported class. MDP simply argues, with virtually no supporting evidence, *students* are more likely to have a student identification card than a driver's license, a utility bill, or a bank statement. Dkt. 57, pp. 8-9. In the course of discovery,

[4] *Snetsinger* does not modify the challenging party's obligation to prove a facially neutral statute was motivated by a discriminatory purpose. Dkt. 124, p. 46 (citing *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445). Critically, the challenged policies in *Snetsinger* were not facially neutral. *Snetsinger*, ¶¶ 27-29. The Montana Supreme Court did quote *State v. Spina* in dicta. *Snetsinger*, ¶ 16 (quoting *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421). In *Spina*, the Montana Supreme Court explained facially neutral laws could be challenged on equal protection grounds if they "in reality constitute[ed] a device designed to impose different burdens on different classes of persons." *Spina*, ¶ 85 (citations omitted). But in the very next sentence it reaffirmed "**it is a basic equal protection principle that the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose**." *Id.* (emphasis added). Plaintiffs have failed to prove the Legislature had an impermissibly discriminatory purpose when it enacted SB 169 (and the other statutes at issue), and this Court has made no such finding.

Plaintiffs have not identified a single individual who lacks a Montana Driver's License, a United States Passport, or some other form of government issued ID. Plaintiffs' claim that the law burdens students is simply implausible. Assuming a student does not have a government-issued ID (itself implausible, since they needed one to register),[5] **he or she still can use a student ID to vote** in conjunction with the voter registration card the Secretary mailed to them (or a utility bill, bank statement, or any other government document with name and address). § 13-2-110(4)(a)(ii); Dkt. 91, ¶¶ 34, 42; Dkt. 82, Ex. 1-22. Not surprisingly, Plaintiffs cannot identify a single college student (or anyone else) precluded from voting by SB 169.

Essentially, then, MYA's and MDP's argument is that SB 169 violates Montana's Equal Protection Clause based on speculation it might prevent "young voters" from using identification that may be available to some of them and might be preferrable for those who have it. A central problem with MDP and MYA's argument is they ask this Court to view a "student ID" as a proxy for all "young voters." But only 32.3% of 18-24 year-olds in Montana are enrolled in college.[6] And, as noted, to register and get a student ID, college students need "a federal or state government issued identification (ex. Driver's license), a passport, military ID or other government-issued

[5] University of Montana, *Get Your Griz Card*, https://www.umt.edu/griz-card/get-your-griz-card/default.php (last accessed May 27, 2022) (students "need to show a government issued photo ID to pick up your Griz Card"); Montana State University, *Get Your Cat Card*, https://www.montana.edu/catcard/students.html (last accessed May 27, 2022) ("A CatCard cannot be issued without identity verification," i.e., "a valid government-issued photo ID").

[6] NCHEMS Information Center, *Percent of 18 to 24 Year Olds Enrolled in College*, http://www.higheredinfo.org/dbrowser/index.php?submeasure=331&year=2017&level=nation&mode=data&state= (last accessed May 27, 2022).

photo ID."[7] That further explains why Plaintiffs have been unable to identify a single student voter precluded from voting by SB 169—in short, the underlying evidence does nothing to support Plaintiffs' claim that SB 169 will preclude students (or any Montanans) from voting.

But even if Plaintiffs were correct SB 169 impacted student voters more distinctly (it does not), the alleged impact is not constitutionally significant. Even where "a somewhat heavier burden may be placed on a limited number of persons," including the elderly and homeless, the law should not be subjected to heightened scrutiny. *Crawford*, 553 U.S. at 199-203. In evaluating a voting system's burdens (especially in a facial challenge, as here), courts look at "[the statute's] broad application to all [] voters." *Id.* at 202-03. And the Court noted any increased harm to certain individuals was mitigated by the opportunity to cast a provisional ballot without ID and/or vote absentee, just like in Montana. *Id.* at 199, 202. That SB 169 may affect different voters in different ways is unavoidable and justified by the "State's broad interests in protecting election integrity." *Id.* at 200.

b. SB 169 was not motivated by discriminatory intent.

MDP and MYA also have failed to meet their burden to present substantial evidence that the Montana Legislature's decision to enact SB 169 was motivated by discriminatory intent. *See Fitzpatrick*, 194 Mont. at 323; *see also Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (party challenging facially neutral law must prove "discrimination" was "a 'substantial' or 'motivating' factor behind enactment of the law"). Their equal protection claims fail because they rely exclusively on conclusory allegations of discriminatory intent, not evidence. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of . . . discriminatory intent

[7] University of Montana, *Get Your Griz Card*, https://www.umt.edu/griz-card/get-your-griz-card/default.php (last accessed May 27, 2022).

or purpose is required to show a violation of the Equal Protection Clause."). 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. U.S.*, 718 F.3d 1370, 1376 (Fed. Cir. 2013) ("mere awareness" of consequences of law not discriminatory intent). Conversely, "isolated statements made by opponents of a bill are to be accorded little weight" in evaluating the Legislature's intent. *Fieger v. U.S. Atty. Gen.*, 542 F.3d 1111, 1119 (6th Cir. 2008) (citing *N. L. R. B. v. Fruit & Vegetable Packers & Warehousemen, Loc. 760*, 377 U.S. 58, 66 (1964)). Fatally, Plaintiffs have not shown sufficient facts to establish the Legislature intended to harm any class of citizens by establishing a uniform standard requiring government-issued IDs as primary identification. *See Fitzpatrick*, 194 Mont. at 323. Instead, the record reflects 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. Dkt. 84, ¶¶ 10-16; Dkt. 83, ¶¶ 11-19.

MYA's and MDP's equal protection challenge fails because they cannot prove with evidence: (i) a disparate impact on "young voters"; or (2) the Legislature's discriminatory intent towards that class. Either deficiency, standing alone, should compel the Court to enter summary judgment in Defendant's favor on Plaintiffs' equal protection challenges to SB 169 (as well as Plaintiffs' similar challenges to the other facially-neutral laws at issue).

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

Even if MYA's and MDP's equal protection claims were supported by sufficient evidence (they are not), Plaintiffs' argument that SB 169 must pass strict scrutiny because it "implicates"

the right to vote is legally incorrect. Their theory, if accepted, would obliterate the Legislature's constitutional duty to regulate elections by "insur[ing] the purity of elections and guard[ing] against abuses of the electoral process." Mont. Const. Art. IV, § 3.

Plaintiffs erroneously assume "**[a]ny** governmental infringement" on the right to vote is unconstitutional "unless strict scrutiny is satisfied." Dkt. 42, p. 15 (citations omitted) (emphasis added). 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.[8] Montana courts would become consumed with determining whether thoroughly banal statutes could survive the most exacting constitutional review. *See, e.g.,* § 13-1-104, MCA ("A general election must be held throughout the state on the first Tuesday after the first Monday in November").

The Court should reject Plaintiffs' argument that strict scrutiny rigidly applies to all voting cases for the same reasons federal courts and most state courts have rejected similar arguments. The U.S. Supreme Court best articulated the rationale for a more flexible approach:

> 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. . . **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**.

[8] As discussed below, Article IV, § 3 directs the Montana Legislature to regulate Montana elections. The 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 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.

Burdick, 504 U.S. at 433 (internal citations omitted) (emphasis added).

The right to vote unquestionably is fundamental under both the Montana and federal constitutions.[9] But that cannot mean there is a right to vote in any manner, free from regulation. *Id.*; *Driscoll*, ¶ 45 (Sandefur & Rice, JJ., concurring in part and dissenting in part). The State's authority to regulate elections is necessary to ensure fair and honest elections, which, in turn, safeguards the right to vote. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) ("The Elections Clause gives States authority 'to enact the numerous requirements as to [voting] procedure and safeguards **which experience shows are necessary in order to enforce the fundamental right involved**.'") (citations omitted, emphasis added).

