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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

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

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Introduction

The Court should grant the Secretary's motion for summary judgment in full. SB 169, HB 176, HB 506, and HB 530 each are facially neutral, generally applicable, non-discriminatory elections laws. They are precisely the type of "time, place, and manner" "procedural regulations" that state legislatures are empowered to adopt to protect the fundamental right to vote, as well as to ensure "elections are 'fair and honest,' and that 'some sort of order, rather than chaos, is to accompany the democratic process.'" *Cook v. Gralike*, 531 U.S. 510, 524 (2001) (citations omitted); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995). Montana law independently confirms the State's "compelling interest[s]" in these election laws. *Larson v. State By & Through Stapleton*, 2019 MT 28, ¶ 40, 394 Mont. 167, 434 P.3d 241.

While Plaintiffs certainly can disagree with the merits of these enactments on policy grounds, Montana law requires far more to establish they are unconstitutional. To defeat the Secretary's motion for summary judgment, Plaintiffs bear "the heavy burden of proving" each statute "is unconstitutional 'beyond a reasonable doubt.'" *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548 (citations omitted).

Regardless of what test the Court applies, the undisputed material facts at issue confirm SB 169, HB 176, HB 506, and HB 530 are constitutionally permissible. Indeed, the Montana Legislature acted in furtherance of its constitutional obligation to "provide by law the requirements for residence, registration, absentee voting, and administration of elections" and "insure the purity of elections and guard against abuses of the electoral process" by adopting these laws. Mont. Const. art. IV, § 3. Plaintiffs' constitutional analysis necessarily fails because it requires the Court to elevate one constitutional provision (Article II, § 13) over another, equally

valid constitutional provision (Article IV, § 3) instead of interpreting those individual sections together to "ensure coordination" within the Montana Constitution as a whole. *Howell v. State*, 263 Mont. 275, 286, 868 P.2d 568, 575 (1994). And Plaintiffs almost concede their legal theories are directly contradicted by the Framers' intentions, which the Montana Supreme Court has concluded are the lodestar of constitutional interpretation. *See Board of Regents v. State*, 2022 MT 128, ¶ 11, ___ Mont. ___, ___ P.3d ___ ("intent of the Framers controls our interpretation" of Montana's Constitution). Plaintiffs cannot cite a single instance in which the Montana Supreme Court has accepted a constitutional interpretation that directly conflicts with the Framers' intentions.

Under Montana law, "[s]tatutes are presumed to be constitutional, and it is the duty of this Court to avoid an unconstitutional interpretation if possible." *Brown*, ¶ 32 (citations omitted). Plaintiffs cannot overcome this presumption, which underpins SB 169, HB 176, HB 506, and HB 530. And that is especially true when, as here, Plaintiffs assert facial challenges. A facial challenge "'to a legislative act is of course the most difficult challenge to mount successfully'" because the challenger "must show that 'no set of circumstances exists under which the [challenged sections] would be valid, i.e., that the law is unconstitutional in all of its applications.'" *Montana Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). This Court must indulge "every possible presumption . . . in favor of the constitutionality of a legislative act." *Hernandez v. Bd. of Cty. Comm'rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638. The Court should do so by granting the Secretary's motion in full.

Legal Argument

I. Trial is unnecessary to resolve Plaintiffs' constitutional challenges.

Plaintiffs fundamentally misapprehend the applicable summary judgment standard. Dkt. 166, pp. 3-4; Dkt. 168, pp. 5-6. To prevail on her Motion, the Secretary need not establish the complete absence of **all** factual disputes. Rather, the Secretary need only "establish the absence of genuine issues of **material fact**." *PPL Montana, LLC v. State*, 2010 MT 64, ¶ 84, 114-117, 355 Mont. 402, 229 P.3d 421 (resolving constitutionality questions as matter of law) (emphasis added), *rev'd and remanded* on other grounds, 565 U.S. 576 (2012); *see also Alexander v. Bozeman Motors, Inc.*, 2010 MT 135, ¶ 36, 356 Mont. 439, 234 P.3d 880 (affirming District Court's summary judgment order based on legal conclusion plaintiffs had "failed to meet their burden of demonstrating beyond a reasonable doubt that § 39–71–413, MCA, is unconstitutional"). And a "material fact" is "one involving the elements of the cause of action or defense at issue **to such an extent that it requires resolution of the issue by a trier of fact**." *Letica Land Co., LLC v. Anaconda-Deer Lodge Cnty.*, 2019 MT 30, ¶¶ 7, 10-16, 394 Mont. 218, 435 P.3d 634 (affirming summary judgment order, which resolved constitutional questions raised under Article II, § 29 of Montana Constitution) (emphasis added).

But constitutional challenges to statutes—even when based on fundamental rights—present the Court with purely legal questions, not questions of fact that must be resolved by a trier of fact. *Id.* That aspect of Montana law has been settled since 1996. *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996); *see also* Dkt. 155, p. 16 n.10. *Wadsworth* is directly on point with Plaintiffs' legal theories, which makes Plaintiffs' refusal to acknowledge its holding remarkable.

In *Wadsworth*, a State employee challenged the Montana Department of Revenue's "conflict-of-interest rule" by arguing it "unconstitutionally infringed upon his fundamental right

to the opportunity to pursue employment" guaranteed by Article II, § 3 of Montana's Constitution. *Wadsworth*, 275 Mont. at 297. Over the State's objections, the district court concluded the finder of fact should determine issues related to the rule's constitutionality. *Id.*, at 294. After holding a trial, the district court provided the fact finder with "instructions on fundamental rights and that fundamental rights may not be infringed by the State without a showing of a compelling state interest." *Id.* The State appealed, and argued the district court "incorrectly referred questions of law" to the finder of fact. *Id.*, at 295. The Montana Supreme Court affirmed that such constitutional analysis presented only "a question of law." *Id.*, at 297 (citing *State v. Pastos*, 269 Mont. 43, 47, 887 P.2d 199, 202 (1994)). And it further concluded the district court explicitly "erred in submitting to the [finder of fact], questions of law that the court itself should have determined." *Id.*, at 298. In particular, the Montana Supreme Court instructed:

> In the instant case, Wadsworth claimed that the conflict-of-interest rule unconstitutionally infringed upon his fundamental right to the opportunity to pursue employment. 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 containing no implicit questions of fact**.

Id., at 297 (emphasis added).[1] The Montana Supreme Court consistently has reaffirmed that holding. *See, e.g., W. Tradition P'ship, Inc. v. Att'y Gen. of State*, 2011 MT 328, ¶ 35, 363 Mont.

[1] Plaintiffs' attempts to distinguish the Montana Supreme Court's legal conclusion in *Wittich* that "A statute's constitutionality undoubtedly is a question of law" as somehow being limited to the procedural posture of that case is flat wrong. *See Comm'r of Pol. Pracs. for State through Mangan v. Wittich*, 2017 MT 210, ¶ 71, 388 Mont. 347, 400 P.3d 735. The relevant language from *Wittich* consists of generally-applicable legal principles based on: (i) § 26-1-201, MCA, which Plaintiffs ignore; and (ii) well-settled Montana Supreme Court precedent, including *Wadsworth*. *Id.* (quoting *Wadsworth*, 275 Mont. at 296).

220, 271 P.3d 1 (citing *Pastos*, 269 Mont. at 47, for principle that under "Montana law the government must demonstrate a compelling interest when it intrudes on a fundamental right, and **determination of a compelling interest is a question of law**") (emphasis added), *cert. granted, judgment rev'd sub nom. on other grounds by Am. Tradition P'ship. v. Bullock*, 567 U.S. 516 (2012); *see also Driscoll v. Stapleton*, 2020 MT 247, ¶ 40, 401 Mont. 405, 473 P.3d 386 (summarizing cases holding that "questions of whether an asserted government interest is constitutionally compelling and whether a challenged statute is narrowly tailored to further that interest are questions of law") (Sandefur & Rice, JJ., concurring and dissenting).

Plaintiffs ask the Court to disregard *Wadsworth*, *Pastos*, and *Western Tradition Partnership*, and conclude their constitutional challenges hinge on disputed factual questions that must be resolved by a fact finder at trial. *See, e.g.,* Dkt. 168, pp. 22-31 (generally arguing "there is a genuine dispute" regarding whether the State's asserted interests are justified by sufficient evidence, and will "actually and effectively" advance the State's interests). That contradicts Montana law. Justice Trieweiler issued a specially concurring opinion in *Wadsworth*, in which he articulated legal arguments identical to Plaintiffs':

> I disagree that the District Court erred by submitting underlying factual issues to the [finder of fact].
>
> The majority correctly concludes that the opportunity to pursue employment is one of life's basic necessities, and therefore, a fundamental right guaranteed by Article II, Section 3, of the Montana Constitution. I also agree that before the State can interfere with that fundamental right, it must establish a compelling state interest for doing so and that whether a particular interest, if proven, is "compelling" is a question of law. **However, where the very facts which form the basis for the State's alleged interest are disputed, the resolution of that dispute involves a question of fact**.

Wadsworth, 275 Mont. at 307-08 (Trieweiler, J., concurring) (emphasis added). The Montana Supreme Court rejected Justice Trieweiler's legal reasoning, and—by extension—Plaintiffs' current position. *Id.*, at 297. Plaintiffs' urging that there are disputed factual issues associated with the State's compelling interests cannot be correct as a matter of law. *Cf. id. with* Dkt. 166, pp. 17-24 and Dkt. 168, pp. 21-32; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)).

Because Plaintiffs' constitutional challenges present only "legal issue[s] containing no implicit questions of fact," which must be resolved by the Court, there cannot be **any** "material facts" precluding summary judgment. *Wadsworth*, 275 Mont. at 297; *Letica Land Co.*, ¶ 7 (material facts are those that require resolution by a "trier of fact").

In fairness, Plaintiffs are correct that constitutional analysis often does contain some factual component. As the Montana Supreme Court noted in *Wadsworth*, the State cannot merely "allege[] a compelling interest"; rather, it generally must substantiate that interest with some amount of "evidence." *Wadsworth*, 275 Mont. at 303; *but see Mont. Auto. Ass'n v. Greely*, 193 Mont. 378, 383, 632 P.2d 300, 303 (1981) (holding statute was justified by compelling interest even though State "did not present evidence to establish a compelling state interest" but instead "cited authority from numerous jurisdictions in which a compelling interest for similar legislation had been found to be present"). Indeed, Plaintiffs correctly cite Montana Supreme Court opinions for the proposition that Montana courts engage in constitutional analysis by reviewing the sometimes "extensive factual record." *See, e.g.,* Dkt. 166, p. 18 (citing *Armstrong v. State*, 1999 MT 261, ¶ 16, 296 Mont. 361, 989 P.2d 364); Dkt. 168, p. 22 (also citing *Armstrong*, ¶ 16). But *Armstrong* is inapposite; there, the district court did not hold a trial on the merits or resolve

constitutional questions by utilizing a finder of fact. Rather, the district court in *Armstrong* considered a factual record similar to that which the parties have developed in this docket, i.e., one consisting of various forms of relevant documentary evidence. *Armstrong*, ¶¶ 63-66. Plaintiffs cannot cite a single Montana Supreme Court opinion holding that district courts must conduct a trial to resolve factual disputes prior to resolving constitutional challenges.

There is simply no reason—practical or legal—why the Court cannot engage in the requisite constitutional analysis by reviewing the factual record the parties have developed, and submitted for the Court's consideration. The Secretary is entitled to summary judgment because she has identified fundamental flaws in Plaintiffs' claims, and Plaintiffs lack the evidence necessary to advance those claims. *Thelen v. City of Billings*, 238 Mont. 82, 88–89, 776 P.2d 520, 524 (1989) (defendant entitled to summary judgment after pointing out "the flaw in Plaintiffs' case," i.e., that "the proof thus far advanced by Plaintiffs is insufficient to avoid summary judgment"); *see generally* Dkt. 155.

