IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

Montana Democratic Party, Mitch Bohn,

Plaintiffs,

Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe,

Plaintiffs,

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

Plaintiffs,

v.

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

Defendant.

Consolidated Case No. DV 21-0451

MDP AND MYA PLAINTIFFS' RESPONSE TO DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Montana Democratic Party ("MDP") and Mitch Bohn (together, "MDP Plaintiffs"), and Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group (together, "MYA") (collectively "Plaintiffs"), submit this combined response to the renewed motion for summary judgment ("Motion") filed by Defendant Montana Secretary of State Christi Jacobsen (the "Secretary").

INTRODUCTION

The Secretary's Motion comes nowhere close to meeting her summary judgment burden. The Motion does not even attempt to establish the absence of genuine material factual disputes—a lost cause, to be sure; there are many. For example, Plaintiffs have adduced overwhelming evidence that the laws at issue (the "Challenged Restrictions") severely burden the fundamental constitutional rights of Montana voters, and that they disproportionately burden the rights of specifically identifiable disadvantaged subgroups. Meanwhile, there is scant evidence in the record of *any* genuine state interest, let alone a compelling one, and certainly nothing indicating that any Challenged Restriction is narrowly tailored to further any such interest.

Nor does the Motion make any attempt to argue that the Challenged Restrictions can survive the strict scrutiny standard that this Court already decided applies in this case. Instead, the Secretary again asks the Court to depart from decades of Montana precedent and adopt an entirely different standard used by the federal courts. But under the federal *Anderson-Burdick* balancing test, the level of scrutiny varies with the extent of the burden the law imposes on voting rights—a heavily fact-based question. The higher the burden, the more searching the level of scrutiny. But even laws that are found to impose minimal burdens on voting rights still must be actually necessary to advance the state's purported interest in them. As a result, even when the evidence leads the Court to conclude that a more deferential level of scrutiny is appropriate, that scrutiny is still more searching than rational basis review.

The Secretary ignores all of this and argues that judgment should be granted in her favor because (she says) the Challenged Restrictions could pass rational basis review. Not only does this position run directly contrary to this Court's earlier ruling applying strict scrutiny, but the Secretary also *misapplies* the federal test that she urges the Court to adopt instead. Under a proper application of that test, the Motion would fail because the Secretary cannot show an absence of a factual dispute about the magnitude of the burdens imposed on Montana voters or whether the Challenged Restrictions are actually necessary to further the proffered state interests. If anything, the evidence

shows the opposite—there is no connection between asserted state interests such as voter confidence and the Challenged Restrictions. Given the breadth of evidence adduced by Plaintiffs, there are, at the very least, genuine factual disputes that preclude summary judgment, under any possible applicable legal standard.

For these reasons, and for the reasons set out in Plaintiffs' preliminary injunction briefing, this Court should deny the Secretary's Motion.

BRIEF FACTUAL OVERVIEW[1]

I. HB 176 and Election Day Registration

House Bill 176 ("HB 176") eliminated Montana's popular and turnout-driving election day registration ("EDR"), which had been in place since 2006, despite extensive testimony detailing how Native Americans, students, the elderly, and disabled and low-income voters have come to rely on EDR to vote, and even though Montanans firmly rejected elimination of EDR by referendum only seven years ago. *See* MDP's PI Br. at 1-8; WNV's PI Br. at 5-6.

II. SB 169 and Voter Identification

Senate Bill 169 ("SB 169") ended Montana's nearly two-decade long practice of allowing voters to use out-of-state driver's licenses or Montana college or university IDs as sufficient identification at the polls. *Compare* § 13-13-114(1)(a), MCA (2005), *with* § 13-13-114(1)(a), MCA. SB 169 relegated those identification documents to second-tier status: voters can no longer use them unless they also present additional documentary proof of their identity. § 13-13-114(1)(a), MCA.

The Secretary wrongly claims that SB 169 merely differentiates between government-issued and other forms of ID. Br. at 20. In reality, SB 169 draws lines *among* various forms of government ID, downgrading to secondary status student IDs—including those issued by schools in the Montana University System—and driver's licenses from other states while simultaneously favoring other forms that young voters are less likely to possess—including Montana concealed-carry permits. *Id*; *see also* James 30(b)(6) Dep. 335:17–336:9, 338:10–13.

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[1] In the interest of brevity, and recognizing that the Court is well-versed in the facts of this case, Plaintiffs will not retread the same ground they covered in the briefing in support of their preliminary injunction motion. Plaintiffs incorporate by reference the background sections from those briefs. *See* MDP's PI Br. 1-16. Plaintiffs do not address the Secretary's motion regarding House Bill 506, which the MYA Plaintiffs have separately challenged in a cross-motion for summary judgment.

After SB 169 was enacted, the Secretary promulgated regulations limiting the utility of the Polling Place Elector Identification Form. Previously, for voters without qualifying identification, the form acted as a failsafe that, upon verification, sufficed as the identification required to cast a regular ballot. *See* ARM 44.3.2110(2)(b) (2013). After the Secretary changed the regulations, the form no longer sufficed. *See* ARM 44.3.2102(9) (2021).

III. HB 530 and Organized Ballot Assistance

Section 2 of House Bill 530 ("HB 530") effectively bans organized absentee ballot assistance efforts. MDP Ex. 11. HB 530 prohibits a person who "distribute[s], order[s], request[s], collect[s], or deliver[s]" ballots from receiving a "pecuniary benefit" and imposes a $100 civil penalty for each violation. HB 530 does not define "pecuniary benefit," but its language indicates that staff members who are compensated in any way (even as ordinary employees and not compensated, for example, per ballot)—including those who work for Plaintiffs—may not assist voters with their absentee ballots. HB 530 was not the first time in recent years that the Legislature attempted to prohibit organized ballot assistance. In 2017, the Legislature enacted the "Montana Ballot Interference Prevention Act" ("BIPA"). MDP Ex. 32 (legislative history of SB 352). In 2020, two Montana district courts held that BIPA violated the Montana Constitution by, among other things, burdening the right to vote and infringing on speech and association rights. *See Driscoll v. Stapleton* ("*Driscoll I*"), No. DV 20 408, 2020 WL 5441604, at *1 (Mont. Dist. Ct. May 22, 2020) *aff'd in part, vacated in part* by *Driscoll v. Stapleton* ("*Driscoll II*"), 2020 MT 247, 401 Mont. 405, 473 P.3d 386; Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020). Before the ink on those decisions dried, the Legislature began drafting a very similar version of the unconstitutional ban, House Bill 406 ("HB 406"). When the Senate did not pass HB 406, the Legislature amended a different bill, HB 530, to include a renewed ballot assistance ban.

HB 530 goes even further than its unconstitutional predecessors. While BIPA and HB 406 targeted only ballot *return* assistance, HB 530 outlaws ballot assistance much more broadly, not only prohibiting assistance with returning ballots, but also with requesting and receiving ballots in the first place.

Despite HB 530's direct command to the Secretary to implement corresponding regulations, during the nearly eleven months between the law's enactment on May 14, 2021 and

its preliminary enjoinment by this Court on April 6, 2022, the Secretary made no effort to promulgate the required regulations.

LEGAL STANDARD

Summary judgment is an "extreme remedy." *Fulton v. Fulton*, 2004 MT 240, ¶ 6, 322 Mont. 516, 517–18, 97 P.3d 573, 575. It is proper only where no genuine issue of material fact exists, and the movant is clearly entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). The movant "bears the burden of initially establishing the *complete absence* of a genuine issue of material fact," *Prindel v. Ravalli County*, 2006 MT 62, ¶ 19, 331 Mont. 338, 347, 133 P.3d 165, 173 (emphasis added), by making a clear showing, using admissible evidence, "as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact." *Frazer Educ. Ass'n, MEA/FEA v. Bd. of Trs., Valley Cnty. Elementary Sch. Dist. No. 2*, 256 Mont. 223, 225, 846 P.2d 267, 269 (1993). In evaluating the Secretary's summary judgment motion, "the evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences will be drawn therefrom in favor of the party opposing summary judgment." *Montanans for Equal Appl. of Initiative L. v. State ex rel. Johnson*, 2007 MT 75, ¶ 15, 336 Mont. 450, 454, 154 P.3d 1202, 1205 (internal quotation omitted). "[I]f there is any doubt regarding the propriety of the summary judgment motion, it should be denied." *360 Ranch Corp. v. R & D Holding*, 278 Mont. 487, 491, 926 P.2d 260, 262 (1996).

Whether, and the extent to which, the Challenged Restrictions implicate fundamental constitutional rights is a question of fact, to be decided based on the evidentiary record. *See, e.g.*, *Driscoll II*, 2020 MT 247, ¶¶ 21-22 (affirming district court's factual finding that challenged statute would burden the right to vote); *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236 (relying on evidentiary record to conclude that state action burdened constitutional rights); *see also Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 200 (2008) (concluding that "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified"); *One Wis. Inst., Inc. v. Nichol*, 155 F. Supp. 3d 898, 905 (2015) (burden of challenged law on right to vote is question of fact). This is true even under the Secretary's preferred *Anderson-Burdick* standard, where "whether an election law imposes a severe burden is an 'intensely factual inquiry.'" *Feldman v. Az. Sec'y of State's Off.*,

843 F.3d 366, 387 (9th Cir. 2017) (quoting *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007)).

In arguing that the constitutionality of the Challenged Restrictions is purely a legal question, the Secretary relies on inapposite cases and overstates their relevance. Br. at 4-5. In *Clark Fork Coalition v. Mont. Department of Natural Resources and Conservation*, 2021 MT 44, ¶ 48, 403 Mont. 225, 481 P.3d 198, there was *no* dispute of fact. Instead, "[t]he narrow issues presented [in that case were] purely legal issues of statutory and constitutional construction that [did] not depend upon adjudication of related factual issues." *Id.* ¶ 2. *State v. Hamilton*, 2018 MT 253, ¶ 22, 393 Mont. 102, 428 P.3d 849, is similarly inapposite because the issue in that case was simply whether a statute was unconstitutionally vague. The case is thus uninformative about whether other kinds of constitutional claims (including those at issue here) may be resolved as a matter of law before trial. Finally, in *Commissioner of Political Practices for State through Mangan v. Wittich*, 2017 MT 210, ¶ 71, 388 Mont. 347, 400 P.3d 735, the issue was merely whether the constitutionality of an underlying statute, raised as an affirmative defense, should have been submitted to the jury. *Id.* ¶ 63. Unlike the defendant in *Wittich*, Plaintiffs here have properly challenged the constitutionality of the Challenged Restrictions and have properly raised them to the Court—not a jury. But it does not follow that the Court should decide those issues without consideration of the extensive factual record about the burden and asserted state interests—indeed, the Secretary's submission of multiple declarations and expert reports addressing those issues indicates that the Secretary acknowledges that factual issues bear on the question of constitutionality.