Rather than adopt a rigid test that dissuades States from exercising this power, federal courts adopted a "more flexible standard" ("*Anderson-Burdick* standard"). *See Burdick*, 504 U.S. at 433-35 (it is an "erroneous 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.") (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Strict scrutiny is reserved for laws that severely burden the right to vote, while lesser burdens trigger less exacting scrutiny; "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* at 434 (citation omitted). Thus, the "general rule" is "'evenhanded restrictions that protect the integrity and reliability of the electoral process

[9] 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.

itself' are not invidious" and, thus, satisfy constitutional scrutiny. *Crawford*, 553 U.S. at 189-91 (plurality). "Common sense" compels this conclusion—government plays a necessary role in structuring and administering elections. *Burdick*, 504 U.S. at 433; *Thornton*, 514 U.S. at 834; U.S. Const. art. 1, § 4, cl.1; Mont. Const. art. IV, § 3. The *Anderson-Burdick* framework—which has been widely adopted—rejects Plaintiffs' all-or-nothing approach. *See Crawford*, 553 U.S. at 190.

The challenged laws here fall squarely within the scope of election regulations that courts have repeatedly upheld under the *Anderson-Burdick* framework, i.e., reasonable regulations that were constitutionally permissible because they did not impose severe burdens on voters. *See, e.g.*, *Crawford*, 553 U.S. at 198 (photo-identification requirement); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (registration deadline requirement); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016) (reduction of early voting period).

This flexible approach is entirely consistent with how the Montana Supreme Court balances fundamental rights with the State's regulatory authority: "'The extent to which the Court's scrutiny is heightened depends both on the nature of the interest **and the degree to which it is infringed**.'"[10] *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173 (1996) (emphasis

[10] If the Court rejects this balancing approach, it is unclear what purpose trial would serve. Defendant does not dispute SB 169, HB 176, HB 506, and HB 530 each "invariably impose some burden upon individual voters," just as all election regulations do. *Burdick*, 504 U.S. at 433. Trial could be useful to evaluate, as a factual matter, the minimal degree to which these laws burden the right to vote, i.e., conduct an *Anderson-Burdick* analysis. But if the Court stands by its original conclusion that any law that "implicates" voting rights must be subjected to strict scrutiny, no material facts could ever be in dispute. Dkt. 124, p. 35. Rather, the only remaining issue to resolve would be a pure question of law, i.e., whether the State's established interests in election regulation were sufficiently compelling to justify SB 169, HB 176, HB 506, and HB 530. *See Wadsworth*, 275 Mont. at 297 ("Wadsworth presented a question of law—i.e. whether he had a fundamental constitutional right and whether the State showed a compelling interest for infringing upon that right. Thus, the question before the District Court was a legal issue

added, citation omitted); *cf. Burdick*, 504 U.S. at 434 ("the rigorousness of our inquiry into the propriety of a state election law depends upon the **extent to which a challenged regulation burdens**" the right to vote) (emphasis added).

And Montana's Constitution provides even greater justification for adopting a flexible standard than federal law. It grants broad power to the Montana Legislature—even broader than the U.S. Constitution gives States. Mont. Const. art. IV, § 3; Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, p. 450 (granting Legislature "very broad" authority to "pass whatever statutes it deems necessary" to keep elections "free of fraud").

Applying Plaintiffs' inflexible strict scrutiny standard improperly elevates one constitutional provision (the Article II, § 13 right to vote) by ignoring completely a competing constitutional provision (Article IV, § 3, which obligates the Legislature to regulate elections). The Court should recognize and affirm both constitutional provisions by balancing them against each other. Balancing competing constitutional interests is not unique to voting rights; the Montana Supreme Court has adopted similar approaches in the context of other fundamental rights. *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[]"); *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 legislative districts); *Nelson v. City of Billings*, 2018 MT 36, ¶¶ 19-29, 390 Mont. 290, 412 P.3d 1058 ("authority to set procedural rules to perpetuate and maintain the legal system of this state" under

containing no implicit questions of fact."). To be clear, Defendant's position is—even though strict scrutiny should not be applied—these laws survive **any** level of constitutional review.

Article VII, § 2 outweighed the fundamental "right to know"); *Mont Cannabis Indus. Ass'n*, ¶ 20 ("[A]lthough 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."); *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 & Rice, JJ., concurring in part and dissenting in part); *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); *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"). In short, it is well-settled that even fundamental rights are not absolute and must be balanced against other constitutional interests.[11]

[11] 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 & Rice, JJ., concurring in part and dissenting in part); *see also 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").

For these reasons, Montana law requires the Court to balance competing constitutional interests—including the State's duty to provide secure, efficient elections—by evaluating the degree to which the modest election regulations at issue burden individual voting rights. *Burdick*, 504 U.S. at 434. The *Anderson-Burdick* standard is the appropriate framework. Pursuant to that standard, the Court should analyze the challenged laws by applying rational basis review.

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

Under the *Anderson-Burdick* standard, this Court must 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. SB 169's modest changes to Montana's ID requirements impose a minimal burden that advances the State's important (indeed, compelling) interests in promoting voter confidence, preventing fraud, verifying residence, and modernizing the State's voting infrastructure. The U.S. Supreme Court upheld similar interests in *Crawford*, rejecting the same arguments Plaintiffs make here. 553 U.S. at 187, 198. The Court likewise should conclude SB 169 is constitutional.

a. Requiring government-issued ID as primary ID imposes minimal, and constitutionally permissible, burdens on voters.

Plaintiffs do not challenge the concept of voter ID in general, implicitly conceding any burdens imposed by Montana's original voter ID laws were constitutionally permissible. They only challenge the Legislature's decision to make government-issued federal and Montana ID primary, and student or other ID nonprimary. That narrow distinction cannot possibly constitute a substantial burden on the right to vote, or really any burden at all. Student ID still may be used to vote, even under SB 169. The Legislature simply recognized it is less reliable than government-

issued ID—the same decision made by airlines, banks, federal courthouses, hotel front desks, and even the colleges Montana students attend—and treated it accordingly.

In *Crawford*, the Supreme Court recognized "the inconvenience of making a trip to the [MVD], 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." 553 U.S. at 198. That conclusion is undeniably correct. In Montana, establishing voter ID is even easier than the Indiana law in *Crawford*. SB 169 provides voters multiple ways to prove their identity, which Plaintiffs consistently ignore. As discussed above, SB 169 also created a simple failsafe for the few voters without qualifying ID through a form declaration of impediment available at election offices. Dkt. 91, ¶¶ 26, 48-53; see also § 13-15-107(3), MCA; ARM 44.3.2110; Dkt. 91, Ex. 2-1 (sample form). Thus, SB 169 imposes, at most, a minimal burden by elevating government-issued IDs over non-governmental issued IDs.

When Plaintiffs attempted to prove SB 169 severely burdened voting rights of Montana students, it backfired. Plaintiffs submitted a declaration to this Court from MSU student Hailey Sinoff who vaguely claimed she needed student ID to vote. Dkt. 70, Ex. M. But at her deposition, Sinoff admitted she never knew the previous law permitted voting with student ID until counsel told her that while preparing for her deposition. "I've never thought of like my student ID card as an acceptable form of identification for anything other than getting into the gym . . . I've never seen anyone use their student ID card as like an acceptable form of identification for something serious." Exhibit 1-36, at 52:15-53:10. She also testified she had qualifying ID to vote under SB 169 when she turned eighteen, including a passport. Exhibit 1-36, at 36:15-22. Not a single Declarant

offered by Plaintiffs in support of their argument has lacked a primary form of identification as defined by SB 169.