Moreover, Plaintiffs' briefing confirms they intend for trial to be nothing more than a second policy debate on the merits of HB 176, SB 169, HB 506, and HB 530. *See, e.g.,* Dkt. 168, p. 22 (arguing trial is necessary to determine whether challenged laws will "effectively" promote State's interests); *Id.* p. 28 (questioning accuracy of Legislature's determination that "EDR creates an administrative burden on election officials"); *Id.* p. 23 (questioning whether laws at issue will "actually and effectively address . . . problem of voter confidence in Montana"); *Id.* p. 24 (questioning whether laws at issue were justified by sufficient evidence of "voter fraud"); *Id.* p. 30 (questioning whether Legislature correctly determined eliminating EDR would result in shorter election lines); *Id.*, pp. 16, 31 (questioning "Legislature's motive[s]" and whether they

are "sincere"); Dkt. 166, pp. 18-25 (generally questioning whether laws at issue "actually promote Defendant's purported interests, and whether they will do so effectively"). Although Montana law directs the Court to evaluate whether a legislative enactment was motivated by a permissible "objective," the inquiry stops there; the Montana Supreme Court repeatedly has instructed courts not to second-guess the wisdom of Legislature's policy decisions in the manner proposed by Plaintiffs. *State v. Jensen*, 2020 MT 309, ¶¶ 7, 16, 402 Mont. 231, 477 P.3d 335 ("'a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data'") (citation omitted); *Duane C. Kohoutek, Inc. v. State, Dep't of Revenue*, 2018 MT 123, ¶ 24, 391 Mont. 345, 417 P.3d 1105 ("once the legislative branch approves a statute, 'this Court's role is not one of second guessing the prudence of the conclusions reached'") (citation omitted); *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 20, 354 Mont. 133, 227 P.3d 42 (Montana courts' "role is not to determine the prudence of a legislative decision" or "psychoanalyze the legislators"); *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 34, 353 Mont. 265, 222 P.3d 566 (courts may not declare statutes unconstitutional "simply because we may not agree with the legislature's policy decision"); *see also Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (justifications for election regulations are "legislative fact[s]" and courts should "accept the[se] findings of legislatures"); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.").

Summary judgment is appropriate under Montana law for two independent reasons. First, by definition there can be no material factual disputes when, as here, the issues before the Court are pure questions of law. *Letica Land Co.*, ¶ 7; *Wadsworth*, 275 Mont. at 297. Second, if the

Court were to hold a trial on the alleged genuine issues of material fact identified by Plaintiffs, that trial likely would amount to a judicial inquiry into the Legislature's judgment and the merits of the Legislature's policy decisions. The Montana Supreme Court consistently has instructed courts that their constitutional review should be limited to whether a legislative enactment serves a constitutionally permissible "objective," and not whether it is necessarily the "best [way] to achieve an objective." *Duane C. Kohoutek, Inc.*, ¶ 24. This Court can conduct that analysis by resolving the Plaintiffs' constitutional challenges on summary judgment.

II. The Secretary is entitled to summary judgment on SB 169 under any applicable legal standard.

A. SB 169 satisfies strict scrutiny review.

MDP and MYA erroneously contend the Secretary has made "no argument" SB 169 can survive strict scrutiny. Dkt. 168, p. 7. To the contrary, the Secretary consistently has identified, with evidence, the compelling governmental interests underlying SB 169. Dkt. 155, pp. 2-3, 22-24. And the Secretary has explained how SB 169 is narrowly tailored to advance those compelling interests. *Id.*, pp. 7-9, 19-22. Indeed, the Secretary has been explicit: SB 169 can "survive **any** level of constitutional review." *Id.*, pp. 16-17 n.10 (emphasis in original). That conclusion is confirmed by courts in other jurisdictions, who have concluded *more restrictive* statutes that require voters to display "government-issued photo ID cards" satisfy strict scrutiny review because they are "narrowly tailored to achieve the state's interest in the integrity of the election process." *City of Memphis v. Hargett*, 414 S.W.3d 88, 104–05 (Tenn. 2013) (concluding voter ID law satisfied strict scrutiny, without deciding strict scrutiny was required).

Montana law does not reflexively require Montana courts to apply strict scrutiny to every Montana election law. *See* § II(B), *infra*. Nevertheless, SB 169 can satisfy that standard, i.e., it is

"justified by a compelling state interest and . . . narrowly tailored to effectuate only that interest." *Malcomson v. Northwest*, 2014 MT 242, ¶ 14, 376 Mont. 306, 339 P.3d 1235.

SB 169 is justified by several compelling interests, including: (i) imposing reasonable procedural requirements designed to ensure the integrity, reliability, and fairness of Montana's election processes; (ii) promoting and safeguarding voter confidence in the security of Montana's elections; (iii) deterring and detecting voter fraud; (iv) ensuring voters satisfy Montana's voter qualification standards, as established by Article IV, § 2 of the Montana Constitution; (v) making voting easier in Montana elections, and (vi) modernizing voter requirements. Montana law does not require "require the State to make a formal evidentiary showing of a compelling state interest[.]" *Driscoll*, ¶ 47 (Sandefur & Rice, JJ., concurring and dissenting) (citing *Greely*, 193 Mont. at 383-84). But the State has established these compelling interests with evidence. Dkt. 83, ¶¶ 11-19; Dkt. 84, ¶¶ 10-16; Dkt. 91, ¶¶ 17-64, Exs. 2-1 and 2-4; Dkt. 82, Ex. 1-22; Dkt. 82, Ex. 1-5, pp. iv-v, 6, 9-10, 18-19; Dkt. 82, Ex. 1-7, p. 5; Dkt. 82, Ex. 1-8, pp. 1-3, 9, 21-23. Plaintiffs disagree with the Legislature's judgment to rely upon and invoke those compelling interests when making policy choices, but Plaintiffs cannot establish the absence of these compelling interests with substantial evidence. *See, e.g.,* Dkt. 169, ¶¶ 1-28, 117-130, 142-152.

And the Court need not even rely on this factual record to conclude the State had a compelling interest in enacting SB 169. That is because "[j]udicial notice may be taken of the compelling need" for voting ID laws, including by relying on "judicial precedent" interpreting similar laws "enacted throughout the country as well as by the Congress." *Greely*, 193 Mont. at 383-84. The U.S. Supreme Court has held that "no justification for regulation is more compelling than protection of the electoral process," i.e., "the State has a compelling interest in

preserving the integrity of its election process." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 378–79 (1995) (citations omitted); *see also Larson*, ¶ 40 (same).

While courts routinely recognize that strict scrutiny is not appropriate in analyzing voter ID laws, courts nonetheless have had no difficulty concluding voting ID laws far more restrictive than SB 169 were justified by compelling interests. *See, e.g., In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 25 (Mich. 2007) (Michigan's voter ID law justified by "compelling regulatory interest in preventing voter fraud as well as enforcement of the constitutional directive contained in art. 2, § 4 to 'preserve the purity of elections" and "to guard against abuses of the elective franchise.'"); *see also Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 72-75, 357 Wis. 2d 469, 851 N.W.2d 262 (concluding it was "beyond question" Wisconsin's voter ID law justified by "significant and compelling" state interests, including "protecting the integrity and reliability of the electoral process, maintaining public confidence in election results and preventing voter fraud"); *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009); *see also Frank*, 768 F.3d at 750 (states have compelling interests in voter ID laws because they "deter[] fraud (so that a low frequency stays low)," "promote[] accurate record keeping (so that people who have moved after the date of registration do not vote in the wrong precinct)," and "promote[] voter confidence"); *see also Crawford*, 553 U.S. at 191 (voter ID laws promote State's compelling interests in promoting public confidence, preventing voter fraud, and facilitating orderly administration of elections and accurate recordkeeping).[2]

[2] Permissible types of "time, place, and manner" election laws include election "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

Plaintiffs' insistence that the Legislature was required to identify voter fraud associated with student IDs before enacting SB 169 is untethered to any legal principle. Dkt. 168, pp. 9, 24. Plaintiffs cite no opinion in support of that requirement. And a multitude of opinions make it clear that states *do not* need to identify voter fraud before enacting election laws. *See, e.g., In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. at 42–43 (the legislature "is not required to wait for an electoral calamity before it may act to fulfill" constitutional obligation to "preserve the purity of elections"); *see also Fisher v. Hargett,* 604 S.W.3d 381, 404 (Tenn. 2020) (rejecting "notion that the State must demonstrate the existence of voter fraud before it properly may undertake measures intended to prevent it"); *see also Texas League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 147–48 (5th Cir. 2020) ("actual examples of voter fraud" have "never been required to justify a state's prophylactic measures to decrease occasions for vote fraud or to increase the uniformity and predictability of election administration") (citing *Crawford*, 553 U.S. at 181, and *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–95 (1986)). Indeed, the Framers to Montana's Constitution directed the Legislature to *proactively* guard against voter fraud, even though the Con-Con transcripts do not contain any evidence of voter fraud existing in Montana in 1972. Mont. Const. Art IV, § 3.

Relatedly, the State's compelling interest in modernizing voter requirements is grounded in Montana law, which requires the Secretary to implement, and assist election administrators in the operation of, the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA") among others. § 13-1-203(1), MCA. In *Crawford*, the United States Supreme Court recognized that NVRA and HAVA "made it necessary for States to reexamine their election procedures." 553 U.S. at 192. The Court noted that HAVA and NVRA indicated

"that Congress believes . . . the integrity of elections is enhanced through improved technology." *Id.*, at 193. By requiring the Secretary to implement both HAVA and NVRA, the Legislature has complied with the mandate contained in Article IV, Section 3, of Montana's Constitution to ensure the integrity of elections and acknowledged the importance of improving and upgrading the technology associated with all aspects of Montana's election infrastructure, including voter identification requirements.

Because SB 169 plainly is justified by various compelling State interests, the only remaining inquiry is whether it is "narrowly tailored to effectuate only that interest." *Malcomson*, ¶ 14. It is. As the Secretary noted in her Opening Brief, the Legislature adopted SB 169 primarily because it was concerned: (i) student IDs were not as reliable as government-issued IDs for purposes of accurate identification; and (ii) student IDs were less likely to confirm a voter's residence. Dkt. 155, pp. 19-20, 23-24 (citing *Common Cause v. Thomsen*, 2021 WL 5833971, at *6 (W.D. Wis. Dec. 9, 2021) for proposition that student IDs can be treated different than government-issued IDs, which are "harder to fake"); Dkt. 83, ¶¶ 15-16; Dkt. 84, ¶¶ 13-15. The Legislature then adopted the least onerous path to address those concerns. It still permitted students to use their student IDs to vote, albeit only when used with another document that confirms the student's name and address such as the "Voter Confirmation Card" the Secretary sends to every registered voter in Montana. § 13-13-114(1)(a)(i)-)(ii), MCA; Dkt. 91, ¶¶ 23-27, 33 40-45, Ex. 2-2. Although Plaintiffs continue to assert voters cannot use a Voter Confirmation Card with a student ID to vote, that is incorrect statutory analysis. A Voter Confirmation Card *is* a "government document that shows the elector's name and current address," so it plainly falls within § 13-13-114(1)(a)(ii)(A). *See also* Dkt. 91, ¶¶ 23-27, 33 40-45, Ex. 2-2.

Protecting voters' ability to use student IDs to vote in this manner—while still addressing the Legislature's legitimate concerns regarding student IDs—is precisely the type of "balanc[ing]" of competing interests the Montana Supreme Court has cited with approval when concluding a statute was narrowly tailored. *See Robinson v. State Comp. Mut. Ins. Fund*, 2018 MT 259, ¶ 24, 393 Mont. 178, 430 P.3d 69. Further, as established *supra*, any resulting burden on students is necessarily low, especially considering the undisputed fact that Montana students must display government-issued ID as a condition precedent to receiving student ID in the first place. *W. Tradition P'ship, Inc.*, ¶ 47 (statute narrowly tailored because it "only minimally affects" challengers).

Plaintiffs have not even attempted to articulate a less restrictive alternative that would address the Legislature's original concerns (assuming, *arguendo*, that is the applicable standard). *See Driscoll*, ¶ 47 ("Satisfaction of strict scrutiny further does not necessarily require evidentiary proof that no other feasible and less restrictive means were available to further the asserted government interest.") (Sandefur & Rice, JJ., concurring and dissenting) (citing *State v. Demontiney*, 2014 MT 66, ¶¶ 16-22, 374 Mont. 211, 324 P.3d 344). Accordingly, it is difficult to understand how Plaintiffs could possibly assert SB 169 is not narrowly tailored. And, to be clear, courts have concluded voter ID laws that prohibit *any* use of student IDs to vote still are constitutionally permissible. *See Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749, 754–55 (M.D. Tenn. 2015) (citing *Crawford*, 553 U.S. at 198). Indeed, the U.S. Supreme Court concluded just such a voting ID law did not impose an unconstitutional burden in *Crawford*. 553 U.S. at 198.