ARGUMENT

There are genuine disputes of material fact regarding the burdens imposed by the Challenged Restrictions and the interests that the Secretary claims they serve. As a result, the Secretary's motion should be denied. The Secretary does not even attempt to meet her burden of showing a lack of genuine dispute about whether the Challenged Restrictions can survive strict scrutiny, as required by the Montana Constitution. By focusing her efforts on arguing for a lower standard of review not supported by Montana authority—and thus presenting no reasoned argument as to how the Challenged Restrictions can survive strict scrutiny—the Secretary tacitly admits that they cannot. But even if the Court were to consider the motion using the test advocated by the Secretary, genuine material factual disputes preclude summary judgment. The Secretary

would have the Court discount—or even entirely ignore—the substantial evidence of the burdens that the Challenged Restrictions impose on Montana's most vulnerable populations while simultaneously excusing the dearth of evidence of any connection between the Challenged Restrictions and the interests they purportedly advance. This runs directly contrary to the familiar standard for reviewing a motion for summary judgment, which requires the Court to view the evidence in the light most favorable to the Plaintiffs.

I. As this Court has already determined, Plaintiffs have standing to challenge these restrictions.

Ignoring the Court's two prior rulings, the Secretary again asserts that MDP and MYA lack standing, Br. at 5-7, but the Court thoroughly addressed the same arguments in both its Order denying the Secretary's Motion to Dismiss and its Order Granting a Preliminary Injunction, finding that MDP has both organizational and associational standing. Order Den. Mot. to Dismiss at 4-10 (holding MDP has organizational standing), 7-10 (holding MDP has associational standing); PI Order at 23 ("For the second time and incorporating by reference its analysis and holding in its previous Order Re Defendant's Motion to Dismiss, the Court finds MDP has standing to challenge HB 176, HB 530, and SB 169 under organizational and associational standing."). The Court similarly held that MYA has associational standing. PI Order at 29.

The law of the case doctrine precludes the Secretary "from re-litigating issues that this Court has already resolved." *Wittich Law Firm, P.C. v. O'Connell*, 2014 MT 23N, ¶ 8; *see also* PI Order at ¶¶ 8-9 (based on law of the case doctrine, "easily dispens[ing] with the Secretary's standing arguments as to MDP"). But even if that were not the case, the Secretary inexplicably ignores these rulings entirely and provides no basis for reconsidering or altering them. As before, the Court should reject the Secretary's contention that Plaintiffs lack standing.[2]

[2] The Secretary's suggestion that Mr. Bohn lacks standing because he has successfully cast his ballot in the past (with the help of his parents) fails because a plaintiff need not be prohibited from voting to have standing to challenge a voting restriction; it is enough that they are subject to the restriction, and that it may make it harder for them to vote. *See Comm. for an Effective Judiciary v. State*, 209 Mont. 105, 108, 679 P.2d 1223 (1984) (rejecting argument that voter lacked standing to challenge election law because "[w]here the public and the electorate were so clearly intended to benefit by a constitutional provision, . . . a registered voter has standing to assert that public interest by contending that the constitutional provision has been the victim of legislative strangulation"); *see also Ohio NAACP v. Husted*, 768 F.3d 524, 541 (6th Cir. 2014), *vacated on other grounds*, *Ohio State Conf. of NAACP v. Husted*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014)

II. The Secretary makes no showing that the Challenged Restrictions can survive strict scrutiny or even *Anderson-Burdick*.

Ignoring the Court's prior ruling that strict scrutiny applies, the Secretary again asks the Court to depart from longstanding Montana precedent and adopt the federal *Anderson-Burdick* test. Br. at 15-19. The Secretary is wrong on this point, but her Motion should be denied regardless of which standard is applied.

A. The Motion makes no argument that the Challenged Restrictions can survive strict scrutiny.

As previously decided by the Court, laws that interfere with fundamental rights, including the right to vote, are subject to strict scrutiny and "can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *Mont. Env't Info. Ctr.*, 1999 MT 248 ¶ 63; PI Order at 33-35. This ruling, too, is the law of the case, and the Secretary again makes no real attempt to revisit it or show that the Challenged Restrictions are narrowly tailored to advance a compelling state interest. All she can muster are bare assertions that they would survive any level of scrutiny, *see, e.g.*, Br. at 16 n.10, but she never even bothers with any reasoned argument in support, signaling that she knows the laws could not possibly survive strict scrutiny. For this reason alone, the Motion fails.

B. Even if *Anderson-Burdick* applied, the Motion should be denied.

Instead, the Secretary argues again for application of the federal *Anderson-Burdick* framework. The Secretary claims that the federal test is compatible with Montana law, Br. at 16-17, but the very case she cites for that claim disproves her assertion. *See Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996) ("The most stringent standard, strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right or discriminates against a suspect class."). The Court has rejected this argument twice, and the Secretary again provides no basis for reconsidering either ruling.[3]

("*Ohio NAACP*"); *Obama for Am. v. Husted*, 697 F. 3d 423, 433 (6th Cir. 2012); *Guare v. State*, 167 N.H. 658, 665 (2015) (holding that confusing language on voter registration form imposed at least an unreasonable burden because it "*could* cause an otherwise qualified voter not to register to vote") (emphasis added).

[3] The Secretary's attempt to change the subject with the statement that fundamental rights are "not absolute" under Montana law, Br. at 18 n.11, is one in a sea of red herrings in her Motion. Plaintiffs have never contended that fundamental rights are absolute, nor that they have the right to vote in

Even so, the Challenged Restrictions would not survive a faithful application of *Anderson-Burdick*. Under *Anderson-Burdick*, "a reviewing court weighs the 'character and magnitude' of the plaintiffs' asserted injury against the 'precise interests' the state puts forward to justify the challenged rule and considers the 'legitimacy and strength' of those interests and the necessity of any burden on the plaintiffs." *Driscoll II*, 2020 MT 247, 401 Mont. 405, 416, 473 P.3d 386, 393 ¶ 19 n.4 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570 (1983)). These are factual issues. *See, e.g.*, *Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018) (factual record necessary to assess importance of state interest); *Feldman*, 843 F.3d at 387 ("whether an election law imposes a severe burden is an intensely factual inquiry") (internal quotations omitted); *Price v. N.Y. State Bd. Of Elections*, 540 F.3d 101, 112 (2d Cir. 2008) (relying on factual record to weigh state's proffered reasons against the burdens imposed); *Duke v. Cleland*, 5 F.3d 1399, 1405 n.6 (11th Cir. 1993) ("The existence of a state interest . . . is a matter of proof."); *One Wis. Inst., Inc.*, 155 F. Supp. 3d at 905 (burden of challenged law on right to vote is question of fact).

The *Anderson-Burdick* test "requires strict scrutiny" when, as here, "the burden imposed [by the law] is severe." *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018). And even regulations that do not impose "severe" burdens on the right to vote are still subject to exacting forms of scrutiny, requiring the state to "articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is *actually necessary*, meaning it actually addresses, the interest put forth." *Ohio NAACP*, 768 F.3d at 545 (emphasis added). Even a "minimal" burden "must be justified by relevant and legitimate state interests '*sufficiently weighty* to justify the limitation.'" *Id.* at 538 (quoting *Crawford,* 553 U.S. at 191) (emphasis added).

As a result, to survive *Anderson-Burdick*, the Secretary must show that the Challenged Restrictions are "actually necessary" to serve state interests: to do this, she must proffer evidence first, that the problem that purportedly justifies the restriction exists, and second, that the restriction

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any manner, free from regulation, Br. at 15, but rather, that infringements of such rights, and statutes that interfere with the right to vote, must be narrowly tailored to serve a compelling state interest. Similarly diversionary and unsupported are the Secretary's hyperbolic claims that applying strict scrutiny would "obliterate the Legislature's constitutional duty," and that Montana courts would become consumed with challenges to laws in Title 13. Br. at 14. The Secretary's citation to the statute setting election days and times—as if it were next on the chopping block, *id.* at 14—illustrates the extent of her overreach. In reality, statutes interfering with fundamental rights, including the right to vote, have long been subject to strict scrutiny in Montana, and yet somehow the vast majority of Title 13 remains on the books.