Plaintiffs' unsupported theory that SB 169 severely burdens out-of-state students living in Montana similarly is unavailing. To register to vote, a person must be a resident, which means a fixed habitation and intent to remain in Montana. § 13-1-112(1), MCA. Once someone becomes a resident, drivers have sixty days to obtain a Montana driver's license. § 61-5-103, MCA. Given that, it makes no sense to suggest SB 169 burdens voters with out-of-state driver's licenses from using that license as a primary ID. If Montana residents, they already are required to obtain a Montana driver's license. Beyond that, those voters may still use out-of-state licenses as a secondary ID, when paired with another document with their address showing they live in Montana. Thus, SB 169 plays an important role in verifying voters' residency.

The burdens SB 169 places on voters, if any, are minimal and reasonable. 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. TSA prohibits passengers using student ID to board a plane.[12] Likewise, Montana colleges require government-issued ID to register.

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.

[12] U.S. Transportation Security Administration, *Identification* https://www.tsa.gov/travel/security-screening/identification (last accessed May 27, 2022) ("Adult passengers 18 and older must show valid identification at the airport checkpoint in order to travel," i.e., "Driver's licenses or other state photo identity cards issued by Department of Motor Vehicles," a "U.S. passport," or other government-issued ID).

Further, if **any** qualified voter does 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 (evidence of which has not presented by Plaintiffs), such voter may still use a student ID (or other photo 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. And, again, SB 169 also created a failsafe for the few voters without qualifying ID through a form declaration of impediment available at election offices, and allows them vote without presenting any ID at all by using the Polling Place Identification Form. *See* ARM 44.3.2102(7); ARM 44.3.2103(1)(f).

Given the myriad ways to satisfy Montana's voter ID laws, Plaintiffs predictably cannot identify a single Montanan unable to comply with SB 169. Just like the voter ID law in *Crawford*, SB 169 "surely does not qualify as a substantial burden on the right to vote." 533 U.S. at 194.

b. SB 169 advances the State's legitimate and compelling interests.

Because the burden imposed by SB 169 is slight, at best, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434. Here, the interests are not only important, but compelling. The Montana Supreme Court already has recognized 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 By & Through Stapleton*, 2019 MT 28, ¶ 40, 394 Mont. 167, 434 P.3d 241. SB 169 falls squarely within those permitted procedural requirements.

Requiring government-issued ID as primary ID is "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process" by "deterring and detecting voter fraud" and "safeguarding voter confidence." *Crawford*, 553 U.S. at 191, 197; *see*

also Dkt. 87, 89 (Defendant's expert reports). Indeed, even Plaintiffs' experts largely concede requiring voter ID "increases voter confidence in elections." Dkt. 124, p. 36.

And in fact, substantial evidence confirms voter ID increases voter confidence in elections and does not impact voter turnout. Dkt. 82, Ex. 1-8; Dkt. 87, ¶ 32; Dkt. 89, pp. 7, 10-12. The bipartisan Carter-Baker Commission recommended states adopt strict photo-ID laws to prevent fraud and increase voter confidence nearly two decades ago. Dkt. 82, Ex. 1-5 at pp. 9, 18-21 (finding robust voter identification laws are "bedrocks of a modern election system" and "essential to guarantee the free exercise of the vote by all U.S. citizens"). That recommendation is especially relevant now, because the public's lack of confidence in elections is an urgent problem in the United States, including Montana. Dkt. 82, Ex. 1-1; Dkt. 82, Ex 1-2; Dkt. 82, Ex. 1-3 at pp. 7, 15; Dkt. 82, Ex. 1-4 at pp. 4-6, 12, 15; Dkt. 82, Ex. 1-5 at pp. ii, 1, 49, and 69; Dkts. 87 and 89; Dkts. 83 and 84. As the Carter-Baker Report noted, "the perception of possible fraud contributes to low confidence in the [electoral] system," which is why it recommended States require REAL ID for voting, a proposal far more burdensome than SB 169. Dkt. 82, Ex. 1-5 at pp. 18-20; *see also Crawford*, 553 U.S. at 197 ("the 'electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters'") (citation omitted).

Consistent with those conclusions, the Legislature was well-within its authority to require that primary ID be government-issued. Student IDs do not have the same level (or perception) of security and reliability as a government-issued ID, which is of course why not even Montana universities will not accept them for registration. Dkt. 84, ¶¶ 13-15; Dkt. 83, ¶¶ 15-17. A Wisconsin federal court recently explained why student IDs are not equivalent to government-issued ID:

> 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 *Nashville Student Organizing Committee v. Hargett*, 155 F.Supp.3d 749, 756 (M.D. Tenn. 2015) (reasonable to believe student IDs are more likely to be falsified)).

Plaintiffs surely disagree with the Legislature's policy decision. But "[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford*, 553 U.S. at 191-97; *Rohlfs*, ¶ 20 ("This Court's role is not to determine the prudence of a legislative decision" and rejecting "examination of the evidence presented to the legislature to justify passing" bill). And after *Crawford*, courts have recognized states have significant interests, and substantial constitutional latitude, in requiring government-issued voter ID. *Hargett*, 155 F.Supp.3d at 756. Montana's interests likewise are indisputable. *Larson*, ¶ 40.

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 (citation omitted). The Legislature's decision to allow only government-issued ID as primary ID is not an unconstitutional burden on the right to vote. Rather, it advances a host of compelling State interests, and is minimally burdensome. SB 169 regulates election procedures in a constitutionally permissible manner.

For these reasons, SB 169 survives any level of constitutional scrutiny, including the *Anderson-Burdick* standard. Defendant is entitled to judgment as a matter of law.

III. The Legislature is vested with explicit constitutional authority to enact, or repeal, EDR; exercise of that discretion cannot violate the Constitution.

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

HB 176 modified § 13-2-304, MCA, by moving the registration deadline from Election Day to noon the day before. Dkt. 82, Ex. 1-19. Election Day Registration ("EDR") was implemented in 2005. But in 1972—when Montana's Constitution was adopted—voter registration ended 40 days prior to Election Day (30 days for federal elections). Rev. Code Mont. §§ 23-3016, 23-3724 (1971). Like Montana, most states do not offer EDR.[13] Dkt. 87, ¶ 23; Dkt. 89, pp. 7, 10, 15.

The Legislature enacted HB 176, in part, to "give election administrators plenty of time to finalize registration rolls and run organized and efficient elections on election day." Dkt. 83, ¶ 6. It also sought to reduce long lines at the polls, which are common on Election Day, and can lead to the perception of fraud, and to give election administrators sufficient time to tabulate and report election results. Dkt. 84, ¶¶ 5-8; Dkt. 83, ¶¶ 5-9. As its 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 . . . . 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.

[13] Montana's late registration period remains longer than most states. Twenty-six states have deadlines between 20-30 days, while 18 states offer EDR. Five States, including Montana, have late registration deadlines between 1 and 15 days. Montana and North Carolina maintain same-day registration during the early voting period. *See Voter Registration Deadlines*, Nat'l Conf. St. Legislatures (January 4, 2022) https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx (last accessed May 27, 2022).

Dkt. 43, Exhibit J at 3:7-20.; *see* Dkt. 84, ¶¶ 6-9; Dkt. 83, ¶¶ 6-10 (Exhibit 8).

Montana election administrators, especially those in rural counties with limited staff, requested and supported HB 176 because EDR placed an excessive burden on them. Dkt. 88; Dkt. 86; Dkt. 85; Dkt. 84, ¶¶ 4-6; Dkt. 83, ¶¶ 4-7. Doug Ellis—former Broadwater County Election Administrator who worked in its election office for nearly 20 years—summarized the problems EDR created:

> Elections are by far the most trying position that I have. And a lot of it is because same day registration. It's extremely hard to put information of all the voters, in the system, get their ballots counted and keep the numbers correct while still registering people to vote the same day you are having an election. It's extremely hard.