For these reasons, SB 169 satisfies strict scrutiny because it is justified by various compelling State interests, and is narrowly tailored to advance those interests in a way that still permits voters to use student IDs on Election Day.

B. The undisputed evidence confirms SB 169 easily passes the flexible *Anderson-Burdick* test.

The Court should apply the *Anderson-Burdick* test for the reasons identified in the Secretary's Opening Brief. Dkt. 155, pp. 13-19. Plaintiffs make no real attempt to articulate why *Anderson-Burdick* is inconsistent with Montana law. In particular, Plaintiffs implicitly concede Montana law directs the Court to consider both "the nature of the interest and the degree to which it is infringed" before determining whether to apply strict scrutiny—or a less exacting standard—to SB 169. *Wadsworth*, 275 Mont. at 302. And that is the very essence of the *Anderson-Burdick* test. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens" voting rights). It is a "sliding scale test"; "when the burden imposed is severe, not only the 'more compelling the state's interest must be,' but the regulation also 'must be narrowly drawn to advance a state interest of compelling importance.'" *Feldman v. Arizona Sec'y of State's Off.*, 843 F.3d 366, 387–88 (9th Cir. 2016) (citations omitted). Conversely, "'when a state election law provision imposes only reasonable, nondiscriminatory restrictions . . . the State's important regulatory interests are generally sufficient to justify the restrictions.'" *Id.*; *see also Tedards v. Ducey*, 951 F.3d 1041, 1067–68 (9th Cir.) (affirming order granting motion to dismiss constitutional challenge to election law because evidentiary hearing is unnecessary when burden imposed is not severe), *cert. denied*, 141 S. Ct. 952, (2020).

Rather than contesting the applicability of the *Anderson-Burdick* test, Plaintiffs repeatedly *invoke* it to highlight what they mistakenly believe to be genuine issues of fact. Dkt. 168, pp. 8-9. As established below, Plaintiffs misapply relevant federal law to assert trial is necessary to resolve: (i) whether SB 169 places a "severe" burden on the right to vote; and (ii) whether any burden SB 169 imposes is justified by sufficiently weighty state interests. Plaintiffs are wrong on both counts. Federal courts consistently have concluded *as a matter of law* that voting ID laws *more restrictive* than SB 169 do not impose a severe burden, and are justified by important State interests. Remarkably, Plaintiffs cite a case explicitly *confirming* that exact conclusion. *See* Dkt. 168, p. 8 (citing *One Wisconsin Inst., Inc. v. Nichol*, 155 F. Supp. 3d 898, 902 (W.D. Wis. 2015) (granting motion to dismiss challenging Wisconsin's voter ID law because the Seventh Circuit already had "held that the Wisconsin voter ID law was not materially different from the Indiana voter ID law that the Supreme Court upheld in *Crawford*.").

Plaintiffs' contention that a "faithful application of *Anderson-Burdick*" should direct the Court to apply strict scrutiny is founded on a false premise. The Ninth Circuit has concluded that "voting regulations are rarely subjected to strict scrutiny" under *Anderson-Burdick*, which is especially true when the election law at issue—like SB 169—is "generally applicable, even-handed, politically neutral, and . . . protect[s] the reliability and integrity of the election process." *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011); *see also Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1187 (9th Cir. 2021) ("most [election] laws need not meet strict scrutiny to pass constitutional muster" under *Anderson-Burdick*). Indeed, the U.S. Supreme Court "has subjected only two types of voting regulations to strict scrutiny," neither of which are present here. *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008) (strict scrutiny only applies to

"regulations that unreasonably deprive some residents in a geographically defined governmental unit from voting in a unit wide election" and "regulations that contravene the principle of 'one person, one vote' by diluting the voting power of some qualified voters within the electoral unit").

Plaintiffs are correct that there is a factual component to the *Anderson-Burdick* test. But Plaintiffs lose the thread at that point. Some federal courts have concluded, for example, that conducting an *Anderson-Burdick* analysis at the motion to dismiss stage can be inappropriate, given the absence of a factual record. Dkt. 168, p. 8 (citing *Soltysik v. Padilla*, 910 F.3d 438, 447–48 (9th Cir. 2018) (reversing order dismissing plaintiff's election law challenge to give plaintiff an opportunity to "develop such evidence" of statute's alleged burden); *but see Nichol*, 155 F. Supp. 3d at 902 (granting motion to dismiss on facts similar to SB 169). That is beside the point at the summary judgment stage. Here, the record has been fully developed. And Plaintiffs are wrong in suggesting determining whether an election law imposes a severe burden is a factual question that must be resolved at trial. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016) (whether challenged law imposes severe burden under *Anderson-Burdick* "is not a factual finding, but a legal determination").

To the extent *Anderson-Burdick* contains a factual element, it merely places a burden of proof *on Plaintiffs* (and not the Secretary) to establish with evidence both that: (i) a challenged election law imposes a "severe" burden; and (ii) the challenged election law is not justified by sufficiently weighty state interests. *See Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 703 (9th Cir. 2018) (under "first prong" of *Anderson-Burdick*, "the magnitude of the burden imposed on voters by the election law, 'is a factual question **on which the plaintiff bears the burden of**

proof.'") (emphasis added) (quoting *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1122–24 (9th Cir. 2016)), *on reh'g en banc sub nom. Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020), *rev'd and remanded sub nom. on other grounds by Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021)); *see also Obama for Am. v. Husted*, 697 F.3d 423, 431–32 (6th Cir. 2012) (election law may fail *Anderson-Burdick* "**if Plaintiffs can show** that the State's burden on their voting rights is not sufficiently justified") (emphasis added). The Secretary is entitled to summary judgment under *Anderson-Burdick* because Plaintiffs lack the facts necessary to prove either prong. *See Thelen,* 238 Mont. at 88-89; *see also Alexander*, ¶ 36.

Plaintiffs lack evidence proving SB 169 imposes a severe burden on voters. Plaintiffs incorrectly assert they are not obligated to identify "specific voters who are disenfranchised as a result of SB 169." Dkt. 168, p. 15. While the *Anderson-Burdick* does permit Plaintiffs to contend that SB 169 affects a subgroup of voters, it affirmatively obligates Plaintiffs to produce "evidence sufficient to show the size of the subgroup and quantify how the subgroup's special characteristics makes the election law more burdensome." *Reagan*, 904 F.3d at 703. Stated differently, Plaintiffs must show "quantifiable evidence from which an arbiter could gauge the frequency with which this narrow class of voters has been or will become disenfranchised as a result of" SB 169. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016). If Plaintiffs cannot identify a specific number of voters affected, or cannot identify any actual voters who have experienced such harms, then SB 169 cannot impose a severe burden. *Reagan*, 904 F.3d at 704-706 (burden not severe when plaintiffs could not "produce a single voter to testify that [challenged election law] would make voting significantly more difficult for her."); *see also Ne. Ohio Coal. for the Homeless*, 837 F.3d at 631.

As noted, *infra* in § II(C), the undisputed facts confirm SB 169 does not impose a severe burden on Montana voters. More to the point, Plaintiffs lack non-speculative evidence quantifying any burden SB 169 has on Montana students. Plaintiffs' burden theory is premised solely on the expert report of Dr. Kenneth Mayer.[3] Dkt. 168, p. 15. But Dr. Mayer has **no** data on how often Montanans use student IDs to vote, rendering it impossible for the Court to know how many Montanans (if any) actually are burdened by SB 169. Dkt. 69, Ex. 35, p. 15 (Dr. Kenneth R. Mayer concedes: "I do not have authoritative data on how many secondary or post-secondary students will use (or attempt to use) a student ID to vote"). Additionally, Plaintiffs do not dispute Dr. Mayer's fundamental error in assuming college students are a proxy for young voters. That analogy fails because only 32.3% of 18-24 year-olds in Montana are enrolled in college. *See* Third Declaration of Dale Schowengerdt, Ex 1-44 (NCHEMS Information Center, *Percent of 18 to 24 Year Olds Enrolled in College*).

[3] Plaintiffs misapply federal law in asserting an expert report based on speculation is sufficient, standing alone, to establish the burden imposed by an election law is severe. Dkt. 168, p. 15 (citing *Fish v. Schwab*, 957 F.3d 1105, 1127-1133 (10th Cir. 2020) and *League of Women Voters of Florida, Inc. v. Detzner*, 314 F.Supp.3d 1205, 1217 (N.D. Fla. 2018). Plaintiffs are wrong. Both cases identified actual voters alleging concrete harm. In *Fish*, the Tenth Circuit analyzed a strict "proof of citizenship" law requiring voters to present a birth certificate or other evidence of citizenship. 957 F.3d at 1114. Rather than abstract testimony about potential impacts of the law, plaintiffs identified eligible voters who "actually were disenfranchised" by the unusually strict law, in addition to concrete evidence over 31,000 eligible voters were actually prohibited from voting. *Id.* at 1128. Likewise, in *Detzner*, "individual plaintiffs assert[ed] various burdens to their own and their peers' voting rights" from a rule that "categorically prohibited [students] from on-campus early voting." 314 F.Supp.3d at 1211, 1216. In fact, the Eleventh Circuit rejected an attempt (similar to Plaintiffs') to challenge voting ID laws based on inferences drawn from a state driver's license database. *Billups*, 554 F.3d at 1354–55 (rejecting argument that Georgia driver's license "data establish that between 289,000 and 505,000 voters lack a photo identification issued by the Department of Driver Safety").

Additionally, Plaintiffs admit they cannot identify any actual voters who have been burdened by SB 169, a key fact on which holdings in similar cases turned. *Cf.* Dkt. 169, ¶ 130 ("Undisputed that every declarant 'could vote' in some form or fashion" under SB 169), with *Reagan*, 904 F.3d at 704-706; *see also Billups*, 554 F.3d at 1354–55 (concluding plaintiffs failed to prove voting ID imposed a severe burden due to their "inability to locate a single voter who would bear a significant burden," irrespective of their speculative expert reports based on raw drivers' license data). Finally, the undisputed fact that Montana universities require students to prove their identity using government-issued ID in order to obtain a student ID logically confirms the burden imposed by SB 169, if any, is a reasonable one that Montana students necessarily meet. *See* Dkt. 155, p. 11 n.10 and n. 11.

Similarly, Plaintiffs cannot meet their burden to prove SB 169 is unconstitutional, summarized *supra* at § II(A). As an initial matter, the "actually necessary" test Plaintiffs' cite is an outlier; it only has been adopted by one federal circuit court of appeals, in an opinion that subsequently was vacated. *See Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 545 (6th Cir. 2014), *vacated sub nom. Ohio State Conf. of The Nat. Ass'n For The Advancement of Colored People v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). Even so, the State meets that test because SB 169 "actually addresses" the State's compelling interests, again as demonstrated *supra* at § II(A). The correct test is the "sliding scale" test applied by the Ninth Circuit. *Feldman*, 843 F.3d at 387–88. Under that "sliding scale," "the State's reasonable and nondiscriminatory restrictions will generally be sufficient to uphold the statute if they serve important state interests," meaning this Court's review should "be quite deferential," and not requiring "'elaborate, empirical verification of the weightiness of the State's asserted

justifications,'" as Plaintiffs baselessly propose. *Price v. New York State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) (quoting *Timmons*, 520 U.S. at 364). The Secretary plainly satisfies that deferential standard. *See, supra,* at § II(A).

Ultimately, the great weight of caselaw confirms SB 169 easily passes the *Anderson-Burdick* test. Plaintiffs cannot square their theory that SB 169 imposes a severe burden on Montana voters with the inexorable fact that federal courts repeatedly have concluded *more restrictive* voter ID laws did not impose a severe burden, and were justified by State interests identical to those asserted here. *See Billups*, 554 F.3d at 1355 (under Georgia's voting ID law, "the burden of producing photo identification is not severe" and justified by State's interest in "deterring voter fraud"); *see also Crawford*, 553 U.S. at 197-98 (same); *see also League of Women Voters of Fla., Inc. v. Lee*, No. 4:21CV186-MW/MAF, 2022 WL 969538, at *95 (N.D. Fla. Mar. 31, 2022) (Florida law does not impose a "severe burden on voters who do not have a valid ID"); *see also Frank,* 768 F.3d at 745, 755; *see also In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. at 33-36.