"actually addresses" the state's interest by effectively targeting the alleged problem. *See, e.g.*, *Ohio NAACP*, 768 F.3d at 547; *Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012). To meet her summary judgment burden, the Secretary would have to establish the absence of any dispute of fact about the extent of the burden imposed and the state interest furthered by the Challenged Restrictions. The Secretary has done neither. The Secretary cites no evidence of voter fraud or problems with election integrity in Montana associated with EDR, student IDs, or third-party ballot assistance. She cites no evidence that any of those practices have decreased voter confidence, nor that the Challenged Restrictions will increase voter confidence or increase election integrity. All the Secretary can muster are statements from a few election administrators who say that EDR added to their burden—but even that is contradicted by statements from other election officials who say otherwise. *See* Rate Aff. ¶ 9; WNV Ex. J at 9-11; Seaman Decl. ¶¶ 3, 7.

At the end of the day, the Secretary offers no admissible evidence that the Challenged Restrictions are "actually necessary"—which is to say, that the restrictions actually address Montana's expressed concerns about election integrity, efficiency, and uniformity. The failure to make this showing would be fatal to the Secretary's motion even if it were analyzed under the standard she advocates.

C. Under any test, the evidence establishes that the Challenged Restrictions burden Plaintiffs' constitutional rights.

Plaintiffs have produced voluminous evidence demonstrating that the Challenged Restrictions severely burden constitutional rights. This evidence is more than sufficient to establish a genuine dispute that precludes summary judgment.

1. HB 176 burdens Plaintiffs' constitutional rights.

The record evidence shows that HB 176's elimination of EDR infringes Plaintiffs' and other Montanans' fundamental right to vote. Because those burdens fall disproportionately on Native, low-income, elderly, disabled, and young voters, HB 176 also violates Plaintiffs' and other Montanans' right to equal protection. Accordingly, there are at minimum plainly contested issues of material fact that are fatal to the Secretary's motion for summary judgment.

a. HB 176 burdens the right to vote.

Election day has become—by far—the most utilized day for voter registration in Montana, with nearly 45 percent of all late registrants registering and voting on election day. Mayer Rep. at 10-11; *see also* Gessler Dep. 173:21–174:4. In total, some 52,000 unique Montanans have utilized EDR since its inception, more than 7 percent of all currently registered Montana voters. Mayer

Rep. at 13. EDR's popularity has only grown over time: by 2016, over 12,000 Montanans registered to vote on election day, and every county in the state registered voters on election day. Mayer Rep. at 10-11, 13.

EDR isn't just popular—it is "the ultimate failsafe" for voters who might not otherwise be able to vote, at least according to one former Montana Secretary of State.[4] That is because EDR reduces the cost of voting by combining both registration and voting into a single administrative step, and it allows voters who are not activated early in the election period the opportunity to register and vote when attention to the election has peaked. *See* Mayer Rep. at 9; Street Rebuttal Rep. at 6 & n.12; Trende Dep. 108:5–9. Contrary to the Secretary's suggestion that ending EDR would affect only dilatory voters, Br. 33, EDR has allowed voters who have tried to register beforehand to correct errors in their voter registration information of which they may be entirely unaware until they appear to vote on election day. *See* Bogle Dep. 75:13–77:17; *cf.* Denson Dep. 64:14–67:15 (explaining how voter was unable to vote because, through no fault of her own, her registration had not been processed and because EDR had been eliminated). As one senator noted, "story after story" describes instances where Montanans "do everything right" when registering to vote at the DMV, but the DMV clerk failed to transfer the voter's registration form to election officials or failed to do so on time. MDP Ex. 15 (transcript of Senate State Admin. Hearing) at 41:15-25. Without the ability to correct those mistakes on election day, those voters cannot cast their ballots and have them counted without facing additional burdens that could further impede their ability to successfully vote. *See* SUF Resp. at 67; Semerad Decl. ¶¶ 4, 9; Seaman Decl. ¶ 3.

The depressive effects on voter turnout from eliminating EDR are established by decades of political science research and are confirmed by Montanans' experiences. Research consistently shows that EDR is uniquely effective at increasing voter turnout, boosting it by 5 percent on average. Mayer Rep. at 10; *see also* Street Rebuttal Rep. at 5 (scholarly findings that "EDR tends to increase turnout, and, correspondingly, that eliminating EDR is likely to reduce turnout . . . are among the more consistent in the political science literature on voting."). Indeed, the elimination of EDR in Montana has *already* disenfranchised dozens of otherwise-eligible voters who attempted to cast ballots in the 2021 municipal elections: during a low turnout, off-year, local

[4] Lisa Baumann, *Ending Election Day registration sees little support,* Great Falls Tribune, (Oct. 19, 2014, 4:17 PM), https://www.greatfallstribune.com/story/news/local/2014/10/19/ending-election-day-registration-sees-little-support/17583087/.

election, which only two-thirds of Montana's counties even held, at least 58 voters were unable to vote because of the elimination of EDR. Miller Decl. ¶¶ 14, 21; *see also* Seaman Decl. ¶ 8; Semerad Decl. ¶ 7; Bogle Dep. 75:13–77:17; Denson Dep. 64:14–67:15. This evidence that the Challenged Restrictions have already disenfranchised voters gives the lie to the Secretary's repeated assertions that the Challenged Restrictions do not impose a substantial burden on the right to vote and have not caused any disenfranchisement. Br. at 13, 27, 48.[5]

These depressive effects fall heaviest on those who have traditionally faced unique challenges to exercising their right to vote—elderly, disabled, low-income, rural, young, and Native voters. Elderly and disabled voters, for instance, often require special transportation, accessible voting machines, and assistance requesting, completing, and returning their voter registration forms, absentee ballot applications, and ballots. *See* Franks-Ongoy Decl. ¶¶ 9, 11-19; MDP Ex. 15 (transcript of Senate State Admin. Hearing) at 7:17, 9:18. These voters, and the organizations that assist them, rely on EDR to allow voters to register and vote in a single trip. *See* Franks-Ongoy Decl. ¶¶ 22-23; MDP Ex. 15 (transcript of Senate State Admin. Hearing) at 31:1-7. For these reasons, EDR is as a "godsend" for disabled voters. MDP Ex. 15 (transcript of House State Admin. Hearing) at 20: 16-18. And Native voters may be burdened most of all. *See generally* WNV Pls.' Opp'n to Renewed Mot. for Summ. J.

HB 176's impact also extends to low-income, rural, and working voters who rely on EDR to register and vote in one stop without requiring additional time off work. *See, e.g.*, MDP Ex. 15 (transcript of House State Admin. Hearing) at 32:2-12. Get-out-the-vote efforts on election day provide many of these voters greater access to transportation to the polls. *See* Bolger Decl. ¶ 7. Moreover, while electors can register to vote only during standard working hours on other days, § 13-2-201, MCA, EDR allows them to do so until 8 p.m. on election day. Those additional hours provide low-income, rural, and working voters a meaningful opportunity to register and vote.

Young voters too would be particularly burdened by HB 176. They are more likely to need to register for the first time in advance of any particular election, and more than half of voters who register on election day are likely registering in Montana for the first time. Mayer Rep. at 14. Young people also tend to move frequently. *See, e.g*., Roche Decl. ¶ 8; Reese-Hansell Decl. ¶¶ 7–8, 16; Denson Dep. 38:23–39:7; MDP Ex. 15 (transcript of House State Admin. Hearing) at 21:9-

[5] The Secretary's 30(b)(6) designee admitted that the Secretary has done nothing to assess how ending EDR will affect turnout. *See* James 30(b)(6) Dep. 287:7–288:20.

15. For these reasons, young voters disproportionally rely on EDR: voters aged 18-24 make up 10.4 percent of registered voters but account for 31.2 percent of those who have registered on election day. Mayer Rep. at 13. And while the average age of registered voters in Montana is greater than 50 years, the average age of election day registrants is 17 years younger. *Id.*[6]

The Secretary would have the Court ignore the burdens the Challenged Restrictions place on specific groups of Montana voters. But even under the Secretary's preferred *Anderson-Burdick* standard, courts specifically consider the effects of the challenged voting legislation on the voters who are actually affected, not just the population of voters as a whole. *See, e.g.*, *Driscoll I*, No. DV 20-408, 2020 WL 5441604, at *6; *Anderson*, 460 U.S. at 792-94 (holding that "it is especially difficult for the State to justify a restriction that" imposes disparate burdens on identifiable groups of voters, including those who share an economic status); *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (holding courts must consider "not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe"); *Vote Forward v. DeJoy*, 490 F. Supp. 3d 110, 116-18, 121-28 (D.D.C. 2020) (finding postal policy did not survive *Anderson-Burdick* where it "place[d] an especially severe burden on those who have no other reasonable choice than to vote by mail"); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216-1217 (N.D. Fla. 2018) ("Disparate impact matters under *Anderson-Burdick*."). Indeed, the burden of a challenged restriction is deemed greater when it disproportionately falls on populations who already face greater hurdles to participation. *See, e.g.*, *Ohio NAACP*, 768 F.3d at 545 (finding significant burden where that burden fell disproportionately on African American, lower-income, and homeless voters likely to use the voting opportunities eliminated by challenged law).

b. The Secretary's argument about its authority to enact EDR is irrelevant.

In an effort to avoid the overwhelming evidence of burdens from HB 176, and again ignoring this Court's prior rulings, the Secretary rehashes, for the third time, her argument that the

[6] HB 176's burdens are not allayed, as the Secretary's affiant Austin James suggests, by failsafe mechanisms, such as provisional ballots. *See* James Aff. ¶¶ 6-16. By requiring voters to make additional in-person trips to perfect their ballots, these alternatives impose their own burdens, rather than mitigating those imposed by the elimination of EDR. *Cf. Priorities USA v. State*, 591 S.W.3d 448, 454 (Mo. 2020) (holding that Missouri's affidavit exception to voter ID law, which required voters to execute an affidavit and present non-photo identification, unconstitutionally burdened the right to vote).