Dkt. 43, Exhibit I, pp. 10:8-11:14. Based on his personal experiences, Mr. Ellis believes ending EDR eases burdens on election administrators, particularly in small counties. Dkt. 88, ¶ 25. Other Montana election administrators, such as Janel Tucek and Monica Eisenzimer, also testified about the distinct difficulties EDR poses on running an efficient election with limited, mostly volunteer, staff. Dkt. 85; Dkt. 86.

Election experts have concluded HB 176 facilitates effective election administration because it "provides election administrators and workers adequate time to process voter registration applications." Dkt. 87, ¶ 16. That is critical because Election Day is exceedingly busy and rural counties in particular face challenges registering voters. Dkt. 87, ¶¶ 16-22; Dkt. 88; Dkt. 86; Dkt. 85. Eliminating EDR reduces Election Day work volume and, in doing so, reduces confusion and mistakes by election workers, providing substantial benefits, especially in rural counties. Dkt. 87, ¶¶ 2, 16-22.

At the same time, social scientists have found no causal link between EDR and increased voter turnout. Dkt. 87, ¶¶ 28-30; Dkt. 89, pp. 7-10. HB 176 is unlikely to have a statistically

significant impact on voter participation in Montana elections, especially because Montana election law allows voters to register and vote on the same day anytime during the 30-day period before Election Day. *Id.*; § 13-2-304(d)(i), MCA (late registrants may return their ballot "before election day").

Moreover, registering to vote in Montana is easy, which voters can do in multiple ways, including by: (i) completing a registration form when applying for, or renewing, a driver's license; (ii) visiting a county election office; or (iii) mailing a registration form to a county election office.[14] *See also* ARM 44.3.2003, 44.3.2005. And all voters can check the status of their voter registration anytime by reviewing their "My Voter Page" on the Secretary's website.[15]

Montana law also provides multiple safeguards for voters on Election Day, allowing voters to correct errors in their registration, update precinct address, and reactivate registration. Dkt. 91, ¶¶ 5-16. Voters also may vote a provisional ballot if errors cannot be rectified before polls close. *Id.* The Secretary of State's office has trained election administrators on this failsafe process. *Id.*

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

Plaintiffs' claim that HB 176 is unconstitutional ignores the plain language of in Article IV, § 3, which grants the Legislature discretion to enact—or repeal—EDR:

> The legislature **shall** provide by law the requirements for residence, registration, absentee voting, and administration of elections. It **may** provide for a system of poll booth registration, and **shall** insure the purity of elections and guard against abuses of the electoral process.

[14] Secretary of State, *How to Register to Vote,* https://sosmt.gov/elections/vote/#1641574992907-9dee3295-aa37 (last accessed June 1, 2022).

[15] Montana Secretary of State, *My Voter Page*, https://app.mt.gov/voterinfo/ (last accessed June 1, 2022).

(Emphasis added). When construing this provision, the Court must use the same rules used in construing statutes, several of which are dispositive here. *Nelson v. City of Billings*, ¶ 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.*, 255 Mont. 125, 128-29, 841 P.2d 502, 504 (Mont. 1992). The plain language of Article IV, § 3 leaves no room for debate: the Framers purposefully placed no limits on the Legislature's discretion to enact, or repeal, EDR. 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 EDR. Plaintiffs' argument that the Constitution requires EDR is directly at odds with the Framers' unambiguous intent, as reflected by the plain language of Article IV, § 3.

Second, constitutional provisions must be read in "coordination with the other sections" so 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 prevails over the general." *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 EDR controls over Article II, § 13's general right to suffrage. Read in "coordination," these provisions clarify the right to suffrage cannot encompass the claimed right to EDR. *Howell*, 263 Mont. at 286-87.

Third, interpreting Montana's Constitution as requiring EDR directly conflicts with the relevant historical context. The Court must construe the Constitution "in light of the historical and surrounding circumstances under which the Framers drafted the Constitution." *Nelson v. City of Billings*, ¶ 14. Here, it is indisputable EDR did not exist in Montana until 2005. Delegates to

Montana's 1972 Constitutional Convention considered—and expressly rejected—proposals that would have required the Montana Legislature to provide EDR. While many Delegates supported EDR, they viewed it as a policy preference, not a constitutional command.

During the 1972 Constitutional Convention, the General Government and Constitutional Amendment Committee drafted a report on "Suffrage and Elections." Montana Constitutional Proposals, February 12, 1972, pp. 333-47. The Committee's Majority proposed giving 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 Committee's Minority proposed to "constitutionalize" voter registration by requiring EDR. *Id.* p. 342 (proposing "poll booth registration" based on North Dakota law and guaranteeing voters the right to "register at the time and place of voting").

Like the Committee, the 100 Delegates were initially conflicted on whether EDR should be required by Montana's Constitution. *See* Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, Vol. III, pp. 400-13, 429-452. Initially, a slim majority (52 in favor, 46 opposed) voted to adopt the Committee's Minority proposal that the "Legislature **shall** provide for a system of poll booth registration[.]" *Id.* pp. 401, 412-13 (emphasis added). After breaking for lunch, that slim majority abruptly collapsed. *Id.* p. 429 (motion to "reconsider our action to accept Section 3"). Delegate Joyce explained why he and others changed their minds, noting that, while he favored EDR as a policy matter, he concluded "we have to permit flexibility if we're going to have a constitution" and giving the Legislature discretion "is the only . . . thing that we should do" because it gives "flexibility there to adjust for problems." *Id.* p. 437-38; *see also id.* p. 444 (Delegate

Van Buskirk, a former election judge, supports majority proposal because "the Constitution should be as flexible as we are able to have it").

Ultimately, the Delegates compromised, as summarized by Delegate 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 provision "leaves it all to the Legislature. We're not trying to constitutionalize it.").

To be clear, Defendant is not arguing this Court lacks authority to review the constitutionality of HB 176. This Court plainly can review the constitutionality of HB 176, but the text and Framers' intent—summarized above—"controls" its analysis. *Nelson v. City of Billings*, ¶ 14. The Court should follow the Montana Constitution's plain language—as confirmed by the Framers' intent. *Id.* Changing the late registration deadline by one day imposes a minimal burden, if any, and is explicitly permitted by the Montana Constitution. The Legislature was well within its discretion to require voters to register by noon the day before an election—a far less restrictive requirement than existed when the Constitution was drafted and ratified. *Id.*

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

Plaintiffs cannot carry their burden of proving HB 176 is unconstitutional "beyond a reasonable doubt." *Rohlfs*, ¶ 7. No evidence supports Plaintiffs' equal protection challenge to HB 176, which fails for the same reason Plaintiffs' equal protection challenge to SB 169 fails. Plaintiffs cannot prove with evidence: (i) HB 176 has a disparate impact on a defined class; or (2)

the Legislature's acted with a discriminatory intent towards that class when it enacted HB 176. *Fitzpatrick*, 194 Mont. at 323; *Hensley*, ¶ 121. HB 176 is facially neutral and applies equally to all Montanans. And the pleadings, depositions, and other discovery documents are void of any evidence that would support a claim of intentional discrimination toward any class of voters. For these reasons, the Secretary is entitled to judgment as a matter of law.

Plaintiffs' claim to a constitutional right to EDR lacks support under Montana law. And courts in other jurisdictions repeatedly have rejected challenges to registration deadlines. The U.S. Supreme Court was blunt: "a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot." *Marston v. Lewis*, 410 U.S. 679, 680 (1973). Registration deadlines impose minimal and routine burdens on voting that advance crucial state interests in "the orderly, accurate, and efficient administration of state and local elections, free from fraud." *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973).

Courts have uniformly concluded strict scrutiny does not apply to registration deadlines, because these deadlines are "'classic' examples of [permissible] regulation." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 196 n. 17 (1999). And these cases come from jurisdictions without an Article IV, § 3 counterpart, and with registration deadlines far more restrictive than Montana's. For example, in *Marston* the Supreme Court approved a 50-day registration deadline. The Court recognized "States have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible fraud." *Marston*, 410 U.S. at 680.