Indeed, *Crawford* is on all fours with Plaintiffs' legal claims, and Plaintiffs never explain why its application of *Anderson-Burdick* to a more restrictive voting ID law would not compel the same conclusion here, i.e., that SB 169 does not impose a severe burden on Montana voters and is sufficiently justified by the State's interests. That is precisely the conclusion the Fourth Circuit Court of Appeals reached in *Lee v. Virginia State Bd. of Elections*, when it concluded that because "[Virginia law] imposes a lighter burden than did the Indiana law challenged in *Crawford*" and the "same justifications" the U.S. Supreme Court relied upon in *Crawford*—including "prevention of voter fraud, and the preservation of voter confidence in the integrity of

elections"—must also "justify the lighter burdens imposed on Virginia voters." *Lee v. Virginia State Bd. of Elections*, 843 F.3d 592, 606–07 (4th Cir. 2016). Plaintiffs do not dispute the Indiana law in *Crawford* is more restrictive than SB 169; logically, then, any "faithful application" of the *Anderson-Burdick* test must reach the same legal conclusion as *Crawford*.

To the extent SB 169 does impose any burdens on Montana voters, they are completely mitigated by SB 169. Montanans still can use student IDs to vote. And SB 169 also introduced, the new Declaration of Impediment Form, in addition to the existing Polling Place Identification Form. Notably, Plaintiffs completely misrepresent how the Declaration of Impediment Form actually works. Plaintiffs incorrectly contend Montana voters using the Declaration of Impediment Form must physically return to polling sites by 5 p.m. the day after an election with a "valid form of ID." Dkt. 168, p. 15. That is wrong. Pursuant to its terms, voters who lack ID can vote a provisional ballot, which will be counted if the voter returns the next day with qualifying ID ***or*** if they fill out the Declaration of Impediment Form on site while voting. *See* § 13-15-107(2)(a). That statutory interpretation is confirmed by the Declaration of Impediment Form itself. *See* Dkt. 91, ¶¶ 17-64, Ex. 2-4. Additionally, SB 169 removes the requirement that an ID be "current."[4] In this way, SB 169 indisputably makes voting easier in Montana.

[4] Plaintiffs correctly note that prior Montana law presumed photo IDs were current and valid. Dkt. 168, p. 16 (citing Admin. R. Mont. 44.3.2102(6)(c) (2021). But that presumption could not make an expired license "current." And the administrative rule did not, and could not, authorize use of expired licenses, which would directly conflict with the previous version of the voter ID law statute requiring that licenses be current. § 13-13-114(1)(a), MCA (2005). Plaintiffs also ignore that removing the requirement that IDs be "current" was requested by Tribal governments in Montana to make voting easier for Native Americans. Dkt. 91, ¶¶ 58-64.

For these reasons, the Court should conclude SB 169 easily satisfies the *Anderson-Burdick/Wadsworth* test, just as numerous courts in other jurisdictions have concluded after applying that test to far more restrictive voter ID laws.

C. Plaintiffs have failed to prove SB 169 violates equal protection.

MDP's and MYA's equal protection analysis of SB 169 is muddled, incomplete, and ultimately unpersuasive. At a minimum, Plaintiffs have failed to carry their heavy "burden of proving it unconstitutional beyond a reasonable doubt" on equal protection grounds. *Rohlfs*, ¶ 7; *see also Thelen*, 238 Mont. at 88-89.

Plaintiffs do not dispute (nor could they) that SB 169 is facially neutral. *Cf.* Dkt. 155, pp. 9-10 *with* Dkt. 168, pp. 13-14. Accordingly, numerous Montana Supreme Court cases hold Plaintiffs are obligated to prove both: (i) SB 169 has a disparate impact on a specifical class of persons; **and** (ii) substantial evidence of the Legislature's discriminatory intent toward that class. Dkt. 155, pp. 9-10 (citing *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) (citing *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) ("even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose")); *Roe v. City of Missoula, ex rel. Missoula City Council*, 2009 MT 417, ¶ 38, 354 Mont. 1, 221 P.3d 1200). Plaintiffs do not acknowledge those cases, let alone articulate why they are not controlling.

The undisputed facts confirm Plaintiffs cannot carry their burden of proving SB 169 disparately impacts any class. Plaintiffs do not dispute students attending college in Montana all must verify their identity using government-issued ID in order to obtain a student ID, confirming the burden imposed by SB 169 (if any) is a reasonable one Montana students routinely meet.[5] *See* Dkt. 155, p. 11 n.10 and n. 11. Plaintiffs have not identified a single Montana student who obtained a student ID without first proving their identity using government-issued ID. And Plaintiffs explicitly concede that the witnesses they have disclosed could vote under SB 169. Dkt. 169, ¶ 130 ("Undisputed that every declarant 'could vote' in some form or fashion" under SB 169). Moreover, Plaintiffs' experts do not know how many Montanans (if any) have voted in past elections using student ID to verify their identity, confirming those alleged expert opinions are speculative. Dkt. 69, Ex. 35, p. 15 (Dr. Kenneth R. Mayer concedes: "I do not have authoritative data on how many secondary or post-secondary students will use (or attempt to use) a student ID to vote"). *See BNSF Ry. Co. v. Eddy*, 2020 MT 59, ¶ 7, 399 Mont. 180, 459 P.3d 857 (party opposing summary judgment "must present substantial evidence to raise a genuine issue of material fact," i.e., "more than 'speculative, fanciful, or conclusory statements.'"); *see also Schwabe ex rel. Est. of Schwabe v. Custer's Inn Assocs., LLP*, 2000 MT 325, ¶ 48, 303 Mont. 15, 15 P.3d 903 (expert reports that are "are conclusory and speculative" are insufficient to raise a genuine issue of material fact), *overruled on other grounds by Giambra v. Kelsey*, 2007 MT 158, ¶ 48, 338 Mont. 19, 162 P.3d 134. Plaintiffs' inability to establish SB 169 has a disparate impact on a

[5] MDP was even more explicit in the brief it recently submitted to the Montana Supreme Court. *See Brief of Appellees Montana Democratic Party and Mitch Bohn*, Montana Supreme Court No. DA 22-0172 (July 15, 2022) at p. 8 ("Students at MSU and UM **must** present a valid, government-issued photo ID before they can receive their student ID.") (emphasis added).

class, standing alone, is fatal to their equal protection claim. *Fitzpatrick*, 194 Mont. at 323; *Hensley*, ¶ 121 (Sandefur, Gustafson, and Fehr, JJ., dissenting).

Instead of identifying *any* facts establishing SB 169 has a disparate impact, Plaintiffs dedicate their response to arguing Montana law does not obligate them to prove the Legislature had a discriminatory intent when it enacted SB 169. Dkt. 168, p. 16. That is incorrect, as established *supra*. *See also N. Carolina State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020) (rejecting equal protection challenge to voting ID law because plaintiffs had failed to prove "discrimination was a 'substantial' or 'motivating' factor behind enactment of the law" and the district court erred by failing to "apply the presumption of legislative good faith") (citations omitted). Plaintiffs merely double down on their incorrect interpretation of *Snetsinger v. Montana University System*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445. Dkt. 168, p. 13. The Secretary went to great lengths in her Opening Brief to articulate why Plaintiffs' interpretation of *Snetsinger* was incorrect. Dkt. 155, p. 10 n.4. Plaintiffs ignore that analysis entirely, including a full accounting of the Montana Supreme Court's opinion in *Spina*, on which the relevant portion of *Snetsinger* is based and which confirms Plaintiffs must prove discriminatory intent with evidence. *See State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421 ("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").

Ultimately, Plaintiffs invite the Court to conclude the Legislature implicitly was motivated by discriminatory intent if it was aware of some alleged negative implications of SB

169, as testified to by witnesses who opposed SB 169.[6] Dkt. 168, p. 16; Dkt. 169, ¶ 166. But Plaintiffs cite no case as legal support for their wholly novel legal proposition. And they ignore the various cases the Secretary has cited that hold the opposite. *See* Dkt. 155, pp. 12-13 (citing *Rack Room Shoes v. U.S.*, 718 F.3d 1370, 1376 (Fed. Cir. 2013) and *Fieger v. U.S. Atty. Gen.*, 542 F.3d 1111, 1119 (6th Cir. 2008)). Moreover, Plaintiffs ignore that SB 169 does not target student IDs. The law simply identifies six forms of government ID that, standing alone, are sufficient to prove identification for voting. All other forms of photo IDs (including student IDs) must be paired with a document showing the voter's name and address. That the Legislature treated all other forms of photo ID equally demonstrates it was not intentionally targeting students.

Plaintiffs also rely on a misquoted statement they attribute to Montana Speaker of the House Wylie Galt as its sole "evidence" of the Legislature's supposed discriminatory intent. Dkt. 168, p. 16; Dkt. 169, ¶ 125. Mr. Galt stated the following while discussing an early version of SB 169: "Basically, it makes that if 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 . . . So this just clears it up that they have a little stake in the game."[7] Dkt. 69, Ex. 35, p. 15 (quoting Wilson, Sam, *Voter ID Bill Amended, Advances in Montana House*, Independent

[6] The U.S. Supreme Court has held that "if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators." *Crawford*, 553 U.S. at 204.

[7] Plaintiffs omit crucial context by asserting Mr. Galt stated "young voters have 'little stake in the game.'" Dkt. 168, p. 16. He did not. In reality, Mr. Galt's statement was that SB 169 ensures young voters "have a little stake in the game," i.e., they meet Montana's residency requirements. Dkt. 69, Ex. 35, p. 15. States have a compelling interest in ensuring voters are residents. *See Storer v. Brown*, 415 U.S. 724, 730–31 (1974) ("State's interest was obviously sufficient to limit voting to residents"); *see also* Mont. Const. Art. IV, § 2.

Record (Mar. 24, 2021)). But Mr. Galt's statement merely confirms the Montana Legislature adopted SB 169, in part, to ensure Montana voters using student IDs were qualified electors, i.e., residents in the counties in which they were attempting to vote.[8] *See* Mont. Const. Art. IV, § 2; *see also* § 13-1-111, MCA. And Plaintiffs' response confirms Mr. Galt's concerns were well founded. Specifically, Plaintiffs state that Montana college students cannot vote using their student IDs along with a copy of their bank statement, because bank statements are "sent to their **permanent** addresses." Dkt. 168, p. 14 (emphasis added). But if a college student's "permanent address" is not their college abode, then they would not meet Montana's residency requirements for that county as a matter of law. *See* § 13-1-112(1), MCA ("The residence of [a voter] is where the individual's habitation is fixed"). Moreover, the Legislature ensured that all voters—including students—would have a "government document that shows the elector's name and current address"—, i.e., the Voter Confirmation Card. § 13-13-114(1)(a)(i)-)(ii), MCA; Dkt. 91, ¶¶ 23-27, 33 40-45, Ex. 2-2. Plaintiffs' inability to prove, with evidence, the Legislature's enactment of SB 169 was motivated by an impermissible discriminatory purpose also is fatal to Plaintiffs' equal protection challenge to SB 169.

[8] Plaintiffs' suggestion that ensuring voters meet residency requirements—an independent requirement of Montana law Plaintiffs have not challenged—is somehow equivalent to the facts of *Carrington v. Rash*, 380 U.S. 89, 96 (1965), is patently false. Dkt. 168, p. 16 n.10. In *Carrington*, the unconstitutional Texas law at issue "prohibit[ed] '(a)ny member of the Armed Forces of the United States' who moves his home to Texas during the course of his military duty **from ever voting in any election in that State** 'so long as he or she is a member of the Armed Forces.'" *Carrington*, 380 U.S. at 89 (emphasis added). Conversely, SB 169 permits students to vote using the same government-issued ID all Montanans must use, and also accommodates students (including transgender students) who prefer to vote using student ID by allowing them to do so after confirming their name and residence with a separate document, including the voter confirmation card the Secretary sends to all registered Montana voters. The U.S. Supreme Court has concluded voting ID laws far more restrictive than SB 169 are constitutional. *See Crawford*, 553 U.S. at 198.