Legislature is free to end EDR by virtue of the language of Article IV, Section 3 of the Montana Constitution. Br. at 28-30. The Court has twice rejected the Secretary's argument. *See* Order Den. Mot. to Dismiss at 16-17; PI Order at 37-38.

The Secretary provides no basis for reconsideration and instead mischaracterizes Plaintiffs' claims. Plaintiffs do *not* "interpret Montana's Constitution as requiring EDR." Br. at 28. Plaintiffs' claim is that Montana voters have come to rely on EDR to exercise their right to vote, and its abolition unduly burdens the ability of Montanans to exercise that right and access the franchise. The burden upon the fundamental right to vote (which Plaintiffs amply proved) requires HB 176 to satisfy strict scrutiny to survive. Because it cannot, it violates the Montana Constitution, regardless of which constitutional provision allowed the Legislature to enact EDR in the first place.

The Secretary's claim that courts in other jurisdictions, applying different law, have upheld registration deadlines more restrictive than Montana's, *id*. at 31-33, is irrelevant. The question before the Court is whether the elimination of EDR in Montana unconstitutionally burdens Montanans' right to vote, and Plaintiffs have presented ample evidence that it does.

c. HB 176 violates equal protection.

HB 176 also violates equal protection. The Secretary glosses over Plaintiffs' evidence of burden, instead focusing her argument on the absence of a "defined class" and evidence of discriminatory intent. *See* Br. at 30-33. But the Secretary misunderstands the law: when a law unconstitutionally burdens a fundamental right, and that burden falls disproportionately on certain segments of the population, a discriminatory motive is not required to prove an equal protection violation. *See, e.g.*, *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445 (noting that, if alleged differential treatment implicates a fundamental right, challenged provision can survive only if the State can show that law is "narrowly tailored to serve a compelling government interest").

Even if Plaintiffs were required to show that HB 176 was enacted to burden Montana's most vulnerable voters, there is at minimum a genuine factual question, as the Legislature was aware of the disparate negative burdens of HB 176 when it was enacted. *See* MDP Ex. 15 (transcript of House State Admin. Hearing, Killsback Test.) at 42:9-19 (explaining that EDR alleviates burdens on Native voters connected to travel costs and distance to polling locations); *id.* (Sunchild Test.) at 17:5-18 (explaining why EDR is so important to Montana's Native voters, including because they have a tradition of voting in person and must overcome long distances to

travel); *see also* Rate Aff. ¶ 9. Despite that knowledge, the Legislature intentionally repealed a critical voting failsafe for these discrete groups. The legislative history thus suggests intentional discrimination against Native voters, which alone precludes summary judgment. *See Prindel*, 2006 MT 62, ¶ 19.

2. SB 169 burdens Plaintiffs' constitutional rights.

Plaintiffs have similarly adduced ample evidence that SB 169's voter ID restrictions burden the fundamental right to vote. Because those burdens fall disproportionately on Montana's youngest voters, the voter ID restrictions also violate equal protection. At a minimum, the evidence creates clear disputes of material fact.

a. SB 169 burdens the right to vote.

By devaluing out-of-state drivers' licenses and student IDs, the voter ID restrictions unconstitutionally burden the right to vote of Montana's youngest voters, who are less likely to have one of the primary forms of identification under SB 169. *See* Dozier Decl. ¶ 3; Reese-Hansell Decl. ¶¶ 7-9. There are over 10,000 out-of-state college students in Montana, and those students are significantly less likely to have a Montana driver's license and will thus be particularly disadvantaged. Mayer Rep. at 15-16.[7] Only 71.5 percent of Montanans aged 18-24 have a Montana driver's license, compared to 94.7 percent of Montanans aged 18 or older. *Id.* at 15. In fact, one study found that, of registered voters between the ages of 18 and 29 who did not cast a ballot in 2016, 21 percent cited problems with voter ID as a reason that they did not vote." Bromberg Rep. at 24-25.[8]

Students are also less likely to have one of the additional "secondary" forms of ID. Mayer Rep. at 15; Bromberg Rep. at 25; *see also* Dozier Decl. ¶ 11; Reese-Hansell Decl. ¶ 9. Students living on-campus or in shared living situations do not receive utility bills, their bank statements are often sent to their permanent addresses, most have no reason to have received a check from the government, and many do not have a job for which they receive paychecks. Mayer Rep. at 15;

[7] The Secretary cites to a broken link to support her claim that "only 32.3% of 18–24-year-olds in Montana are enrolled in college." Br. at 11. Even if this unverifiable claim were true, it remains the case both that students are disproportionately burdened by SB 169 and that SB 169 burdens thousands of qualified, young Montana voters.

[8] The Secretary's focus on the testimony of a single MSU student, Hailey Sinoff, Br. at 20, that she has access to a primary form of ID cannot overcome the ample record evidence that many college students do not.

Bromberg Rep. at 25; *see also* Dozier Decl. ¶ 11.[9] In contrast, young voters are far more likely to have college or university IDs, which are integral to the student experience. *See* MDP Ex. 20 (transcript of House State Admin. Hearing, Katjanastutzer Test.) at 11:1-14. Transgender students in particular are more likely to rely on student IDs as their primary form of ID because the process for obtaining a gender-affirming driver's license or state ID card is more difficult and intrusive than the process for obtaining a gender-affirming student ID. Reagor Dep. 105:17–106:11, 106:23–107:12, 122:4–123:5.

The Secretary's argument that Plaintiffs cannot demonstrate a burden on the right to vote without identifying specific voters who are disenfranchised as a result of SB 169, Br. at 10-12, 20-21, is unsupported as a matter of law: she cites no case that requires this, in Montana or elsewhere. And courts regularly credit expert testimony quantifying the burdens imposed by voting restrictions to find that a challenged law burdens the right to vote. *See Fish v. Schwab*, 957 F.3d 1105, 1127-1133 (10th Cir. 2020); *League of Women Voters of Fla.*, 314 F. Supp. 3d at 1217. In fact, such evidence is often more useful to courts than examples of discrete voters. *See Crawford*, 553 U.S. at 201-02.

Rather than establishing an absence of genuine dispute about the burdens imposed by SB 169, the Secretary mischaracterizes the law and its effects in a futile effort to minimize those burdens. The Secretary's contention that SB 169 made voting easier by creating a new failsafe, Br. at 8, is simply false. The Secretary's new Declaration of Impediment form permits an elector who lacks sufficient identification to cast a provisional ballot, which will be counted *only if* (1) the voter physically returns by 5 p.m. the day after the election, (2) provides a valid form of ID or other documentation, *and* (3) demonstrates a "reasonable impediment" to obtaining a photo ID. 13-15-107(3)-(4), MCA. In stark contrast, the pre-SB 169 Polling Place Elector Identification Form was a true failsafe that did not require voting a provisional ballot because it alone sufficed for identification at the polls once verified by election officials, allowing the voter to cast a regular ballot even without showing ID. *See* ARM §§ 44.3.2110(2)(b) (2013), 44.3.2102(9) (2010). But, citing SB 169, the Secretary promulgated regulations that limited the utility of the Polling Place Elector Identification Form such that it may no longer be utilized as primary identification. MAR

[9] Although the Secretary claims that voters may use their voter registration confirmation in combination with certain photo IDs to vote, Br. at 7-8, 11, 22, the Legislature affirmatively removed "notice of confirmation of voter registration" from the list of qualifying evidence of identity. *See* MDP Ex. 9.

Notice No. 44-2-250, Mont. Sec'y of State (Oct. 8, 2021), https://sosmt.gov/wp-content/uploads/44-2-250pro-arm.pdf ("MAR Notice No. 44-2-250"). Also misleading is the Secretary's claim that SB 169 made voting easier by removing the requirement that primary ID be "current." Br. at 8. The Secretary neglects to mention that pre-SB 169 regulations specified that all photo IDs were "presumed to be current and valid." ARM 44.3.2102(6)(c) (2021). SB 169, along with the Secretary's corresponding regulatory changes, indisputably make voting harder.

b. SB 169 violates equal protection.

Because SB 169 disproportionately impacts Montana's youngest voters, it also violates equal protection. The Secretary, again ignoring this Court's prior rulings, claims that Plaintiffs cannot establish unequal treatment of young voters without assigning an age range to that category of voters and present no equal protection issue because the law does not facially classify voters by age. Br. at 9-10. But the Court already concluded otherwise. *See* PI Order at 42-43. And again, the Secretary provides no basis for reconsideration.

In any event, Plaintiffs have shown that young Montanans are unduly affected because SB 169 limits the use of IDs disproportionately used by them. While evidence of intentional discrimination is not necessary to prove Plaintiffs' claims, the Legislature knew that the Challenged Restrictions would disproportionately impact young voters. *See* MDP Ex. 15 (transcript of State Admin. Hearing) at 21:9-15 (EDR), MDP Ex. 20 (transcript of Senate State Admin. Hearing) at 13:6-15 (transcript of House State Admin. Hearing) at 19: 6-8 (student IDs), MDP Ex. 29 (transcript of House Judiciary Hearing) at 15:7-11. Perhaps most tellingly, Speaker of the House Wylie Galt remarked, "[I]f you're a college student in Montana and you don't have a registration, a bank statement, or a W-2, it makes me kind of wonder why you're voting in this election anyway." Mayer Rep. at 15. He concluded that young voters have "little stake in the game." *Id.* This evidence, which the Secretary completely ignores, establishes at minimum a genuine factual dispute about the Legislature's motive.[10]

[10] Notably, the U.S. Supreme Court rejected a virtually indistinguishable rationale offered decades ago by Texas when it attempted to justify restrictions that made it harder for "transient" members of the military to vote in that state. *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

3. HB 530 burdens Plaintiffs' constitutional rights.

The evidence also establishes that HB 530 burdens Plaintiffs' constitutional rights to vote, equal protection, and freedom of expression. At bare minimum, it raises a genuine dispute about the nature of the burden.

a. The challenge is ripe.