The Court recognized the same in *Burns*, approving a Georgia law requiring a voter to register "50 days" pre-election. 410 U.S. at 686-87; *see also Dunn v. Blumstein*, 405 U.S. 330, 347-

48 (1972) (approving Tennessee's 30-day registration deadline "to give officials an opportunity to prepare for the election."); *Rosario*, 410 U.S. at 760 (rather than strict scrutiny, relevant inquiry is whether challenged law imposes an "arbitrary time limit unconnected to any important state goal."). Lower courts have followed suit. *See, e.g., Beare v. Briscoe*, 498 F.2d 244, 247 (5th Circ. 1974) (recognizing "the state's right to impose some reasonable cutoff point for registration"); *Barilla v. Ervin*, 886 F.2d 1514, (9th Cir. 1989) (upholding Oregon's 20-day deadline even though shorter period was administratively feasible); *Key v. Board of Voter Registration of Charleston County*, 622 F.2d 88, 90 (4th Cir. 1980) (upholding 30 day registration deadline as "perfectly valid and constitutional" even though it prohibited correcting registration after the deadline).

Plaintiffs challenging registration requirements under state constitutions have been equally unsuccessful. For example, the Massachusetts Supreme Judicial Court upheld a 20-day voter registration cutoff, concluding it did not impose a substantial burden and passed rational basis review. *Chelsea Collaborative, Inc. v. Secretary of Commonwealth*, 480 Mass. 27, 100 N.E.3d 326 (Mass. 2018). Like Montana, voting is a fundamental right under the Massachusetts Constitution. But "[t]he requirement that voters register before exercising their fundamental right to vote is supported by the legislative objective of conducting orderly and legitimate elections." *Id.*, 480 Mass. at 40. A New Jersey appellate court concluded the same, noting no "precedent where a court has applied a strict scrutiny test to determine the constitutionality of an advance registration requirement." *Rutgers University Student Assembly v. Middlesex County Bd. of Elections*, 446 N.J. Super. 221, 233, 141 A.3d 335, 342 (N.J. App. 2016); *id.* at 234, 240 (concluding 21-day registration deadline "imposes no more than a minimal burden" supported by "the State's important interests

in preventing voter fraud, ensuring public confidence in the integrity of the electoral process, and enabling voters to cast their ballots in an orderly fashion.").

Registration deadlines, like voter ID requirements, are routine burdens requiring voters take reasonable action to vote. If a voter's resulting "plight can be characterized as disenfranchisement at all, it was not caused by [the registration requirement], but by their own failure to take timely steps to effect their enrollment." *Rosario*, 410 U.S. at 758; *see also Barilla*, 886 F.2d at 1524 (voters who failed to comply with the registration deadline "were all disenfranchised by their willful or negligent failure to register on time."); *Chelsea Collaborative, Inc.*, 480 Mass. at 38 (voters were disenfranchised by their own inaction, which easily could have been avoided had they "merely looked into what is required to register and done so.").

There are, of course, outer limits in which a registration period could substantially burden a voter's fundamental right. For example, the U.S. Supreme Court concluded the 50-day registration deadline it approved was approaching the "outer constitutional limits in this area." *Burns*, 410 U.S. at 687. But there is no reasonable argument Montana's one-day registration deadline, which is 39 days shorter than when its constitution was ratified, comes remotely close.

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

The Court should reject Plaintiffs' request to apply strict scrutiny and instead utilize the *Anderson-Burdick* standard to balance the State's compelling regulatory interests against 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," *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—summarized above—in ensuring an orderly, accurate, and efficient election that increases public confidence in elections. Ending EDR furthers the State's interest in ensuring the integrity, reliability, and efficiency of election processes by allowing local election staff to focus their Election Day resources on the herculean task of running an election. Dkt. 88; Dkt. 86; Dkt. 85; Dkt. 43, Exhibit I, pp. 10:8-11:14. This alleviates the potential for error due to the increased burden on election staff caused by having to process new voter registrations at the same time they are processing and counting votes. Election officials from Flathead, Broadwater, and Fergus County all agree EDR posed a serious burden on their staff. *Id.* Legislators supported ending EDR after hearing testimony about the complications and delays EDR had caused. Dkt. 84, ¶¶ 4-8; Dkt. 83, ¶¶ 5-10.

Running an election is a monumental task, especially in Montana's rural counties. Dkt. 88; Dkt. 86; Dkt. 85; Dkt. 43, Exhibit I, pp. 10:8-11:14. Processing new registrations on Election Day takes longer than processing votes, which causes significant disruptions to the process and results in lengthy lines. Dkt. 88, ¶¶ 15-22; Dkt. 86, ¶¶ 9-11. Processing new registrations also increases stress on election staff, and often delays election administrators from reporting election results. *Id.*

And, in fact, WNV's own documents indicate long lines at polling places in remote locations have impacted Native Americans' ability to vote. Dkt. 82, Ex. 1-24. EDR caused long lines at polls and prevented Tribal voters from registering and voting because they could not afford to wait. *Id.* WNV's evidence reflects what the State knows to be true: allowing EDR can actually undermine Montanans' ability to vote. The purpose of HB 176 was to alleviate these burdens.

Eliminating EDR allows election administrators to focus their limited resources on efficiently running elections, assisting voters, and making sure votes are counted accurately and timely reported. Dkt. 88; Dkt. 86; Dkt. 85; Dkt. 43, Exhibit I, pp. 10:8-11:14; Dkt. 87, ¶¶ 2, 16-22. It also permits election administrators to assist individuals who are ill, in the hospital, or have other circumstances preventing them from voting in person, which is impossible when EDR is offered. Dkt. 86, ¶ 12; Dkt. 84, ¶¶ 6-9.

The Framers purposefully designed Article IV, § 3 to allow the Montana Legislature to experiment with EDR. Roughly 30 years after the Constitution was ratified, it did so. But 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 EDR had created. At the same time, the Legislature has also greatly liberalized registration by mail, and increasingly made it easier to vote in various ways. Dkt. 87; Dkt. 89 (Defendant's expert reports). In short, the Legislature fixed problems posed by EDR, while retaining a long late registration period to encourage voter participation. Dkt. 83, ¶¶ 6-10; Dkt. 84, ¶¶ 4-8. That is precisely the type of policy decision Article IV, § 3 explicitly entrusted to the Legislature.

For these reasons, HB 176 survives any level of constitutional scrutiny, including the *Anderson-Burdick* standard.

IV. MYA's challenge to HB 506 fails as a matter of law.

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. To be qualified to vote in Montana elections, a person must be "18 years of age or older." Mont. Const. Art. IV, § 2; *see also* § 13-1-

111(1)(b), MCA (same). Notably, under Montana law an absentee "ballot is voted when the ballot is received at the election administrator's office." § 13-13-222(3), MCA. Thus, HB 506 protects the voting rights of young Montanans by ensuring they do not mistakenly cast an absentee ballot while unqualified to vote.

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. § 13-1-111, MCA; Dkt. 83, ¶¶ 25-28; Dkt. 84, ¶¶ 22-24; Dkt. 91, ¶¶ 128-132. 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.[16] *Id.*; *see also* Dkt. 81, ¶¶ 6-9. The Secretary requested the Legislature resolve this conflict to ensure all individuals in these circumstances were treated equally, regardless of their home county. *Id.*; § 13-1-201, MCA.

MYA is the sole challenger to HB 506. MYA argues HB 506 violates Article II, § 13, by restricting certain individuals' ability to vote absentee. But the right to vote does not include the right to vote absentee, and the Montana Supreme Court has never held otherwise. The right of suffrage granted by Article II, § 13 of the Montana Constitution does not guarantee the right to vote absentee, nor the right to receive an absentee ballot before a voter becomes qualified to vote in Montana elections. MYA's claim fails because it cannot establish constitutional injury.