Plaintiffs' equal protection challenge to SB 169 necessarily fails because Plaintiffs cannot prove, with evidence, that: (i) SB 169 has a disparate impact on a specifical class of persons; and (ii) substantial evidence of the Legislature's discriminatory intent toward that class.

III. The Secretary is entitled to summary judgment on HB 176 under any applicable legal standard.

A. HB 176 satisfies strict scrutiny review.

WNV, MDP, and MYA again all mistakenly conclude the Secretary has made "no argument" HB 176 can survive strict scrutiny. Dkt. 166, pp. 6-7; Dkt. 168, p. 7. That is false. Just as she did with respect to SB 169, the Secretary consistently has identified, with evidence, the compelling governmental interests underlying HB 176. Dkt. 155, pp. 2-3, 25-27. And the Secretary has articulated how HB 176 is narrowly tailored to advance those compelling interests. Dkt. 155, pp. 25-27, 33-35. To avoid any doubt, the Secretary explicitly stated HB 176 "survive[s] **any** level of constitutional review." *Id.* pp. 16-17 n.10 (emphasis in original).

Indeed, the U.S. Supreme Court has upheld far more restrictive registration deadlines than HB 176. Dkt. 155, p. 31 (citing *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (affirming 50-day registration deadline) and *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973) (same)). Because those opinions were issued before it adopted the *Anderson-Burdick* test, the U.S. Supreme Court arguably applied strict scrutiny in both *Marston* and *Burns*. *See Auerbach v. Rettaliata*, 765 F.2d 350, 354 (2d Cir. 1985) (concluding both *Marston* and *Burns* "subject[ed] to strict scrutiny state laws" setting registration deadlines); *see also* Lawrence G. Sager, *Some Observations About Race, Sex, and Equal Protection*, 59 Tul. L. Rev. 928, 958 n.16 (1985) (same).

If the 50-day registration deadlines in *Marston* and *Burns* satisfied strict scrutiny, there is no reasoned argument for why Montana's 1-day registration deadline cannot. And, in fact,

Plaintiffs cite no legal opinions holding that *any* election registration deadline—let alone a minimal, 1-day deadline like the one imposed by HB 176—has ever been held unconstitutional. Even if it applied, HB 176 satisfies Montana's strict scrutiny standard, i.e., it is "justified by a compelling state interest and . . . narrowly tailored to effectuate only that interest." *Malcomson*, ¶ 14.

HB 176 is justified by multiple compelling State interests, including: (i) imposing reasonable procedural requirements designed to ensure the integrity, reliability, and fairness of Montana's election processes; (ii) reducing administrative burdens on election officials; and(iii) making voting easier in Montana elections. Once again, Montana law does not "require the State to make a formal evidentiary showing of a compelling state interest or that the subject statute is narrowly tailored to further that interest." *Driscoll*, ¶ 47 (Sandefur & Rice, JJ., concurring and dissenting) (citing *Greely*, 193 Mont. at 383-84)).

In any event, the Secretary has established the existence of these compelling interests with evidence. Dkt. 155, pp. 25-27; Dkt. 84, ¶¶ 5-9 (State legislator voted for HB 176 because it "address[ed] practical problems with the operation of elections in Montana" as identified by election officials testifying to Montana Legislature, and will "assist in reducing long lines at the polls and curb delays in tabulating and reporting results"); Dkt. 83, ¶¶ 5-10 (State legislator voted for HB 176 to "give election administrators plenty of time to finalize registration rolls and run organized and efficient elections"); Dkt. 43, Exhibit J at 3:7-20 (Montana legislator sponsored HB 176 to make Montana's registration process "more efficient"); Dkt. 88 (rural county election administrator attested that, in Montana, "only a handful of county election offices in Montana's most populous counties have robust resources" necessary to administer

EDR, and that EDR "adds a significant administrative burden" to election officials in rural counties and results in long lines for voters on Election Day); Dkt. 86 (Flathead county election official attested that EDR places administrative burden on election officials, and that "[e]nding voter registration at noon the day before an election helps election administration"); Dkt. 85 (rural county election administrator attested that "ending election day registration makes it easier to administer elections by allowing us to focus on processing votes, and managing issues from the various polling locations"); Dkt. 43, Exhibit I, pp. 10:8-11:14 (rural election administration official asked Montana Legislature to enact HB 176 during legislative testimony to ease administrative burden on small counties); Dkt. 87, ¶¶ 2, 16-22, 28-30 (election expert report establishing how HB 176 "provides substantial benefits, particularly for rural counties" by decreasing administrative burden on Election Day); Dkt. 89, pp. 7-10, 15 (election expert report concluding that, even after enacting HB 176, Montana "still provides ample opportunities to register and vote").

Although Plaintiffs contend EDR does not place an excessive administrative burden on election officials in *urban* counties, Plaintiffs do not dispute the burdens EDR imposed on Montana's *rural* counties. *See, e.g.,* Dkt. 169, ¶¶ 43 (conceding accuracy of election officials' "testimony as it relates to HB 176 and their rural small counties"), 44, 47, 51-55, 72 (acknowledging some Montana election officials requested HB 176). And even though election officials in urban counties may be better equipped to administer EDR, Plaintiffs admit it has caused voters to experience an average of "1.5 to 2 hours" waiting in line to vote in person in recent elections. Dkt. 169, ¶ 80. The Legislature was justified in addressing those problems.

This factual record plainly substantiates the compelling State interests advanced by HB 176. If the Court remains unconvinced, it should take "[j]udicial notice" of the "compelling need" for the registration deadline set by HB 176 by relying on "judicial precedent" interpreting similar registration deadlines "enacted throughout the country." *Greely*, 193 Mont. at 383-84; *see also McIntyre*, 514 U.S. at 378-79. Consistent with U.S. Supreme Court precedent, "courts have repeatedly upheld, against similar challenges, registration cutoffs" far more restrictive than HB 176. *Barilla v. Ervin*, 886 F.2d 1514, 1522 (9th Cir. 1989); *see also Deutsch v. New York State Bd. of Elections*, No. 20 CIV. 8929 (LGS), 2020 WL 6384064, at *4 (S.D.N.Y. Oct. 30, 2020) ("Since *Rosario*, courts nationwide have routinely upheld state laws requiring voters to register to vote three to four weeks before an election") (citing *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973)). WNV's counsel authored a law review article confirming that precise point: "When it comes to EDR, however, litigation has been unsuccessful to date," which "speaks to the practical limitations of courts as vehicles for affirmative reform, and counsels a strategy that focuses primarily on legislative efforts to establish EDR." *See* Dale E. Ho, *Election Day Registration and the Limits of Litigation*, The Yale Law Journal Forum, Vol. 129 (Nov. 18, 2019), https://www.yalelawjournal.org/forum/election-day-registration-and-the-limits-of-litigation (last accessed July 3, 2022). The Court should follow this well-established legal principle.

As a matter of law, the State's interests supporting HB 176 are compelling. The U.S. Supreme Court has confirmed states have a compelling interest in setting registration deadlines. *Rosario*, 410 U.S. at 760 ("the State is certainly justified in imposing some reasonable cutoff point for registration . . . which citizens must meet in order to participate in the next election"); *see also Marston*, 410 U.S. at 680 ("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 frauds").

And it is well-settled that registration deadlines are justified by States' compelling interest in reducing the administrative burden elections officials face on Election Day. *See Hobbs*, 18 F.4th at 1181 ("the State has an important regulatory interest in reducing the administrative burden on poll workers"); *see also Diaz v. Cobb,* 541 F. Supp. 2d 1319, 1339-40 (S.D. Fla. 2008) (noting State's compelling interest in easing burdens that "disproportionately" fall on election officials "in small counties"). Maintaining order in elections also is a compelling interest that justifies registration deadlines. *Diaz*, 541 F. Supp. 2d at 1335 ("public interest in the maintenance of order in the election process is not only important, it is compelling"); *see also Green v. Mortham*, 155 F.3d 1332, 1335–36 (11th Cir. 1998) (summarizing cases); *see also Pisano v. Strach*, 743 F.3d 927, 936–37 (4th Cir. 2014) ("states have an interest 'in ensuring orderly, fair, and efficient procedures for the election of public officials,'" which "requires the imposition of some cutoff period") (citations omitted); *see also Husted*, 834 F.3d at 633-35 (same); *see also Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 212 (M.D.N.C. 2020). Courts also have concluded that States' compelling interest in "detecting fraud" justifies registration deadlines. *Lemons*, 538 F.3d 1104–05; *see also Husted*, 834 F.3d at 633-35 (same).

The court in *Rutgers* summarized the "compelling interests" that justified New Jersey's 21-day registration deadline, including "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." *Rutgers Univ. Student Assembly v. Middlesex Cnty. Bd. of Elections*, 446 N.J. Super. 221, 240–41, 141 A.3d 335, 347 (App. Div. 2016). Each of those

compelling interests underpin HB 176. The Court should rely on this voluminous "judicial precedent" to conclude HB 176 is justified by compelling State interests. *Greely*, 193 Mont. at 383-84. Plaintiffs present no reasoned argument to the contrary. Having established HB 176 is justified by various compelling State interests, the only remaining inquiry is whether it is "narrowly tailored to effectuate only that interest." *Malcomson*, ¶ 14. It absolutely is. Notably, the Legislature did not return to the 30-day registration deadline that existed under Montana law before it adopted EDR. *See* § 13-2-301(1)(a) (2003). Rather, the Legislature made the smallest possible change that still would adequately address the concerns election officials in rural counties brought to the Legislature's attention. It did so by imposing a 1-day registration deadline. No less onerous options than HB 176 existed, and Plaintiffs have identified none. *But see Robinson*, ¶ 21 (statute can survive strict scrutiny review even if challenging party can identify potentially "more narrowly-tailored means of protecting the State's interest").

For these reasons, HB 176 satisfies strict scrutiny because it is justified by various compelling State interests, and is narrowly tailored to advance those interests in a way that still permits voters to simultaneously register, and vote, during Montana's unusually lengthy late registration period. § 13-2-304, MCA.

B. Plaintiffs concede EDR is not required by Montana's Constitution.

Plaintiffs' response briefs make a startling admission: "Plaintiffs' do *not* interpret 'Montana's Constitution as requiring EDR.' 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." Dkt. 168, p.13 (emphasis in original, citations omitted). That is remarkable. Plaintiffs concede EDR is not required by Article II, § 13 of Montana's

Constitution. And they tacitly acknowledge their legal theories are **directly contradicted** by Article IV, § 3, as confirmed by the Framers' intent. *Cf.* Dkt. 166, p. 9 and Dkt. 168, pp. 12-13 *with* Dkt. 155, pp. 27-30.

Boiled down, Plaintiffs invite the Court to adopt a truly radical—and wholly novel—legal principle. Plaintiffs' theory is that if the Legislature ever liberalizes Montana's election laws (such as by adopting EDR), it is locked into that system for all time. Unsurprisingly, Plaintiffs cannot cite any relevant legal authority in support of this new theory.[9] Moreover, this theory directly conflicts with the Framers' intentions, which "controls" this Court's constitutional analysis. *Cf. Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058, *with* Dkt. 168, p. 12 (Framers' intentions are "irrelevant").

The Framers were explicit: "if the Legislature provides [EDR], **they're not locked in**." *Cf.* Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, Vol. III, p. 450 (emphasis added), *with* Dkt. 166, p. 9 (Montana's "Constitution does not then contemplate that the Legislature may then revoke that system once it has been provided."). Indeed, the Framers repeatedly made it clear their desire to ensure the Legislature was afforded sufficient "flexibility" and "very broad" authority to "pass whatever statutes it deems necessary" to "insure the purity

[9] WNV's reliance on *Big Spring v. Jore* is inapposite. *See* Dkt. 166, p. 9 (citing *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219). *Jore* actually confirms the Montana Legislature is afforded considerable discretion to adopt new, more restrictive election laws in response to changing facts. *Jore*, ¶ 18 ("Many of the statutes and regulations that govern the counting of ballots in Montana were only recently enacted in response to the problems that arose during the 2000 Presidential election[.]"). To be sure, *Jore* does instruct that, once qualified electors cast ballots that comply with Montana's election laws, they must "be treated equally to the other" ballots being tabulated. *Jore*, ¶ 28. But that principle has no application to the facially neutral "time, place, and manner" laws at issue here, which merely ensure that all qualified electors cast their ballots in the same orderly fashion. *Cook*, 531 U.S. at 524.

of elections and guard against abuses of the electoral process." *Id.* pp. 437-38, 444, 450; *see also Jore*, ¶ 18. Plaintiffs cannot square their legal theories with the Framers' clearly-stated intentions, and do not even attempt to do so.