This Court has already addressed and rejected the Secretary's argument that Plaintiffs' challenge to HB 530 is not yet ripe.[11] PI Order at 38-39. The Secretary ignores this and provides no basis for reconsideration. Instead, she observes that she has not yet issued regulations implementing the statute. Of course, during the nearly 11 months that HB 530 was in effect before it was enjoined, the Secretary did nothing to promulgate the required regulations.

b. HB 530 burdens the right to vote.

The record demonstrates that HB 530 will burden the many voters who rely on organized absentee ballot assistance—including Native Americans, seniors, students, and low-income, disabled, rural, and working voters—who face significant challenges while trying to exercise their right to vote. Just as the court held in *Driscoll*, banning organized ballot collection "eliminat[es] important voting options that make it easier and more convenient for voters to vote," thereby "increasing the costs of voting." *Driscoll v. Stapleton* ("*Driscoll III*"), Cause No. DA 20-0408, Slip op. at 23, ¶ 7, (13th Jud. Dist., Yellowstone Cnty, July 24, 2020).

The vast majority of Montana's voters vote absentee. MDP Ex. 27. As the number of absentee voters in the state has increased, so too has the assistance provided by civic and political organizations, including secure and reliable ballot collection and return. *Id. See also* Bohn Decl. ¶ 5; Bolger Decl. ¶ 20; Franks-Ongoy Decl. ¶ 19; Semerad Decl. ¶ 12; McDonald Aff. ¶¶ 6, 12; Horse Aff. ¶¶ 13-14. Organized ballot assistance has been invaluable to Montanans whose work commitments, school schedules, family care responsibilities, mobility impairments, lack of access to mail service, or lack of access to transportation made returning their absentee ballots difficult or even impossible. *See* Bohn Dep. 23:19–24:1; Bolger Decl. ¶ 20; Franks-Ongoy Decl. ¶ 19; Gray Aff. ¶¶ 4-15, 22; Street Rep. ¶ 7. Organizations reduced these barriers by allowing

[11] If the Secretary is right that HB 530 is not ripe for review because the substance of the final rule is "speculation," then HB 530 would constitute an unlawful delegation of legislative power. *See* Mont. Const., art. V, § 1; *Bacus v. Lake County*, 138 Mont. 69, 78, 354 P.2d 1056 (1960) (explaining that, in delegating powers related to the administration of statutes, the legislature must prescribe "a policy, standard, or rule" for the administrative body's guidance).

voters to give their absentee ballots to representatives of community organizations or campaigns, who then transported sealed ballot envelopes to official drop-off sites. *See generally* MDP Exs. 28 (*Driscoll* trial transcript), 29 (transcript of House Judiciary Hearing on HB 406); *see also* Bohn Dep. 25:17–26:7; Bolger Decl. ¶¶ 15-18, 20; Franks-Ongoy Decl. ¶ 19; Gray Aff. ¶¶ 11-15; Street Rep. ¶ 7. In 2016 and 2018, organized ballot-return assistance likely helped over 2,500 voters cast their ballots. Mayer Rep. at 17. No wonder, then, that the Secretary's own Elections Director, Dana Corson, admitted under oath that organized ballot assistance programs are good for democracy because they increase voter turnout. MDP Ex. 28 (*Driscoll* trial transcript) at 537-38.

The Secretary nevertheless argues that "Plaintiffs merely offer generalized testimony regarding the alleged disparate impact of Montana's ballot-collection law on minority voters." Br. at 51. Not so. The undisputed evidence establishes that HB 530 "will disproportionately affect the right of suffrage for . . . Native Americans." *Driscoll II,* 2020 MT 247, ¶ 21. *See generally* WNV Pls.' Opp'n to Renewed Mot. for Summ. J. The same is true of senior and disabled voters, many of whom also rely on organized absentee ballot assistance to exercise their right to vote. Franks-Ongoy Decl. ¶¶ 16-19. These voters' mobility limitations make obtaining and returning absentee ballots challenging, and it can be difficult for them to stand in line at polling locations or elections offices. *Id*. They might not have a family member who can make sure that their absentee ballots make it to the polls on time. *Id*. ¶ 14. As a result, these voters have relied on organized ballot assistance. *Id*. ¶¶ 16-19; Bolger Decl. ¶ 20. The law will also disparately burden low-income, rural, and working voters who rely on organized absentee ballot assistance for similar reasons. MDP Ex. 29 (transcript of House Judiciary Hearing) 15:7-11; 16:11-19; 22:16-20 (transcript of Senate State Admin. Hearing) at 12:14-13:13. Many of these voters, too, often lack access to personal transportation. *See* Ex. 29 (transcript of Senate State Admin. Hearing) at 12:25-13:1 (transcript of House Judiciary Hearing) at 8:21-22; 15:8-11; 23:17-19. Students, too, stand to be unduly burdened by the law, having come to rely on ballot assistance programs to exercise their right to vote. MDP Ex. 28 (*Driscoll* trial transcript) 10-40; Semerad Decl. ¶ 12. Many young voters must navigate voting for the first time while balancing schoolwork and jobs. MDP Ex. 28 (*Driscoll* trial transcript) at 10-40; Ex. 29 (transcript of House Judiciary Hearing) at 15:7-11; 16:11-19; 22:16-20, (transcript of Senate State Admin. Hearing) at 12:14-13:13. To help mitigate those burdens, organizations have operated ballot return assistance programs on college campuses to assist college students. MDP Ex. 28 (*Driscoll* trial transcript) at 10-40; Ex. 29 (transcript of House

Judiciary Hearing) at 7:11-8:3, (transcript of Senate State Admin. Hearing) at 14:4-7; 18:24-20:11. These groups provide secure lock boxes on campuses where students can drop off their absentee ballots, as well as door to door assistance programs. *Id*.

Recognizing these burdens, in 2020 two Montana district courts held that a similar restriction on absentee ballot assistance unconstitutionally violated Montanans' fundamental right to vote. *See Stapleton*, 2020 WL 8970685, at *22; *Driscoll I*, No. DV 20-408, 2020 WL 5441604, at *6. The facts that informed those decisions have not changed. Thousands of voters have relied on ballot collection in Montana elections, Mayer Rep. at 17, and for many, it made the difference between voting and not voting at all. HB 530's renewed ballot assistance ban—which goes even further than its unconstitutional predecessor by prohibiting assisting voters not only with returning their completed ballot, but also with requesting and receiving their ballot in the first place—is likewise unconstitutional.

c. HB 530 violates equal protection.

HB 530 similarly violates equal protection. The record reflects that the Legislature was aware of the disparate negative burdens of HB 530, and despite this knowledge, intentionally repealed this critical failsafe for these discrete groups. *See* MDP Ex. 29 (transcript of House Judiciary Hearing) at 18:8-11 (burdens on elderly voters and voters with limited mobility), 16:11-19 (burdens on low-income voters); 22:16-20 (burdens on low-income and minority voters); (transcript of Senate State Admin. Hearing) at 12:14-13:13 (burdens on disabled, low-income, rural, and working voters). Following the *Stapleton* and *Driscoll* trials in 2020, the Legislature was plainly on notice of the discriminatory impact of HB 530 and other ballot assistance bans. And during the legislative session, Representative Tyson Running Wolf explained that Section 2 of HB 530 "effectively ends the legal practice of ballot collection," which is heavily relied upon by Native voters in Montana and would result in "en masse" disenfranchisement. In his words, "[b]allot collection is a lifeline to democracy for rural indigenous communities" because of social and economic barriers such as long distances to election offices and lack of access to transportation in Indian Country.[12]

[12] *See* House Floor Session - Audio Only (Apr. 27, 2021, 10:04 AM), available at http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/43525?agendaId=223947 (last accessed Apr. 4, 2022); Keila Szpaller, *Election security bill*

Moreover, HB 530's immediate predecessor, HB 406, did not advance in the Legislature following testimony by the chief legal counsel for the Office of Commissioner of Political Practices, who identified possible constitutional concerns. Rate Aff. ¶ 13; WNV Ex. M at 4-6. After the failure of HB 406, in the same legislative session in which protections for Native American voting rights were rejected, HB 530 was advanced at the last moment without any committee hearings or opportunity for public comment. This irregular procedure is alone indicative of discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."). The enactment history of HB 530 suggests intentional discrimination against Native voters and alone creates a genuine question of material fact that makes summary judgment inappropriate.

d. HB 530 burdens the freedom of speech.

The evidence also demonstrates that HB 530 unconstitutionally impedes the freedom of expression of MDP by limiting its ability to communicate its missions and values to voters. The free speech guarantee in Montana's Constitution encompasses "the opportunity to persuade to action, not merely to describe facts." *Mont. Auto Ass'n v. Greely,* 193 Mont. 378, 387, 632 P.2d 300, 305 (1981). This includes communication and coordination with voters for ballot collection purposes. *See Stapleton*, 2020 WL 8970685, at *23 (quoting *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988)); *see also Driscoll III*, Cause No. DA 20-0408, slip op. at 24, ¶ 9.

Helping voters obtain and return absentee ballots allows organizations to express their beliefs in the importance of civic engagement. For example, by offering ballot assistance during its GOTV efforts, MDP "communicates its belief in working together to help all citizens participate in democratic elections, particularly for voters who have experienced historically low turnout rates when compared to the rest of the population, or who for various reasons—disability, advanced age, poverty, or discrimination—would have difficulty voting." Bolger Decl. ¶ 13; *see also id.* ¶¶ 4, 6. These GOTV efforts are part of how MDP accomplishes its mission. *See id.* ¶ 6.