[16] Montana law does not contemplate county election administrators receiving an absentee ballot from an unqualified elector, and then holding it for some period of time until the elector becomes qualified before accepting the ballot as valid. *See* § 13-13-222(3), MCA.

MYA also argues HB 506 violates Article II, § 15 of the Montana Constitution by burdening "a minor's right to exercise the same rights as adults," Dkt. 73, pp. 14-15. But minors are not "qualified electors," and the Montana Constitution does not grant them the same right to vote as adults. 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 distinguishing factor that is enshrined in the Montana Constitution.

A. MYA cannot establish an injury caused by HB 506 because the Article II, § 13 right of suffrage 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. This Court correctly concluded "there is no explicit fundamental right to vote by absentee ballot[.]" Dkt. 124, p. 40. And federal courts consistently have held 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); *McDonald v. Bd. of Election Comm'rs of Chi.,* 394 U.S. 802, 803-04 (1969); *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 consistently has 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, § 13 is explicitly limited by the Montana Constitution's: (i) voter qualification standards; and (ii) mandate that the Legislature set the "requirements for residence, registration, *absentee voting*, and administration of elections." Mont. Const. art. IV, §§ 2-3 (emphasis added). Accordingly, irrespective of 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 & 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, by clarifying and ensuring uniformity in the application of Montana's absentee voting laws (as required by § 13-1-201, MCA) and by preventing unqualified electors from voting through Montana's absentee voting process (as required by Article IV, § 2 and § 13-1-111, MCA). MYA focuses on a tiny sliver of the potential voting population whose ability to vote absentee theoretically may be affected (but not eliminated) by HB 506. Notably, those relevant individuals include only: (i) Montana voters who turn 18 within a month of an election; and (ii) who reside in one of the Montana counties whose election administrator erroneously concluded Montana law permitted them to mail absentee ballots to and receive voted ballots from unqualified electors. This plainly is insufficient to show a constitutional violation of the right to vote guaranteed by Article II, § 13, especially when considering the various ways to vote still available to those limited number of individuals under Montana law.

Justices Leaphart, Gray, Regnier, and Chief Justice Turnage warned against MYA's selective interpretation of Article II, § 13 when they wrote: "If 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' [in 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 constitutional interpretation—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 and Article IV, § 2's voting qualification requirements. MYA's constitutional challenge to HB 506 fails as a result.

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 youth to meet age and residency criteria before being issued a ballot. Dkt. 73, p. 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 explicitly lack the right to vote under Montana's Constitution. Article IV, § 2. Article II, § 15 is therefore wholly inapplicable. MYA's challenge to HB 506 based on Article II, § 15 fails.

Even if Article II, § 13 did grant *adults* the right to vote absentee (and the Court already has concluded it does not), 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 guard against unqualified voters returning ballots. Montana's compelling interests justify enactment of HB 506.

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 persons." *Gazelka*, ¶ 15. If it does not, the Court's analysis must end and MYA's equal protection claim fails. *Id*.

MYA alleges HB 506 creates an unconstitutional age-based class because it treats Montanans who turn eighteen during the late registration period differently from already qualified electors during that same period. Dkt. 73, p. 14. 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 v. State*, 2016 MT 44, ¶¶ 17-18, 382 Mont. 256, 368 P.3d 1131; *Wilkes v. Mont. State Fund*, 2008 MT 29, ¶¶ 15-20, 341 Mont. 292, 177 P.3d 483; *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 12, 325 Mont. 1, 103 P.3d 1019 (finding two age-based classes similarly situated because age was "unrelated to a person's ability to engage in meaningful employment").

MYA cannot establish 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 Article IV, § 2 of the Montana Constitution, which requires voters to be "18 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." *Id.*; *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, the Secretary is entitled to judgment as a matter of law on MYA's equal protection claim.

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-discriminatory and imposes a minimal burden, if any. 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; *see also* Mont. Const. Art. IV, § 2. And, providing ballots only to those individuals who 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. Dkt. 70, Ex. I, at ¶ 7 ("Of course, because of House Bill 506, I will have to vote in person to participate in the June 2022 primary election.").

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: (1) It ensures all voters who turn 18 during the late-registration period are treated the same, regardless of the county in which they live; (2) It provides clarity to election administrators and the Secretary regarding the handling of absentee ballots for voters who turn 18 during the late registration period; (3) It ensures all Montana election administrators follow the same practices when mailing absentee ballots to voters who turn 18 during the late registration period; (4) It prevents election administrators from having to separately hold voted absentee ballots received from underage voters until the time the voter turns 18, a practice that is inconsistent with § 13-13-222(3), MCA; (5) It allows the Secretary to finalize election administration software coding for Montana's election system software; and (5) It helps ensure only qualified voters are voting in Montana elections, as defined by the Montana Constitution. Dkt. 83, ¶¶ 25-28; Dkt. 84, ¶¶ 22-24; Dkt. 91, ¶¶ 128-132. ; *see generally* Dkt. 81.

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. Dkt. 91, ¶ 131; Dkt. 81, ¶¶ 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. Dkt. 81, ¶ 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, as required by Montana law. Dkt. 83, ¶¶ 25-28; Dkt. 84, ¶¶ 22-24; Dkt. 91, ¶¶ 128-132; *see generally* Dkt. 81; *see also* § 13-1-201, MCA (requiring "uniformity in the application, operation, and interpretation of the election laws"). 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, i.e., unqualified voters returning absentee ballots and having them counted once they turned 18. Dkt. 91, ¶¶ 128-132; *see* § 13-13-222(3), MCA.

HB 506 addresses compelling State interests and meets and exceeds the "important regulatory interests" required under the *Anderson-Burdick* standard and, indeed, satisfies any level of scrutiny. *Burdick*, 504 U.S. at 434; *Larson*, ¶ 40. Accordingly, the Secretary is entitled to judgment as a matter of law on MYA's challenges to HB 506.

V. Plaintiffs' speculative challenges 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.

MDP asks the Court to declare HB 530 unconstitutional because it allegedly violates Montanans' constitutional rights, including by burdening "the right to vote of absentee voters in Montana." Dkt. 3, pp. 40-47. WNV seeks similar relief—"a judgment declaring that Section 2 of HB 530 violates" various provisions of the Montana Constitution, as well as "permanent injunctive relief against the application of Section 2 of HB 530." Dkt. 1, pp. 42-43.

The factual record the Court needs to evaluate Plaintiffs' constitutional challenges does not yet exist. HB 530 § 2(1) merely directs the Secretary to adopt an administrative rule. The Secretary has not done so, and was not required to do so until July 1, 2022.[17] HB 530, § 2(1). Plaintiffs' argument that Defendant's final rule, once adopted, will harm them is necessarily

[17] In accordance with the Court's Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motions for Preliminary Injunctions dated April 6, 2022 (Dkt. 124), the Secretary and her agents have not taken any actions to enforce § 2 of HB 530, including working to adopt the administrative rule § 2 of HB 530 contemplates. *See also* Dkt. 142, pp. 10-11.

speculative. 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 to animate both HB 530 **and** its penalty has not been adopted, the claims made by WNV and MDP cannot be ripe under well-settled Montana and federal law.

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 when parties invoke "hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Id.* ¶ 54 (citation omitted). With respect to administrative acts, the Montana Supreme Court has held:

> 'The ripeness requirement is designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, **and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties**.'