Ultimately, courts that have considered Plaintiffs' "one-way ratchet" theory for election laws universally have rejected it. *See, e.g., Husted*, 834 F.3d at 635 (rejecting plaintiffs' theory that "any expansion of voting rights must remain on the books forever"). The Sixth Circuit's rationale for rejecting this theory mirror those discussed by Montana's Framers:

> **Such a rule would have a chilling effect on the democratic process: states would have little incentive to pass bills expanding voting access if, once in place, they could never be modified in a way that might arguably burden some segment of the voting population's right to vote**. Accepting the long recognized ... role of the States as laboratories for devising solutions to difficult legal problems,' we hold that imposing such a one-way ratchet is incompatible with the 'flexible' *Anderson-Burdick* framework.

Id. (citations omitted) (emphasis added). And recent real-world examples—such as the COVID-19 pandemic—aptly illustrate why Montana election laws should remain flexible to accommodate changing facts, without forever "locking in" those accommodations.

Plaintiffs have confirmed their requests for relief are not "require[ed]" by Montana's Constitution. Dkt. 168, p. 13. That frankly should end the inquiry. The Court summarily should reject Plaintiffs' invitation to recognize constitutional rights that are not guaranteed by Montana's Constitution, which—if recognized—would expressly conflict with the Framers' intentions. The Court should grant the Secretary's motion.

C. The undisputed evidence confirms HB 176 easily passes the flexible *Anderson-Burdick* test.

Plaintiffs have failed to carry their burden of proving facts sufficient to establish HB 176 fails the *Anderson-Burdick* test.[10] As confirmed by opinions Plaintiffs have cited, the *Anderson-Burdick* test places the "burden of proof" on Plaintiffs to establish the "severity of the burden that an election law imposes." *Feldman*, 843 F.3d at 387; cited by Dkt. 166, p. 5. But no court has **ever** concluded voter registration deadlines—even ones far more restrictive than HB 176—impose a "severe burden" on voters. *See Rutgers University Student Assembly*, 446 N.J. Super. at 233 (citing the absence of "precedent where a court has applied a strict scrutiny test to determine the constitutionality of an advance registration requirement" under *Anderson-Burdick*); *see also Dudum*, 640 F.3d at 1106 ("voting regulations are rarely subjected to strict scrutiny"). And there is no legal support for Plaintiffs' theory the Court must hold a trial to determine whether Plaintiffs can carry their burden of proving HB 176 severely burdens voting rights. *See Husted*, 834 F.3d at 628 (whether challenged law imposes severe burden under *Anderson-Burdick* "is not a factual finding, but a legal determination"). Montana law requires the Court—and not a fact finder—to answer that legal question. *Wadsworth*, 275 Mont. at 297.

HB 176 easily satisfies both prongs of the *Anderson-Burdick* test because it: (i) does not impose a severe burden on voters; and (ii) it is justified by sufficiently weighty state interests, as confirmed, *supra*, at § III(A). *Reagan*, 904 F.3d at 703; *Obama for Am.*, 697 F.3d at 431–32. The

[10] The Secretary incorporates by reference the legal and policy reasons she previously has made for why the Court should apply the *Anderson-Burdick/Wadsworth* standard. *See* Dkt. 155, pp. 15-19. Instead, the Secretary assumes—as Plaintiffs do in their response briefing—that the *Anderson-Burdick* test applies. *See* Dkt. 168, pp. 8-12 (HB 176 does not "survive a faithful application of *Anderson-Burdick*"); Dkt. 166, pp. 7-8 (HB 176 unconstitutional "[e]ven if the federal *Anderson-Burdick* standard applied").

Secretary is entitled to summary judgment because Plaintiffs have failed to identify facts establishing HB 176 fails either prong. *See Thelen,* 238 Mont. at 88-89; *see also Alexander*, ¶ 36.

No evidence suggests HB 176 imposes a severe burden on Montana voters.[11] As established, *infra* at § III(D), the undisputed facts confirm HB 176 does not severely burden any Montana voters. Plaintiffs' burden theory is premised on a fundamental legal error. Plaintiffs assume EDR "allows voters to register and vote in a single trip," and that HB 176 eliminates that option by requiring two separate trips to the polls. Dkt. 168, p. 11; Dkt. 166, pp. 2-3, 10-12; Dkt. 45, p. 26 (Report of Dr. Daniel Craig McCool erroneously claims HB 176 "eliminated" the option for Native Americans and the disabled to "mak[e] one trip to town to register and vote."). But that's incorrect. HB 176 preserves "same-day registration" during Montana's 29-day late registration period preceding elections ("SDR"). Dkt. 87, ¶¶ 15-16, 26; Dkt. 89, pp. 7, 10. Under HB 176, Montanans still can elect to simultaneously register and vote at whatever time is convenient for them during that 29-day period. §§ 13-2-304(1)(a) and (1)(d)(i); *see, infra,* n.15.

Plaintiffs' analogy to *Driscoll* and the BIPA litigation necessarily fails. Dkt. 166, pp. 10-13 (citing *Driscoll*, ¶ 21). In *Driscoll*, Plaintiffs identified a nexus between the socioeconomic burdens

[11] Plaintiffs' expert, Dr. Mayer, contends Montanans are burdened by HB 176 because so many Montanans have used EDR in past elections. *See* Dkt. 168, pp. 9-10 (citing Mayer Rep. at pp. 10-11, 13). That argument is unavailing for two reasons. First, it ignores that Montanans can adapt to HB 176 and register to vote during Montana's lengthy late-registration period. Second, Dr. Mayer's numbers are incorrect. The numbers he cites include *all registration activity* on election day, including changes to precinct, corrections, address changes, and registration reactivations, which are allowed under HB 176. Dkt. 91, ¶¶ 65-66. While there is no way to segregate only new registrations or county changes on election day, Plaintiffs' representations of the number of voters purportedly impacted by elimination of EDR is likely greatly inflated. *Id.* Moreover, even if there is an error with a voter's registration that cannot be reconciled on election day, the voter must be given a provisional ballot, which is counted as soon as the error is reconciled. *Id.* at ¶¶ 4-16.

they rely upon and BIPA. For instance, WNV claims Native Americans "are more geographically isolated, less likely to have access to a car or gas money, face poor roads, and are more likely to live farther away from their registration sites than the general population." Dkt. 166, p. 11. Assuming, *arguendo*, that is accurate, BIPA—which severely restricted voters' ability to have their ballots collected and transported to polling places by most third parties—"exacerbated" those socioeconomic burdens. *Driscoll*, ¶ 21. Not so with HB 176. That is because both EDR and SDR require voters to travel the same distance to election sites, over the same roads, using the same cars and gas. The only meaningful difference between EDR and SDR is the timing: EDR takes place on a single date (Election Day), whereas SDR can take place on any one of 29 days during Montana's late registration period.

Providing identical same-day registration options (and resulting burdens) as EDR to Montanans during the 29-day late registration period surely cannot qualify as a burden,[12] and Plaintiffs provide no coherent argument to the contrary, except they prefer EDR as policy. But there is no logical reason—let alone the required "substantial evidence"—for why Plaintiffs' cannot adapt to HB 176. *BNSF Ry. Co.*, ¶ 7. Plaintiffs still can operate "get out the vote" campaigns ("GOTV") that help Montanans register,[13] including GOTV campaigns that provide

[12] Courts applying the *Anderson-Burdick* test have concluded that eliminating same-day registration *entirely* does not impose a "severe burden" on voters. *See Husted*, 834 F.3d at 630 ("the elimination of same-day registration and the resulting need for Ohioans to register and vote on separate occasions is, at most, minimally burdensome," especially given the various ways in which Ohioans still can register and vote). To be clear, HB 176 retains same-day registration. But *Husted* illustrates the fundamental legal problem with Plaintiffs' argument that a far less restrictive election law (HB 176) somehow imposes a "severe burden."

[13] Some Plaintiffs already initiated these efforts by developing an online portal allowing voters to fill out an online registration form, after which the organizations mail the completed form with an addressed and stamped envelope, so the voter can sign and send it to the Secretary of State. *See*

transportation to registration sites during Montanan's 29-day late registration period to vulnerable Montanans. *See* Dkt. 166, pp. 11-12; Dkt. 168, p. 11. The only change is that they will do so in a way that does not result in an excessive administrative burden on rural election officials. *See* § III(A), *supra*.

And Plaintiffs' have failed to support their theory that HB 176 imposes a "severe burden" on Montanans with "quantifiable evidence," as is required by *Anderson-Burdick*. *Reagan*, 904 F.3d 706. In its First Amended Complaint, MDP alleged that HB 176 would burden "thousands" of Montanans. Dkt. 3, ¶¶ 22, 35. But no data supports that. Over 337,000 votes were cast in Montana elections governed by HB 176 in 2021. Dkt. 91, ¶ 36. MDP now claims "**dozens**" of Montanans were unable to vote in those elections due to HB 176, i.e., 0.017% of the electorate. Dkt. 168, p. 10 (emphasis added). That plainly is not evidence of a "severe burden." *See Ne. Ohio Coal. for the Homeless*, 837 F.3d at 631 (under *Anderson-Burdick*, "[z]eroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst"). Indeed, all election registration deadlines—even EDR—inevitably prohibit some individuals from voting, but it does not logically that election deadlines are burdensome. *See Deutsch*, 2020 WL 6384064, at *5 (rejecting plaintiffs' theory that registration deadline imposed severe burden when it "completely disenfranchise[d] thousands of voters" because that "observation is true of any voter registration deadline").

Ultimately, the complete absence of any supporting caselaw inevitably dooms Plaintiffs' theory that HB 176 and its 1-day registration deadline imposes a "severe burden" on Montana

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Montana Voter Registration Portal, *Register to* Vote, https://www.mtvr.org/wnv (last accessed July 3, 2022).

voters under *Anderson-Burdick*. Various courts from other jurisdiction repeatedly have concluded—as a matter of law—that far more restrictive registration deadlines do not impose a "severe burden." *See Mi Familia Vota v. Hobbs*, 977 F.3d 948, 952 (9th Cir. 2020) (staying preliminary injunction order because Arizona's 29-day voter registration deadline "does not impose a 'severe burden'" on voters as a matter of law); *Diaz*, 541 F. Supp. 2d at 1340 (Florida's 29-day registration deadline is "a reasonable, non-discriminatory restriction that advances an important state interest in the conduct of an honest, fair and orderly election" and "does not impose a severe burden" on voters); *Democracy N. Carolina*, 476 F. Supp. 3d at 214 (denying preliminary injunction because North Carolina's 25-day registration deadline does not "result in a severe burden on the right to vote," even during pandemic); *Pisano*, 743 F.3d at 936–37 (generally concluding "[e]lection law . . . filing deadlines . . . do not impose severe burdens"); *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 149 (D. Conn. 2005) (Connecticut's 7-day registration deadline "does not impose a severe burden" on voters); *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1281–82 (11th Cir. 2020) (staying preliminary injunction order that extended absentee ballot deadline because district court incorrectly concluded that deadline imposed a "severe burden" on voters); *Rutgers Univ. Student Assembly*, 446 N.J. Super. at 235 (affirming summary judgment order concluding New Jersey's 21-day registration deadline did not impose severe burden).