HB 530, as enacted, would burden MDP's ability to engage in protected political activity. HB 530 would prevent "MDP staff and volunteers" from "assist[ing] voters in returning their

heads to Gov. Gianforte's desk, Daily Montanan (Apr. 27, 2021, 7:24 PM), https://dailymontanan.com/2021/04/27/election-security-bill-heads-to-gov-gianfortes-desk/.

ballots": "because HB 530 carves out from its prohibition certain paid employees . . . but does not exclude paid staff members of the MDP, we are forced to assume that paid staff members, or volunteers who reimbursed for certain expenses, may not assist voters with their absentee ballots." Bolger Decl. ¶ 22.

e. HB 530 violates due process.

HB 530 is also unconstitutionally vague, and therefore infringes upon Plaintiffs' due process rights. *See City of Whitefish v. O'Shaughnessy,* 216 Mont. 433, 440, 704 P.2d 1021, 1025 (1985). Because "pecuniary benefit" is unclear, so too is whether ballot assistance would be permitted to continue under HB 530. Though the Secretary gestures at the *possibility* of curing infirmities with HB 530 during the rulemaking process, *see* Br. at 46-47, she has made no effort to even begin that process.

Indeed, in her Motion, the Secretary provides no adequate definition for any of the statutory ambiguities Plaintiffs have raised and acknowledges that the administrative rulemaking process "designed to provide that clarity has yet to occur." *Id*. at 47. Additionally, the Secretary asserts that Plaintiffs' attempts to ascertain the effects of HB 530 are "necessarily speculative." Br. at 43-44. By her own terms, then, the Secretary acknowledges genuine issues of material fact that remain outstanding as to Plaintiffs' vagueness claim.

* * *

For these reasons, evidence in the record before this Court establishes that the Challenged Restrictions, individually and collectively, burden Plaintiffs' fundamental rights. At bare minimum, the evidence raises a genuine issue about the scope of that burden. For that additional independent reason, the Secretary's motion should be denied.

III. The Secretary's purported state interests do not pass constitutional muster.

The Secretary's Motion should also be denied because there is a genuine dispute about whether and to what extent the Challenged Restrictions further any genuine state interests.

The Secretary attempts to justify the burdens imposed by the Challenged Restrictions by pointing to the State's interests in ensuring confidence in elections, preventing voter fraud, intimidation, and coercion, ameliorating administrative burden, and lessening long lines at polling locations. Br. at 2-3, 8, 19, 22-23, 25, 32-34, 51, 55. At bottom, the Secretary's arguments rely entirely upon vague state interests in "electoral integrity" and overbroad generalizations about hypothetical risks posed by ballot collection. Yet to survive even the Secretary's preferred level of

constitutional scrutiny, the Secretary must provide competent evidence of the specific problem justifying the restriction. *See, e.g.*, *Ohio NAACP*, 768 F.3d at 547 (finding "a handful of actual examples of voter fraud" and "general testimony regarding the difficulties of verifying voter registration" insufficient to establish voting restriction was actually necessary). Even with evidence of an actual problem, the Secretary must also demonstrate that the Challenged Restrictions are "actually necessary" to resolve it, and that they will do so effectively. *See Obama for Am.*, 697 F.3d at 434 (finding state failed to offer evidence that local election officials actually struggled to cope with period of early voting that the State eliminated, fatally undermining its "vague interest" in smooth election administration); *Ohio NAACP*, 768 F.3d at 547 (finding state failed to show that particular type of voter fraud about which it expressed concern was "logically linked" to restriction on early voting and registration at issue, and further failed to explain how restriction would prevent fraud).

Whether the Challenged Restrictions actually promote the Secretary's purported interests, and whether they will do so effectively, are questions of fact. *See Armstrong v. State*, 1999 MT 261, ¶ 16, 62, 296 Mont. 361, 364, 989 P.2d 364, 368 (relying on extensive factual record to conclude that "the legislature has no interest, much less a compelling one, to justify its interference with an individual's fundamental . . . right" in case involving constitutional challenge to state statute requiring pre-viability abortions to be performed by physicians); *Duke*, 5 F.3d at 1405 n.6 ("The existence of a state interest . . . is a matter of proof.").

Because the Secretary offers no substantive evidence—let alone evidence that is beyond dispute—that the Challenged Restrictions will actually and effectively address the Secretary's purported interests, she again fails to meet her burden of showing that she is entitled to judgment as a matter of law.

A. The Challenged Restrictions are not justified by concerns about voter confidence.

The state's asserted interest in preserving public confidence in election integrity cannot justify the severe burdens imposed by the Challenged Restrictions, particularly where any shortage of public confidence results from misinformation spread for political gain rather than EDR, student IDs, or third-party ballot collection. The Secretary claims a crisis of confidence as an "urgent problem" in Montana's elections, Br. at 23, but the Secretary's own expert belied this claim when he testified that voter confidence is not a problem in Montana. Trende Dep. 243:7–9. Similarly,

less than two years ago, the then-Secretary of State's expert witness testified that "Montana's strong election ecosystem encourages and supports voter participation and results in generally high turnout *and high voter confidence*." MDP Ex. 37 (Decl. of Lonna Atkeson) (emphasis added).

Overall, voter confidence in Montana has been relatively high, and remarkably stable, over time—74 percent of Montana voters in 2012, 76 percent of Montana voters in 2016, and 72 percent of Montana voters in 2020 were "very confident" that their vote had been counted as intended. *See* Street Rebuttal Rep. at 19-20. This confidence is likely in large part due to the fact that voter fraud in Montana is exceptionally rare. *See infra* Section III.B. Indeed, the previous Montana Secretary of State conducted an audit of the 2020 election and concluded that "[n]o discrepancies were found during the Post-Election Audit that exceeded the statutory limits as set by Sec. 13-17-507 MCA." McCool Rep. ¶ 106.

To the extent there is a problem of voter confidence in Montana, the Challenged Restrictions will not actually and effectively address that problem. The Secretary provides no evidence that Montanans' purported loss of confidence is related to student IDs, paid ballot collection, or EDR. She similarly provides no evidence that the Challenged Restrictions would have any effect on voter confidence. *See* SUF Resp. ¶¶ 1-7, 9-10, 12-13, 18, 23-24. Indeed, the Secretary has done nothing to even attempt to measure voter confidence in Montana. *See* James 30(b)(6) Dep. 245:17–246:13. Without a shred of evidence, the Secretary cannot show that the Challenged Restrictions actually serve the state's interest in promoting public confidence in elections.

Moreover, the evidence indicates that the Secretary's purported concerns about voter confidence is manufactured. Both the Secretary's expert and her designee agree that the concerted effort by members of the Secretary's party to spread misinformation about the 2020 election negatively affect voter confidence. *See* James 30(b)(6) Dep. 326:11–18; Trende Dep. 146:10–147:1. Yet despite being the State's highest election official, the Secretary has done precious little to preserve confidence by combatting that misinformation. Instead, she has cynically pointed to any resulting decline in confidence—real or perceived—as justification for her efforts to restrict access to the franchise. Legislative sponsors and other state actors should not be permitted to manufacture a governmental interest to justify voting restrictions by sowing public doubt through unsubstantiated—and, as has been repeatedly proven over the last several years, often demonstrably false—allegations about voter fraud and insecure elections. Such tactics create

perverse incentives and cannot justify the significant burdens imposed by laws like the Challenged Restrictions. *See, e.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 218 (Mo. 2006) ("[I]f this Court were to approve . . . severe restrictions on . . . fundamental rights owing to the mere perception of a problem . . . then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.").

B. The Challenged Restrictions are not necessary to prevent voter fraud.

The Secretary has failed to show any compelling evidence of voter fraud in Montana, let alone any fraud that any Challenged Restriction would remedy. Indeed, there is no genuine dispute about at least one fact at issue in this case: voter fraud in Montana is vanishingly rare. *See* Mayer Rep. at 6-8; McCool Rep. ¶¶ 106-08. The Secretary's expert testified that he does not believe widespread voter fraud exists, Trende Dep. 215:17–21, and his report notes that he is "not convinced that voter fraud is a substantial problem in Montana," Trende Rep. at 12. Moreover, no fraud was identified in Montana's 2020 post-election audit. McCool Rep. ¶ 106. And in connection with last year's BIPA litigation, the Cascade County Clerk testified that no counties in Montana have "ever had any cases of voter fraud." *Id*. ¶ 108. [13]

The rate of voter fraud is also infinitesimally small in the United States. According to the conservative Heritage Foundation, voter fraud constitutes "about 0.00006 percent of the total votes cast" in the United States. McCool Rep. ¶ 109. A recent analysis of three states with all vote-by-mail elections calculated that the number of "possible cases" of voter fraud was 0.0025 percent of all votes cast. *Id.*

Of particular salience, there is *no* evidence of any voter fraud in Montana associated with EDR, student IDs, or third-party ballot assistance. *See* Mayer Rep. at 6-8; Semerad Decl. ¶ 11; Seaman Dep. 195:19–196:14, 197:2–15; MDP Ex. 20 (transcript of House Judiciary Hearing) at 22:5-21 (Secretary's Election Director admitting to same during legislative hearings on SB 169). Neither of the Secretary's *two* examples of voter fraud convictions in Montana's history, implicate ballot collection, student IDs, or EDR. *See* SUF Resp. ¶¶ 36-41.