Qwest Corp. v. Montana Dep't of Pub. Serv. Regulation, 2007 MT 350, ¶¶ 19-20, 340 Mont. 309, 174 P.3d 496 (quotations omitted, emphasis added); *see also Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 891-92 (1990) (administrative rule "is not ordinarily considered the type of agency action 'ripe' for judicial review . . . until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, **by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him**.") (emphasis added); *see also Wildlands CPR, Inc. v. U.S. Forest Serv.*, 872 F. Supp. 2d

1064, 1083 (D. Mont. 2012) ("a purely legal question [regarding an administrative rule] may not be ripe for judicial review '**if the regulations' effects were speculative and the record was incomplete**.'") (emphasis added), *aff'd in relevant part by WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920 (9th Cir. 2015) (citation omitted).

The Court lacks the "concrete" facts necessary to evaluate the constitutionality of § 2 of HB 530, including: (i) the final rule adopted by the Secretary; and (ii) the way in which that final rule, once adopted, actually affects Plaintiffs. *Id.* At present, HB 530, § 2, is not "enforceable," and cannot harm Plaintiffs or any Montanans. It simply directs the Secretary to adopt an administrative rule. The Secretary has not yet adopted the Rule contemplated by HB 530, § 2. Dkt. 91, ¶¶ 67-71. In fact, the Secretary has not yet even begun the administrative rulemaking process that will lead to the adoption of such a rule, a condition precedent to ever enforcing the rule. *Id.*

And the Plaintiffs admit as much. *See* Blackfeet Nation Depo. Tr., 182:14-24 (the Blackfeet Nation admitting that HB 530 has not been enforced against it and stating that it is unaware of any enforcement action relating to HB 530). Thus, the parties' request that this Court declare unconstitutional and permanently enjoin HB 530 is a request to strike down a rule before it has been noticed for public comment and before the Secretary has been permitted to respond to Plaintiffs' criticisms of HB 530 through Montana's administrative rule making process. *See* §§ 2-4-301, et seq., MCA.

This Court's Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motions for Preliminary Injunctions dated April 6, 2022 (Dkt. 124) confirms the factual record necessary to render Plaintiffs' constitutional challenges to HB 530 ripe does not exist at present.

First, this Court concluded—irrespective of what administrative rule Defendant ultimately adopts—"there will be a civil penalty when engaging in many types of ballot assisting activities." Dkt. 124, p. 29. But the Court does not—and cannot—know what specific types of ballot assisting activities ultimately will be prohibited, or how such a rule might actually affect Plaintiffs. *See Qwest Corp.*, ¶ 25 ("Judicial appraisal of agency action stands on surer footing when it takes place in the context of a **specific** factual record.") (emphasis added). Second, this Court concluded Plaintiffs already had been harmed by HB 530 because they have "been attempting to determine whether the activities their organizations have previously engaged in will be subject to civil penalties under HB 530." Dkt. 124, p. 39. But Tribal Nation Plaintiffs have admitted that HB 530 has not been enforced against them, and that they will participate in the rulemaking process relating to HB 530 when it occurs. *See e.g.* Blackfeet Nation Depo. Tr., 182:14-183:2 (the Blackfeet Nation admitting that HB 530 has not been enforced against it and stating that it is unaware of any enforcement action relating to HB 530).

That conclusion further confirms Plaintiffs claims are unripe because: (i) even Plaintiffs are unsure whether they will be harmed by the rule Defendant ultimately adopts; and (ii) a party's speculative concern that a proposed rule might subject them to some future hardship is insufficient to create a ripe controversy. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 811-12 (2003) (rejecting party's argument that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis").

In effect, Plaintiffs ask the Court to prohibit Defendant from even attempting to address their criticisms of HB 530 through Montana's rulemaking process, based entirely on Plaintiffs' speculation that Defendant's final rule might harm Plaintiffs in some undefined manner.

Plaintiffs fault § 2 of HB 530 for not providing sufficient clarity while ignoring that the process designed to provide that clarity has yet to occur. Plaintiffs' argument is circular, and precludes Defendant from creating the factual record the Montana Supreme Court and federal courts have concluded is necessary to properly evaluate agency actions like § 2 of HB 530. *Qwest Corp.*, ¶¶ 19-25; *Lujan,* 497 U.S. at 891-92; *Wildlands CPR, Inc.*, 872 F. Supp. 2d at 1083.

Defendant respectfully requests the Court afford her the opportunity to actually adopt the rule contemplated by § 2 of HB 530 before evaluating its constitutionality. If the Court does so, MDP and WNV will be able to voice their concerns during the administrative rulemaking process contemplated by § 2 of HB 530, and Defendant may be able to resolve their concerns through that process. *See Winter v. California Med. Rev., Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989) (because agency may change its position in response to party's concerns, courts "must give the agency an opportunity to formulate a final position" before issue becomes ripe).

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 judgment should be entered in favor of Defendant on Plaintiffs' challenges to HB 530.

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 absentee 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 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 absentee 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 the restriction "adversely and disparately" affected American Indian, Hispanic, and African American citizens. *Id.* at 2334. But the Supreme Court upheld the law, finding "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. HB 530 is facially neutral, and eminently reasonable.

This Court agrees there is no state or federal constitutional right to vote by absentee ballot, or have that ballot collected in a particular manner. Dkt. 124, p. 40; *see also 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*, 394 U.S. at 807-08;

Crawford, 553 U.S. at 209 (Scalia, J., concurring); *Driscoll*, ¶ 45 (Sandefur & Rice, JJ., concurring in part and dissenting in part).

Montana election laws, like Arizona's, "generally makes it very easy to vote." *Brnovich*, 141 S. Ct. 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 up until noon the day before Election Day. § 13-13-201, MCA; § 13-13-211, MCA. Absentee ballots are mailed to eligible voters 25 days before Election Day. § 13-13-205(1)(a)(ii), 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 directly at the election office, or by mail addressed 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*, ¶ 20 ("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 & 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** (including Plaintiffs) to collect a ballot provided they don't "accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots."[18]

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. *Fitzpatrick*, 194 Mont. at 323 ("disproportionate impact of a facially neutral law will not make the law unconstitutional, unless a discriminatory intent or purpose is found"); *Hensley*, ¶ 121 (for "facially neutral" law to violate equal protection clause, it must have "a discriminatory purpose **and** effect on otherwise similarly situated classes") (Sandefur & Gustafson, JJ., dissenting). That view is consistent with a long line of federal precedent. *See Washington v. Davis*, 426 U.S. 229, 248 (1976); *Crawford*, 553 U.S. at 207 (J., Scalia, concurring); *see also Brnovich*, 141 S. Ct. at 2343, 2346-47. Second, Plaintiffs lack sufficient evidence establish a disparate impact claim, i.e.: (i) concrete evidence of a

[18] HB 530 exempts 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.

disparate impact on a specific class of persons; and (ii) substantial evidence of discriminatory intent towards that class. *Fitzpatrick*, 194 Mont. at 323; *Gazelka*, ¶ 16; *Hensley*, ¶ 121.

Rather, Plaintiffs merely offer generalized testimony regarding the alleged disparate impact of Montana's ballot-collection law on minority voters. *See* Dkt. 57, pp. 11-12; Dkt. 42, pp. 2-3, 10-11. The *Brnovich* plaintiffs provided similar evidence. *See Brnovich*, 141 S. Ct. at 2347. This 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 it is 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; *see also Fieger*, 542 F.3d at 1119. Plaintiffs, similarly, cannot meet their evidentiary burden. Thus, Defendant is entitled to summary judgment.

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 survives strict scrutiny analysis. 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. Dkt. 82, Ex. 1-5 at pp. 46-47; Dkt. 83, ¶¶ 20-24; Dkt. 84, ¶¶ 17-21.

First, the 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) (citation omitted); *Larson*, ¶ 40. In *Brnovich*, the Supreme Court determined "[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 "[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 the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker found "[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*, p. 46 (Sept. 2005)). Because "[v]ote buying schemes are far more difficult to detect when citizens vote by mail," the Commission recommended: (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.* Both the Supreme Court and 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. As the Court noted 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; *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986) ("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.[19] Thus, "[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)); *see also* Dkt. 87, ¶¶ 43-44.