The Ninth Circuit provided the best articulation for why registration deadlines do not severely burden voting rights, when it affirmed a summary judgment order upholding an Oregon law that eliminated EDR and imposed a 20-day registration deadline. *Barilla*, 886 F.2d 1524–25. The Ninth Circuit concluded registration deadlines do not "totally deny" or "ban" individuals

from voting. *Id*. Instead, they merely place "a 'time limitation' on when the plaintiffs had to act in order to be able to vote." *Id*. And a reasonable time limitation, standing alone, could never impose a burden on voting rights that was "'substantial' enough to require strict scrutiny." *Id*. (citations omitted) (concluding voters who failed to comply with the registration deadline "were all disenfranchised by their willful or negligent failure to register on time."). HB 176 plainly falls within that definition of a "time limitation," and Montana law retains its unusually generous late registration period, during which Montanans simultaneously can register and vote at any point during a 29-day period. §§ 13-2-304(1)(a) and (1)(d)(i).

For these reasons, the Court should conclude HB 176 easily satisfies the *Anderson-Burdick* test, just as numerous courts in other jurisdictions have concluded after applying that test to far more restrictive registration deadlines.

D. Plaintiffs have failed to prove HB 176 violates equal protection.

Plaintiffs' equal protection challenges to HB 176 fail for same reasons identified, *supra*, at § II(C).[14] As WNV concedes, HB 176 is a "facially neutral law." Dkt. 166, p. 14. Accordingly, well-settled law obligates Plaintiffs to prove, with evidence, both that: (i) HB 176 has a disparate impact or burden on a defined class; and (ii) the Montana Legislature's decision to enact HB 176 was motivated by an impermissible discriminatory intent. *Gazelka*, ¶ 16; *Fitzpatrick*, 194 Mont. at 323; *Hensley*, ¶ 121; *Feeney*, 442 U.S. at 272; *Roe*, ¶ 38; *Raymond*, 981 F.3d at 303. Plaintiffs cannot make either showing. Thus, the Secretary is entitled to summary judgment on Plaintiffs' equal protection challenge to HB 176. *See Thelen,* 238 Mont. at 88-89; *see also Alexander*, ¶ 36.

[14] For sake of brevity, the Secretary will not reiterate the legal errors underlying Plaintiffs' interpretation of *Snetsinger*, which are summarized, *supra*, at § II(C). *See also* Dkt. 155, p. 10 n.4.

The undisputed facts at issue confirm HB 176—which sets a registration deadline at noon the day before Election Day—does not impose *any* burden on voters, let alone a substantial burden on a defined class. Context, here, is important. Plaintiffs do not dispute "most states do not permit election-day registration." Dkt. 169, ¶ 68. So the burden HB 176 imposes on Montana voters is no different than the reasonable burden borne by most voters in this country. *See Hobbs*, 977 F.3d at 952 (registration deadline set 29 days before Election Day does not impose "severe burden" on voters). And to the extent HB 176 does impose a burden, Montana law mitigates that burden through the various registration options afforded to voters. Dkt. 89, p. 13 (articulating why "voting in Montana remains generally easy," even under HB 176); *see also* Dkt. 155, p. 27.

Plaintiffs also do not dispute Montana has one of the longest late registration periods in the country.[15] Dkt. 155, p. 25; *see also* Dkt. 89, pp. 7, 13-15; Dkt. 87, p. 15; *see also* § 13-2-304, MCA. During the 29-day period preceding an election, Montanans *simultaneously* can register, and vote. *Id.*; *see also* §§ 13-2-304(1)(a), MCA (late registration period covers 29-day period before Election Day, up until "noon the day before the election) and § 13-2-304(1)(d)(i), MCA (voters who use late registration can return voted ballot "before election day"). HB 176 does not impose *any* new burdens on vulnerable Montanans, including Native Americans or the disabled; it merely shifted the existing burdens away from Election Day (when vulnerable Montanans likely

[15] The Missoula County Elections Office put it best: "Montana is one of only a handful of states that allow late registration. Most states require a voter to register 30 days prior to an election to be eligible to vote. In Montana, one can register during that 29 day window until noon the day before an election. This will save the voter time and supports the process" allowing Montanans to "register and vote" during "late registration" period. *See* Missoula County Elections Office, *Voter Registration*, https://www.missoulacounty.us/government/administration/elections-office/voter-registration (last accessed July 2, 2022).

faced a bottleneck of long lines[16]) to Montana's lengthy late registration period. Native Americans and the disabled—like all Montanans—still can make one trip to an Election Office to simultaneously register and vote whenever it is most convenient for them at any point during the 29-day period preceding an election. To the extent making that single trip is burdensome, the burden is equivalent whether it occurs during the 29-day late registration period (as is permitted under HB 176) or on the far busier Election Day (as was permitted prior to HB 176). The alleged "burdens" Plaintiffs impute to HB 176 all rest upon their expert's incorrect legal conclusion that HB 176 "eliminated" the option for Native Americans and the disabled to "mak[e] one trip to town to register and vote." Dkt. 45, p. 26 (Report of Dr. Daniel Craig McCool). That's incorrect; Montana law still permits same-day registration during the late registration period. § 13-2-304, MCA. *See, supra*, n.15. As a result, Plaintiffs cannot show HB 176 imposes a disparate impact on a defined class.

Plaintiffs' equal protection challenge to HB 176 also fails because Plaintiffs cannot prove the Legislature's decision to enact HB 176 was motivated by discriminatory intent. Plaintiffs incorrectly claim that, because witnesses testified HB 176 was disfavored by certain groups—including Native Americans and the disabled—the Montana Legislature must have been motivated by discriminatory intent for enacting HB 176 in spite of that testimony. Dkt. 166, p. 14; Dkt. 168, p. 13. But that argument is untethered to any legal authority, and it is directly contradicted by numerous opinions cited by the Secretary that are directly on point. *See* Dkt. 155, pp. 12-13; *Rack Room Shoes*, 718 F.3d at 1376 (proving discriminatory intent requires showing

[16] Indeed, during its recent Rule 30(b)(6) deposition of Blackfoot Nation, Dawn Gray testified the Blackfoot Nation was aware some tribal members were dissuaded from utilizing EDR on Election Day in 2020 due to long lines at polling places. Dkt. 157, Ex. 1-34, at 220:13-221:5.

"more than mere awareness of consequences," rather it requires proof that the Legislature enacted HB 176 "'because of, not merely in spite of, [its] adverse effects upon an identifiable group'") (citations omitted); *see also Fieger*, 542 F.3d at 1119 ("isolated statements made by opponents of a bill are to be accorded little weight" in evaluating the Legislature's intent"); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Moreover, Plaintiffs' theory flows from the false premise that HB 176 imposes some new burden on voters; as established, *supra*, that Montanans can simultaneously register and vote during late registration fatally undermines that theory.

And while WNV and MDP claim there is "a genuine factual question about the [Legislature's] motive" for HB 176, that ignores the relevant summary judgment standard.[17] Dkt. 166, p. 14; Dkt. 168, p. 13. It is Plaintiffs' burden to affirmatively prove HB 176 is unconstitutional. *Brown*, ¶ 32. If Plaintiffs lack evidence to do so—including evidence proving discriminatory intent—the Secretary is entitled to summary judgment. *See Thelen,* 238 Mont. at 88-89; *see also Alexander*, ¶ 36. More to the point, Plaintiffs' own witnesses disagree HB 176 was

[17] MDP and WNY both cite *Prindel* for the proposition that, if the Legislature is aware of legislation's potential negative impacts on vulnerable groups, that is evidence of intentional discrimination sufficient to defeat a motion for summary judgment. Dkt. 166, p. 14 (citing *Prindel v. Ravalli County*, 2006 MT 62, ¶ 19, 331 Mont. 338, 133 P.3d 165); Dkt. 168, p. 14 (citing *Prindel*, ¶ 19). But *Prindel* does not support Plaintiffs' position; it is a negligence case that analyzes whether a county jail owes a duty of care to the public to incarcerate an individual to prevent that individual from harming the public. *Id.*, ¶¶ 14-15. The relevant portion cited by Plaintiffs merely contains the generic appellate standard of review for an order granting a motion for summary judgment. *Prindel* never references: (i) equal protection challenges; (ii) analyses of legislative histories; (iii) what constitutes sufficient evidence of discriminatory intent; or (iv) alleged disparate burdens borne by vulnerable groups. Notably, *Prindel* rejects Plaintiffs' theory that their speculation HB 176 was motivated by discriminatory intent is sufficient to defeat the Secretary's motion. *Prindel*, ¶ 19 (party opposing summary judgment must "'show by more than mere denial, speculation, or conclusory statements, that a genuine issue of material fact exists.'").

motivated by discriminatory intent. During the recent Rule 30(b)(6) deposition of Blackfoot Nation, Dawn Gray testified the Blackfoot Nation had no "evidence of any discriminatory intent in the legislative record with respect to HB530.2 or HB 176." Dkt. 157, Ex. 1-34, at 207:19-23.

Plaintiffs' equal protection challenge to HB 176 necessarily fails because Plaintiffs cannot prove, with evidence, that: (i) HB 176 has a disparate impact on a specifical class of persons; and (ii) substantial evidence of the Legislature's discriminatory intent toward that class.

IV. The Secretary is entitled to summary judgment on Plaintiffs' challenges to HB 530.

In response to the Secretary's motion seeking summary judgment on all claims asserted by Plaintiffs against HB 530, Plaintiffs restate the same arguments they made during preliminary injunction proceedings before this Court. In doing so, Plaintiffs do not meaningfully engage with the Secretary's arguments on summary judgment, and their response falls far short of meeting their high burden to prove HB 530 unconstitutional beyond a reasonable doubt. Dkt. 155 at 43–57.

Plaintiffs impliedly recognize this by all but abandoning their claims that HB 530 constitutes an unconstitutional delegation of legislative power, relegating their analysis in support of that to a single footnote. A sole footnote is insufficient argument to survive summary judgment based on the Montana Supreme Court's well-established requirement that on summary judgment a non-moving party must provide more than "speculative, fanciful, or conclusory statements," to survive. *BNSF Ry. Co.*, ¶ 7 (citations omitted). Thus, the Secretary is indisputably entitled to summary judgment on at least some claims challenging HB 530, and the question before this Court is whether Plaintiffs have demonstrated the existence of a disputed issue of material fact sufficient for their remaining claims to survive, or if the Secretary is entitled to judgment as a matter of law.

A. Allowing Plaintiffs' challenge of HB 530 § 2 to proceed fundamentally conflicts with Montana law.

But, before this Court reaches the merits of this dispute, it must address the issue of justiciability. Plaintiffs make much of the fact the Secretary has not yet begun the rulemaking process contemplated by HB 530 § 2. MDP Br. at 21; WNV Br. at 17. WNV offers a position particularly offensive to the democratic system of government by arguing the Secretary should conduct the rulemaking contemplated by HB 530 § 2 within the confines of briefing to this Court, WNV Br. at 17, a course of action that would allow no other entities or individuals, besides the Plaintiffs in this case, the ability to participate in the rulemaking process. The thrust of this argument—Plaintiffs' attempt to utilize the courts to push the policy positions they favor, rather than allow the democratic process to proceed as intended—pervades every argument in this case.

In response to the Secretary's assertion that claims against HB 530 are not justiciable until the rulemaking process has been completed, Plaintiffs agree said process has not yet begun, MDP Br. at 21, WNV Br. at 17, and describe the Secretary's participation in the process as "mandatory," WNV Br. at 10, but argue the lack of definition accompanying terms like "pecuniary benefit" and "governmental entity" render the statute unconstitutional anyway. Put another way, Plaintiffs contend that since they allegedly cannot understand the terms used in HB 530 § 2, the Secretary must be prevented from interpreting those terms in the course of an administrative rulemaking proceeding.[18]

[18] At the same time, Plaintiffs are apparently sufficiently able to interpret the language of HB 530 § 2 to conclude "the statutory text requires the rule to reach the activity of Plaintiffs, using numerous terms to capture all manner of prohibited activity related to absentee ballot assistance." WNV Br. at 10.

Montana's Constitution allows the Legislature to "provide for direct review by the district court of decisions of administrative agencies." Mont. Const. art. VII, § 4(2). In the context of administrative rulemaking, the Legislature has done so. *See* § 2-4-506, MCA. By law, a "rule may be declared invalid or inapplicable in an action for declaratory judgment if it is found that the rule or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff." § 2-4-506(1), MCA.