Yet, relying on vague and unsubstantiated anecdotes from supporters of the Challenged Restrictions and "expert" testimony about isolated allegations of election fraud in *other states*, the

[13] Even some local Republican groups are now contributing to the effort to fight the myths regarding voter fraud in Montana. *See, e.g.*, MDP Ex. 26. Last month, Missoula County's Republican Party spent two days and $5,000 to dispel baseless allegations of fraudulent activities in Missoula County's administration of the 2020 general elections. *Id.*

Secretary argues that the hypothetical risk of voter fraud in Montana justifies the Challenged Restrictions. Br. at 52-53. Despite her failure to provide any proof of voter fraud, the Secretary relies on *Crawford*, which upheld a challenged law under *Anderson-Burdick*. Br. at 52. But in *Crawford*, the Court found that the Plaintiff presented very little evidence of a burden posed by the challenged law, effectively raising only a facial challenge. 553 U.S. at 203. Here, as noted *supra*, Plaintiffs have provided evidence that the Challenged Restrictions create severe burdens for Montana voters. And recent research cited by the Secretary's own expert concluded: "[C]ontrary to the argument used by the Supreme Court in the 2008 case *Crawford v. Marion County* to uphold the constitutionality of one of the early strict ID laws, we find no significant impact on fraud or public confidence in election integrity. This result weakens the case for adopting such laws in the first place." Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2018*, 136 Q.J. Econ. 2615, 2653-54 (2021), cited by Gessler Rep. at 19.

More importantly, *Crawford* is not the law in Montana, as Montana courts require evidence of the state's allegedly compelling interest. In 2020, the Montana Supreme Court found that the Secretary could not justify BIPA under *any* standard because "he did not present evidence in the preliminary injunction proceedings of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana." *Driscoll II*, 2020 MT 247, ¶ 22. In other words, the Montana Supreme Court has already found that, absent meaningful evidence of voter fraud or voter coercion in Montana, the State cannot justify these laws under *Anderson-Burdick*, let alone strict scrutiny.

Moreover, there is no reason to believe that the Challenged Restrictions will actually serve Montana's interest in preventing voter fraud. The Secretary cites her purported experts to support the proposition that requiring government-issued ID as primary ID advances the state's interest in preventing fraud. Br. at 22-23. But neither provides any supporting evidence, and in any event, as noted earlier, SB 169 does not differentiate IDs based on whether they are government-issued, but rather, favors some forms of government ID over others.

Mr. Trende references a study that found that information about the existence of voter identification laws may reduce the *perception* of fraud. Trende Rep. at 12; *see also* Street Rebuttal Rep. at 15-17. But Mr. Trende does not claim that SB 169 does anything to protect against *actual* voter fraud, and a recent study cited by the Secretary's other expert concluded that voter ID laws

neither reduce fraud nor improve voter confidence. Cantoni & Pons, *supra* II.B, at 2653-54, *cited by* Gessler Rep. at 19; *see also* Street Rebuttal Rep. at 16 (citing 2016 Stewart et al. study finding "that public perceptions of fraud and confidence in the integrity of the electoral system are not connected to actual state variation in voter identification requirements").

For his part, Mr. Gessler opines that requiring a government document showing a voter's address, in addition to a student identification card, helps prevent voters from illegally voting in a district in which they are not registered, and the Secretary argues that SB 169 is important to verify a voter's residency. Gessler Rep. at 21; Br. at 21. But neither Mr. Gessler nor the Secretary are able to explain how SB 169 ensures compliance with residency requirements, because it doesn't: SB 169 is not designed to ensure that voters vote in the proper district, and it is certainly not narrowly tailored to advance this interest. SB 169 does not require that the address on a voter's primary ID be the voter's current ID or match the registered address. Mayer Rep. at 17. A voter's address is instead documented through the voter registration process, not in reference to the identification he or she brings to the polls. *Id.* at 16. By the time a voter arrives at the polls to vote, they have already satisfied the requirement designed to ensure that they are registered in the proper district. *Id.* And other than a U.S. passport or Tribal ID, none of the primary forms of identification affirm voting eligibility—noncitizens can obtain a Montana driver's license or state ID card, concealed carry permit, and a military ID. Mayer Rep. at 17. Indeed, by the Secretary's own admission, SB 169 "do[es] not address proof of citizenship." MAR Issue No. 2 at 170, Mont. Sec'y of State, (Jan. 28,2022), https://sosmt.gov/wp-admin/admin-ajax.php?juwpfisadmin=false&action=wpfd&task=file.download&wpfd_category_id=735&wpfd_file_id=46687&token=&preview=1. And again, there is no evidence connecting student IDs or out-of-state driver's licenses to any instances of voter fraud. *See* James 30(b)(6) Dep. 342:5–343:15, 344:3–14.

Nor is there any evidence that HB 530 will effectuate the state's asserted interest in preventing voter fraud. As noted *supra*, the Secretary cites no evidence of voter fraud convictions in Montana related to ballot collection. McCool Rep. ¶ 111. As discussed in the expert report by Dr. McCool, "the number of cases of actual voter fraud, or even alleged voter fraud, is infinitesimally small compared to the number of votes cast," and, if anything, "the rate of voter fraud cases is slightly higher in states that ban ballot assistance." McCool Rep. ¶ 111. In other words, "[c]laims that ballot assistance leads to voter fraud are not supported by the data." *Id.*; *see*

also SUF Resp. ¶¶ 30-32. Nevertheless, Mr. Gessler suggests that paid ballot collection "creates a temptation [for ballot collectors] to cut corners or perhaps blatantly violate the law," because of the financial motive. Gessler Rep. at 26. But Mr. Gessler provides no evidence—empirical or otherwise—to support this contention. *See* Street Rebuttal Rep. at 14. Even setting aside the fact that WNV does not pay its organizers per ballot, Horse Aff. ¶¶ 9-10, HB 530 is wholly unnecessary to address these vague concerns because Montana has a panoply of criminal statutes that penalize the sort of conduct Mr. Gessler envisions. *See* Street Rebuttal Rep. at 14-15. In other words, the conduct Mr. Gessler says HB 530 addresses is already unlawful under Montana law, and there is no evidence that making it *more* unlawful would have any additional deterrent effect.

Lastly, there is no evidence that HB 176 would serve the state's interest in preventing voter fraud. Though the Secretary argues that banning EDR promotes election integrity, she has not offered evidence of any connection between EDR and fraud.

C. HB 176 is not necessary to ameliorate administrative burdens on election officials.

Despite the Secretary's claims that HB 176 advances state interests by alleviating administrative burdens associated with EDR, which would reduce the potential for error by burdened elections staff, Br. at 34, she presents no evidence of any mistakes on election day, let alone any connection between those mistakes and EDR. *See* Gessler Dep. 161:10–17. And rather than introducing errors into Montana's elections, EDR helps ameliorate errors that occur in the registration process before election day. Without the ability to correct those mistakes on election day, some voters may not be able to successfully vote. *See* Semerad Decl. ¶¶ 4, 9; Seaman Decl. ¶ 3. If EDR leads to additional work for election administrators, it is only because it boosts voter turnout: as noted by Audrey McCue, the Elections Department Supervisor in Lewis and Clark County, when she testified in opposition to HB 176, "any time somebody registers and vote[s], it's more work for us." MDP Ex. 15 (transcript of Senate State Admin. Hearing) at 11:2-6.

In any event, it is well established that the Secretary's interest in easing administrative burdens on some election officials cannot outweigh the fundamental right to vote. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) (finding "no contest" between the denial of a fundamental constitutional right and the state's administrative burdens); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2018) (administrative burdens on State are "minor when balanced against the right to vote, a right that is essential to an effective democracy").

Moreover, there is a genuine issue of material fact about whether EDR actually adds to the burdens on election administrators. The Secretary relies on affidavits from three election administrators who claim that EDR increases their workload on election day. *See* Br. at 34. But these election administrators merely speculate about the effects of ending EDR—only one of them has administered a *single* election prior to the enactment of EDR, *see* Eisenzimer Decl. ¶ 2 (noting that her career in election administration began in 2005, the year before EDR was enacted), and another has handled *only one* election day registration during her time as an administrator, *see* Tucek Decl. ¶ 2 (noting that she worked in Petroleum County from July 2017 through January 2021); *see also* Mont. Sec'y of State, *Total Late Voter Registration Activities*, available at https://sosmt.gov/elections/latereg/ (last accessed Apr. 5, 2022) (showing that only a single voter registered to vote on election day in Petroleum County between 2017 and 2021).

In contrast, several election administrators testified that EDR did not impose significant administrative burdens and that ending EDR might actually make things harder for them. Ms. McCue testified that ending election day registration was "not . . . helpful administratively," "will not help [her]" in her job administering elections, and "is certainly more work." Rate Aff. ¶ 9; WNV Ex. J at 9-11. Eric Semerad, the Gallatin County Clerk and Recorder, testified that EDR was "not causing additional burden" in his county, and that it was a "mistake" to repeal EDR because it will disenfranchise voters. Semerad Decl. ¶¶ 5, 9. Similarly, Bradley Seaman, Missoula County Elections Administrator, testified that his staff was "prepared to accommodate Election Day registration" and that EDR "has been an important facet of Montana law that has acted as a failsafe for many voters to cast their vote." Seaman Decl. ¶¶ 3, 7. At the very least, this considerable testimony from election administrators creates a genuine issue of material fact as to whether or not EDR creates an administrative burden on elections officials.

Moreover, it is disputed whether and to what extent HB 176 would alleviate any of these alleged burdens. HB 176 does not prevent election administrators from registering new voters on election day. After HB 176, if a Montanan comes to the elections office to vote on election day but had not previously registered, election administrators "register them to vote in the next election." Eisenzimer Dep. 71:15-21. In other words, HB 176 does not prevent elections administrators from doing the same work registering people to vote on election day: the only effect of HB 176 is to prevent same-day registrants from voting. Further, the Secretary's own expert

testified that HB 176 "would not necessarily decrease" the administrative burden on election administrators. Gessler Dep. 152:8–153:14.