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 repeatedly confirmed the State's 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).

[19] 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* Dkt. 82, Exs. 1-9 to 1-11; *see also Griffin v. Roupas*, 385 F.3d 1128, 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.").

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." House Floor Session on HB 530 (April 27, 2021) (available at http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41103?agendaId=219792). And documents produced by WNV highlight the reality behind this concern because they establish WNV coordinated with a partisan political committee to provide transportation to voters on Election Day and recruit volunteer drivers; WNV also received funds from Montana Democrats. Dkt. 82, Ex. 1-24.

The Legislature is constitutionally obligated to ensure 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, survives 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.[20] For that reason, a variety of federal courts—including both the Ninth and Fifth Circuits—have held 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) (concluding 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 collecting ballots is not expressive conduct "[e]ven if ballot collectors intend to

[20] As established, *supra*, HB 530 does not prohibit Plaintiffs or any Montanans from collecting ballots or communicating any message; it only prevents ballot collectors from accepting "a pecuniary benefit . . . in exchange for" collecting ballots, which is not expressive conduct.

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 associated with the collection of absentee ballots. The Supreme Court, moreover, has recognized 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; *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 the Secretary will not resolve any alleged vagueness issues during the rulemaking process that § 2 of HB 530 requires her to conduct. Even if Plaintiffs' claims regarding HB 530 were ripe (they are not), Plaintiffs would face a high bar in

establishing the rule required by § 2 of HB 530 is unconstitutionally vague. *See Wing v. State ex rel. Dep't of Transp.*, 2007 MT 72, ¶ 14, 336 Mont. 423, 155 P.3d 1224 (Montana Supreme Court does "not require 'perfect clarity and precise guidance' to uphold a statute's constitutionality") (citations omitted); *see also Monroe v. State*, 265 Mont. 1, 3, 873 P.2d 230, 231 (1994) ("statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language" . . . party alleging statute is unconstitutionally vague must do more than merely establishing the statute "'requires a person to conform his conduct to an imprecise'" standard, and instead must prove "'no standard of conduct is specified at all'").

Numerous federal courts have held 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 (citation omitted). 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 claims are 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). 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.

VI. The Elections Clause of the U.S. Constitution prohibits judicial override of SB 169, HB 176, HB 506, and HB 530.

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1 ("Elections Clause"). The Elections Clause delegates "broad" authority to regulate federal elections to state legislatures: "'Times, Places, and Manner' . . . are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'" *Ariz. v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 8-9 (2013) (citation omitted).

The Court may not interfere with the Legislature's constitutional obligation to regulate federal elections because that authority has been strictly delegated to the Legislature—not the State at large—by the U.S. Constitution. "Generally the separation of powers among branches of a State's government raises no federal constitutional questions, subject to the requirement that the government be republican in character." *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting from denial of certiorari). "But the words 'shall be prescribed in each State by the *Legislature* thereof' operate as a limitation on the State." *Id.* (emphasis in original). "And to be consistent with Article I, § 4, there must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts." *Id.*

Just such a limit exists here. SB 169, HB 176, HB 506, and HB 530 each regulate election procedures and, therefore, fall squarely within the Legislature's delegated authority over the "Times, Places and Manner of holding" federal elections. U.S. Const. art. I, § 4. By its very

terms, the Elections Clause—in coordination with the Supremacy Clause of the U.S. Constitution, Article VI, ¶ 2—restricts state court interference with state legislation regulating federal election procedures, even when based upon the Montana Constitution.

The United States has not authorized state courts to regulate election procedures. Articles I and II of the United States Constitution delegates clear, exclusive authority to state legislatures to determine the rules by which elections are conducted—*see* Order Denying Application to Stay, Moore v. Harper, No. 21A455, 595 U.S. __ (2022) (Alito, Thomas, and Gorsuch, JJ., dissenting)—and the grant of this authority alters to some extent the usual balance of power between branches of government as to election-related regulations. Depriving Montana's Legislature of its ability to regulate elections would violate the United States Constitution's explicit and mandatory delegation of authority to the Legislature to do just that.

As used by the Elections Clause—and ordinary parlance—the term "Legislature" means "the representative body which makes the laws of the people." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting) (quotation omitted). Without raising a federal constitutional claim, Plaintiffs ask the Court to invalidate politically popular, legitimately-enacted legislation modifying election procedures. Under ordinary circumstances, this would be an overreach. But, because the legislation governs the "Times, Places and Manner of holding" federal elections, the relief Plaintiffs seek would violate the U.S. Constitution. When the Legislature enacted SB 169, HB 176, HB 506, and HB 530, it acted pursuant to authority delegated exclusively to it by the U.S. Constitution. Because Plaintiffs' requested relief necessarily conflicts with the Legislature's constitutional obligation to

regulate elections, Defendant is entitled to judgment as a matter of United States constitutional law.

Conclusion

For the foregoing reasons, the Court should grant Defendant's Renewed Motion for Summary Judgment in full, and enter judgment in favor of Defendant on all of Plaintiffs' claims in this consolidated docket.

Dated this 3rd day of June, 2022.

/s/ Dale Schowengerdt

CROWLEY FLECK PLLP

Attorneys 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 Support of Motion to the following on 06-03-2022:

Rylee Sommers-Flanagan (Attorney)
40 W. Lawrence Street
Helena MT 59601
Representing: Montana Youth Action, Montana Public Interest Research Grp., Forward Montana Foundation
Service Method: eService

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

Ryan Ward Aikin (Attorney)
1018 Hawthorne St.
Missoula MT 59802
Representing: Montana Youth Action, Forward Montana Foundation
Service Method: eService

Ian McIntosh (Attorney)
1915 S. 19th Ave
P.O. Box 10969
Bozeman MT 59719
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

E. Lars Phillips (Attorney)
1915 S. 19th Ave
Bozeman MT 59718
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

William McIntosh Morris (Attorney)
1915 S. 19th Ave.
P.O. Box 10969
Bozeman MT 59719

Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

Clayton H. Gregersen (Attorney)
P.O. Box 2529
Billings MT 59101
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

David M.S. Dewhirst (Govt Attorney)
215 N Sanders
Helena MT 59601
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

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

Leonard Hudson Smith (Attorney)
P.O. Box 2529
Billings MT 59103
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

Kathleen Lynn Smithgall (Govt Attorney)
215 N. Sanders St.
Helena MT 59601
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

John Mark Semmens (Attorney)
900 N. Last Chance Gulch
Suite 200
Helena MT 59601
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

Jonathan Patrick Hawley (Attorney)
1700 Seventh Avenue
Suite 2100
Seattle WA 98101
Representing: Montana Democratic Party, Mitch Bohn
Service Method: eService

John C. Heenan (Attorney)
1631 Zimmerman Trail, Suite 1

Billings MT 59102
Representing: Montana Democratic Party, Mitch Bohn
Service Method: eService

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

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

Fort Belknap Indian Community (Plaintiff)
Service Method: Other Means by Consent

Blackfeet Nation (Plaintiff)
Service Method: Other Means by Consent

Confederated Salish And Kootenai Tribes (Plaintiff)
Service Method: Other Means by Consent

Northern Cheyenne Tribe (Plaintiff)
P.O. Box 128
Lame Deer 59043
Service Method: Other Means by Consent

Jonathan Topa (Attorney)
125 Broad Street 18th Floor
New York 10004
Representing: Western Native Voice
Service Method: Other Means by Consent

Henry James Brewster (Attorney)
10 G Street NE, Ste 600
Washington 20002
Representing: Montana Democratic Party, Mitch Bohn
Service Method: Other Means by Consent

Electronically signed by Regina Grimsley on behalf of Dale Schowengerdt
Dated: 06-03-2022