Even if HB 176 reduced purported administrative burdens on election administrators, the bill is not narrowly tailored to meet this goal. The affidavits the Secretary submitted on behalf of election administrators nowhere suggest that repealing HB 176 is the only way to reduce the administrative burdens facing them and their staff. And the Secretary cannot prove that HB 176 is narrowly tailored to alleviate burdens on elections officials because her office has not actually assessed whether these alleged burdens can be ameliorated by other means, such as additional staffing. *See* James 30(b)(6) Dep. 285:21–286:22; Gessler Dep. 190:2–191:17. In fact, there are myriad ways for the State to reduce any administrative burdens on elections officials—including hiring more poll workers on election day and modernizing election equipment. One of the Secretary's own affiants admitted that more staff would ameliorate burdens he said were created by EDR. *See* Ellis Dep. 149:8–150:6. All these options would achieve similar goals without significantly increasing voter costs and decreasing turnout, as repealing EDR would do.

D. HB 176 will not reduce lines at polling locations.

There is at minimum a genuine dispute about whether EDR leads to longer lines at the polls, and whether ending EDR would decrease wait times, as the Secretary claims. *See* Br. at 34. In fact, EDR does not increase lines at most polling locations because EDR occurs at a single site—usually the county clerk's office—not at all polling locations. *See* Mont. Admin. R. 44.3.215(1)(b)(iv) (EDR occurs at county election administrator's office or central location designated by county election administrator); Mayer Rep. 8-9; Mayer Rebuttal Rep. at 5; Semerad Decl. ¶ 5 (explaining that EDR did not happen at polling location); Street Rebuttal Rep. at 11-13; Eisenzimer Dep. 28:18–29:5.

The Secretary's claims of longer lines are overblown. As one of the Secretary's affiants admitted, his assertion that EDR caused longer lines was specific to the line at the county election office, where only a few voters voted—and most of those few were there because they needed to register—and did not affect the polling locations where the vast majority of in-person voting occurred. Ellis Dep. 156:13-157:25. And again, any reduction in wait times resulting from reduced turnout is hardly salutary.

Notably, voter wait times in Montana are generally low. In the last two general elections—both with EDR in place—very few voters waited in long lines: 100 percent of voters in 2020 and

97.7 percent in 2016 reported waiting in line on election day for less than 30 minutes. Mayer Rep. at 8-9. Only 10 percent of all in-person voters waited more than 10 minutes to vote in 2020. *See* Street Rebuttal Rep. at 12-13 & tbl.2. And during the past decade, as EDR has become increasingly popular, wait times at the polls in Montana have *decreased*, likely because more Montanans vote using absentee ballots. *Id.* at 13. Because "the data indicate that election day registration is not associated with long wait times in Montana," Mayer Rep. at 9, there is a genuine issue regarding whether the abolition of EDR is necessary to serve the state's purported interest.

Even if EDR causes some longer lines at the election office, there are myriad ways to reduce wait times—including hiring more poll workers, modernizing voting machines, or expanding early voting—that would benefit Montana voters and would not decrease turnout. *See* Ellis Dep. 149:13–150:6 (testifying that more staff and resources would alleviate his concerns about the administrative burdens cause by EDR). And there is certainly a genuine issue regarding whether the interest in reducing wait times—which are already almost entirely under 30 minutes—is sufficiently legitimate and weighty to justify HB 176's burdens on voters.

E. HB 530 is not necessary to prevent voter coercion and intimidation.

HB 530 is not necessary to serve the state's purported interest in ensuring election integrity and fairness by "regulating the connection between money and ballot collection." Br. at 53. State laws already prohibit voter coercion and intimidation in a broad manner that also covers ballot collection, and there is no evidence that fraud is more likely to occur when a pecuniary benefit for ballot collection is involved.

In *Western Native Voice v. Stapleton*, the court definitively rejected the State's vague and unsupported interest in restricting ballot collection "to stop unsolicited ballot collection and to prevent ballot interference," which was counter to testimony of election administrators that unsolicited ballot collection and ballot interference were not problems in the State. Findings of Fact, Conclusions of Law, and Order, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020), ¶¶ 98-101. Once again, the Secretary here fails to identify any evidence of voter coercion or intimidation in Montana, let alone any evidence that links such practices to organized ballot collection, and instead merely relies on the testimony of the bill's sponsor, who failed to identify any evidence that paid ballot collection threatens election integrity. Br. at 54. Moreover, there is no evidence of voter coercion and intimidation related to ballot collection in Montana. Findings of Fact, Conclusions of Law, and Order, *Stapleton,* No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020);

Stapleton, ¶ 99. Multiple election administrators in Montana's most populous counties testified that they have observed no fraud in ballot collection. Semerad Aff. ¶ 12 (Gallatin County); Seamen Decl. ¶ 11 (Missoula County). And the handful of election administrators who submitted affidavits in support of the Secretary's motion identify no instances of voter coercion, intimidation, or fraud. As discussed *supra*, no voter fraud was identified in Montana's 2020 post-election audit by the former Secretary of State, and the Secretary has identified only two voter fraud convictions in Montana's history, neither of which concerns ballot collection. At the very least, this testimony and the absence of contrary evidence from the Secretary creates a genuine issue of material fact as to whether restricting ballot collection and other ballot assistance responds to a compelling state interest in election integrity.

Montana already has laws on the books that regulate election security and prohibit coercion and intimidation, including the criminalization of election code violations, a clear anti-intimidation law, and strict regulations on political contributions and expenditures. *See, e.g.*, § 13-35-103, MCA; § 27-1-1501, MCA *et seq.*; *see also* Findings of Fact, Conclusions of Law, and Order, *Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020), ¶ 107 (finding Montana's anti-intimidation law more protective than BIPA because it "would apply to all acts of intimidation when collecting a ballot, whether a ballot was delivered in person or by mail"). For example, using duress or fraud to compel a voter to either vote or refrain from voting is prohibited, and penalties for violating these laws are substantial, including misdemeanor or felony charges, imprisonment for up to 10 years, or fines up to $50,000. Street Rebuttal Rep. at 15 (citing § 13-35-218; MCA). The Secretary provides no evidence that the current laws prohibiting intimidation or coercion with respect to elections are insufficient to ensure election integrity nor any evidence that HB 530 fills in any regulatory gaps created by these laws.

F. There is a genuine dispute regarding whether the state's purported interests in implementing SB 169 are sincere.

Contrary to the Secretary's claims that SB 169 was passed to prevent election fraud and promote public confidence in election security, Br. at 22, there is evidence in the record that these stated justifications are simply rhetorical guise, serving as cover for other motives.[14] In constitutional challenges to legislation, whether the state's purported interests are sincere is a

[14] The Legislature's repeated attempts to eliminate ballot collection suggests that the Legislature's purported interests in HB 530 are insincere, too. *See supra* II.C.3.

question of fact. *See Armstrong*, 1999 MT 261, ¶¶ 60, 62, 64 (holding that challenged statute did not advance the State's purported interest, and that state's purported interest "served as little more than a rhetorical guise" where real motivation was "prevailing political ideology and the unrelenting pressure from individuals and organizations promoting their own beliefs and values"). As in *Armstrong*, the evidence demonstrates that the Secretary's purported interests are pretextual and that the true interests that motivated the law were based in political ideology and the desire to discourage voter turnout among students. During debate on SB 169, Speaker Galt stated: "[I]f you're a college student in Montana and you don't have a registration, a bank statement or a W-2, it makes me kind of wonder why you're voting in this election anyway." Mayer Rep. at 15. He added that many college students have "little stake in the game." *Id.* Because a prominent backer of the bill suggested that it would be a good thing if the bill decreased student voting, a reasonable factfinder could conclude that the Legislature passed SB 169 in part to discourage student voting, especially in light of the larger national pattern of states discouraging student voting for political reasons. *Id.*

IV. The Elections Clause of the U.S. Constitution does not prevent this Court from ensuring compliance with Montana's state constitution.

Finally, the Secretary's argument that the Elections Clause prohibits judicial review of the challenged restrictions, *see* Br. at 57-59, should be rejected because it "is inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015," "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences." *Harper v. Hall*, 2022-NCSC-17, ¶ 175, 380 N.C. 317, 391, 868 S.E.2d 499, 551 (2022).

A long line of Supreme Court decisions confirms that state courts may review state laws governing federal elections to determine whether they comply with the state constitution. *See Smiley v. Holm*, 285 U.S. 355, 368 (1932) (holding Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided"). The state legislature's enactment of election laws reflects an exercise of the lawmaking power; accordingly, the legislature must comply with all of "the conditions which attach to the making of state laws," including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power." *Id*. at 365, 369. The Supreme Court more recently reaffirmed that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and

manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Leg. v. Ariz. State Indep. Redistricting Comm'n*, 576 U.S. 787, 817–18 (2015); *accord Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (holding that "state constitutions can provide standards and guidance for state courts to apply" when reviewing laws passed pursuant to the state's authority under the Elections Clause). These cases foreclose the Secretary's extreme position that the Elections Clause completely disables state courts from ensuring that state laws governing elections comply with state constitutional requirements.

CONCLUSION

The Parties in this case have developed, and are continuing to develop, an extensive evidentiary record about the burdens that the Challenged Restrictions place on voters, and the purported justifications that the Secretary has offered for these burdens. Over three dozen declarants and eight expert reports, combined with substantial documentary evidence and deposition testimony, have created a genuine dispute of material fact regarding these issues. For the reasons stated herein, as well as those provided in Plaintiffs' preliminary injunction briefings, this court should deny the Secretary's Motion.

Dated: June 24, 2022

Respectfully submitted,

By: */s/ Matthew P. Gordon*

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