Here, it is indisputable that the challenged rule does not yet exist. Montana's Declaratory Judgment Act does not "license litigants to fish in judicial ponds for legal advice." *Montana Dep't of Nat. Res. & Conservation v. Intake Water Co.*, 171 Mont. 416, 440, 558 P.2d 1110, 1123 (1976).

A justiciable controversy **must** exist in order for Plaintiffs' challenge to HB 530 to proceed. *Serena Vista, L.L.C. v. State of Montana Dep't of Nat. Res. & Conservation*, 2008 MT 65, ¶ 14, 342 Mont. 73, 179 P.3d 510. Section 2-4-506(1), MCA, is a procedural justiciability requirement that must be satisfied before the issue is ripe for review. *See N. Star Dev., LLC v. Montana Pub. Serv. Comm'n*, 2022 MT 103, ¶ 23, ___ Mont. ___, 510 P.3d 1232. In other words, an administrative rule must be issued before the administrative rule can be declared unconstitutional.

In *North Star Development, LLC v. Montana Public Service Commission*, the Montana Supreme Court acknowledged a separate provision of the Montana Administrative Procedures Act, § 2-4-702(1)(a), MCA, as "an express procedural prerequisite for exercise of district court subject matter jurisdiction under [the related provision of MAPA, § 2-4-702(1), MCA]." *N. Star Dev., LLC*, ¶ 23. While the promulgation of an administrative rule is not a contested case proceeding, the foundation of the Court's decision in *North Star* is instructive here. The Court

recognized that Montana's Constitution authorizes the Legislature to "provide for direct review by the district court of decisions of administrative agencies." Mont. Const. art. VII, § 4(2); *N. Star Dev.*, ¶ 23. Both the cited provision in *North Star*, § 2-4-702, MCA, governing judicial challenges to contested case proceedings, and the provision at issue here, § 2-4-506(1), MCA, governing declaratory judgment actions against administrative rules, are exercises of the legislative authority.

Accordingly, these statutes operate as limitations on a district court's exercise of subject matter jurisdiction. *N. Star Dev.*, ¶ 23. And because an administrative rule has not yet been issued, § 2-4-506(1), MCA, Plaintiffs' claims against HB 530 are not justiciable because the "procedural justiciability requirement" contained in § 2-4-506(1), MCA, has not been satisfied. *Id.* Justiciability is "a mandatory prerequisite to the initial and continued exercise of [subject matter] jurisdiction." *Id.*, ¶ 22 (citing *Larson*, ¶ 18) (alteration original). Therefore, the Secretary is entitled to summary judgment.

B. Plaintiffs' assertions of harm caused by HB 530 § 2 are contradicted by the record.

After failing to confront the analysis outlined in the preceding section, WNV nevertheless contends their challenge is ripe because they stopped ballot collection efforts due to HB 530, and their activities have been "chilled." WNV Br. at 10. But this assertion is not supported by the record. WNV fundamentally misunderstood HB 530 § 2. During its Rule 30(b)(6) Deposition, WNV admitted it was unaware that HB 530 § 2 contemplated the completion of an administrative rulemaking process. WNV Depo. at 250:10–18. Additionally, WNV admitted it had not even attempted to understand the meaning of the terms it alleged were ambiguous. WNV Depo. 248:23–249:1. Second, WNV admitted that HB 530 was not the only reason why it ceased

ballot collection efforts. Exh. 1–43, Rule 30(b)(6) Dep. Trans. Western Native Voice at 251:3–10 (noting the fact that Western Native Voice has not engaged in any ballot collection activities since the passage of HB 530 was due, in part, to the timing of passage).

And MDP simply argues their challenge is ripe because this Court has already said it is. MDP Br. at 17. In doing so, MDP entirely ignores the analysis provided by the Secretary as to why invalidating the rule contemplated by HB 530 § 2 before it has been issued is an improper exercise of this Court's subject matter jurisdiction.

C. Plaintiffs do not meet their burden of establishing why a ban on paid ballot collection, while unpaid ballot collection is allowed to continue, violates their First Amendment rights.

Plaintiffs spill much ink arguing that HB 530 is unconstitutional because BIPA was unconstitutional. WNV Br. at 15-16; MDP Br. at 17-19. HB 530 is not BIPA. BIPA required a record of each ballot delivered, along with information from the ballot gatherer. Exh. 1–48 at 2–3. HB 530 does not. BIPA prohibited collection of more than six ballots, *Id.* at 2, HB 530 does not. BIPA prohibited, altogether, some individuals from gathering ballots, HB 530 does not. *Id.* at 2–3. In short, Plaintiffs' continued reference to BIPA is merely an effort at litigating this case on something other than the merits.

The rule eventually promulgated pursuant to HB 530 will prohibit one thing: receipt of a pecuniary benefit in exchange for conveyance of a ballot to a place of deposit by certain individuals. HB 530 does *not* prohibit unpaid ballot collection. Thus, in order to prevail on their claim that HB 530 violates their freedom of speech, Plaintiffs must demonstrate that they have a constitutionally protected interest in paid, as opposed to unpaid, ballot collection. They cannot do so.

The only case Plaintiffs can find to support their premise that paid ballot collection is constitutionally protected speech is *Meyer v. Grant*, 486 U.S. 414 (1988). But *Meyer* addressed signature gathering, not ballot collection. *Meyer*, 486 U.S. at 415–416. The Court explicitly noted "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer*, 486 U.S. at 421. The Court concluded "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 421–422. Collecting a ballot is not the same. And Plaintiff Western Native Voice acknowledged that it was not communicating a specific political message when engaging in ballot collection. *See* Exh. 1–43, Rule 30(b)(6) Dep. Trans. Western Native Voice at 183:10–22.

And Plaintiffs' claims that paid ballot collection is necessary to effectively get out the vote is belied by the record. Plaintiff CSKT stated they did not distinguish between paid and unpaid ballot collection. Exh. 1–45, Dep. Trans. Confederated Salish and Kootenai Tribes at 93:9–20. In fact, Robert McDonald, whose Declaration is cited by Plaintiffs as supporting the contention that paid ballot collection is necessary in Indian country, WNV Br. at 16, stated that if he ever perceived someone as asking for payment for returning a ballot "it would raise great concern," noting that it did not "fit the character of [his] community" to "be paid for a service like that." Exh. 1-32, Dep. Trans. Robert McDonald at 30:5–33:21. And Plaintiff Mitch Bohn testified he did not distinguish between paid and unpaid ballot collection. Exh. 1-38, Dep. Trans. Bohn Depo. 41:9-13. Plaintiffs attempt to claim that paid ballot collection is necessary in order to collect ballots in Indian Country but offer no evidence in support. In short, the facts gleaned from

depositions repudiate the statements made in the declarations cited by Plaintiffs. *See Ray v. Connell*, 2016 MT 95, ¶ 13, 383 Mont. 221, 371 P.3d 391 (citations omitted).

Plaintiffs have not met their high burden of proving, beyond a reasonable doubt, that HB 530 interferes with their freedom of speech. *Rolhfs*, ¶ 7. The Secretary is entitled to summary judgment.

D. Plaintiffs offer scant evidence to support their theory that HB 530 will unconstitutionally burden the right to vote.

Again, in arguing HB 530 unconstitutionally burdens the right to vote, Plaintiffs rely in large part on analogy to two district court decisions finding BIPA unconstitutional. Plaintiffs allege "the facts that informed those decisions have not changed." MDP Br. at 19. Given that Plaintiffs' factual basis for this case has crumbled when tested during discovery, the factual predicate for the BIPA cases is, at best, questionable. But, setting that aside, whether the facts have changed does not matter. Specific to HB 530, Plaintiffs offer no evidence demonstrating how many individuals utilized paid, as opposed to unpaid, ballot collection, and admit that, in 2016 and 2018, "organized ballot-return assistance likely helped over 2,500 voters cast their ballots." MDP Br. at 18. For perspective, in only the general elections held during those two years, 1,026,114 Montanans cast their ballots. By Plaintiffs own admission, then, organized ballot-return assistance affected 0.24% of voters.

Statutes are presumed constitutional, regardless of the area of law the affect. *See Rohlfs*, ¶ 7. And this presumption must not be casually disregarded especially where, as here, Plaintiffs do little to respond substantively to the Secretary's arguments. Plaintiffs do not attempt to explain how ballot collection, which necessarily requires an individual to have an absentee ballot, impacts a fundamental right when—as this Court recognized, there is no fundamental right to an absentee

ballot. *See* Dkt. 124, p. 40. And Plaintiffs do not even attempt to explain how the requirement that an individual not be allowed to utilize a paid ballot collector, or otherwise comply with HB 530, falls outside of the "'usual burdens of voting,'" *Brnovich*, 141 S. Ct. at 2356 (quoting *Crawford*, 553 U.S. at 198), a requisite fact to establish if the assertion that paid ballot collection is to have any meaning.

In short, in the apparent hope of convincing this Court to skip the requisite threshold legal determination of whether HB 530 interferes with a fundamental right, Plaintiffs avoid confronting the legal arguments set forth by the Secretary and reiterate alleged burdens that may be imposed by the law in the future—a fact dependent on the contours of an administrative rule that has not yet been issued. *See Clark Fork Coal. v. Montana Dep't of Nat. Res. & Conservation*, 2021 MT 44, ¶ 48, 403 Mont. 225, 481 P.3d 198 (whether a "challenged statutory provision substantially interferes with a fundamental right, facially or as applied, is a question of law."). The Montana Supreme Court has consistently recognized that district courts are duty-bound "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, and Plaintiffs face a high burden when challenging the constitutionality of a statute, *Rohlfs*, ¶ 7. Plaintiffs' failure to meet the analysis presented by the Secretary must subject their claims to summary judgment.

E. Plaintiffs' contention that HB 530 violates the Montana Constitution's guarantee of equal protection is at odds with governing case law.

In essence, Plaintiffs contend HB 530 violates Mont. Const. art. II, § 4, because a district judge in a different case evaluating a different law found that a restriction on ballot collection violated equal protection. Further, Plaintiffs contend that, because the Legislature heard

testimony where individuals stated their concerns that HB 530 would have a discriminatory impact on Native Americans, HB 530 violates equal protection. Both of these arguments hold little water. First, as addressed above, HB 530 is not BIPA and Plaintiffs' continued attempts to distract this Court with reference to that prior legislative referendum is simply a refusal to engage with the laws at issue in this case. And following Plaintiffs' argument to its logical conclusion reveals the slippery slope they urge this Court to step down. The Secretary does not contest that BIPA was an attempt by the voters of the State of Montana to regulate ballot collection. However, there is no support in Montana law for the theory that once a regulation on conduct has been found unconstitutional, any subsequent regulation on that conduct is also unconstitutional. But that is precisely the level of analysis Plaintiffs ask this Court to engage in by repeatedly referencing BIPA in the course of this litigation.

Second, Plaintiffs' argument that testimony from individuals during legislative hearings about the potential discriminatory impact of a proposed law constitutes evidence that said law was passed with discriminatory intent is both unsupported by the record and invites this Court down an even steeper slippery slope. WNV Br. at 13-15. For example, as to the record, Western Native Voice testified that it did not believe the bills passed during the 2021 Legislative Session, including HB 530, indicated an animus towards Native American voters. Exh. 1–46, Depo. Trans. Western Native Voice at 31:11-23.

And, as to the contention that testimony to the Legislature can serve as a basis to find discriminatory intent, various courts have already rejected this argument. *See Rack Room Shoes*, 718 F.3d at 1376 (proving discriminatory intent requires showing "more than mere awareness of consequences,"); *see also Fieger*, 542 F.3d at 1119 ("isolated statements made by opponents of a

bill are to be accorded little weight" in evaluating the Legislature's intent). And, if this premise were valid, any entity or individual wishing to declare a law unconstitutional could simply attend legislative hearings, testify in opposition, and then cite the Legislature's knowledge of that testimony as evidence that the Legislature enacted the targeted law with a discriminatory intent.

These arguments fall far short of establishing, beyond a reasonable doubt, that HB 530 violates Mont. Const. art. II, § 4, and the Secretary is entitled to summary judgment.

F. Even if Plaintiffs' claims were ripe for review, HB 530 survives application of even strict scrutiny.

As set forth in the Secretary's Brief in Support of the instant motion, Dkt. 155 at pp. 51-54, if review was appropriate, HB 530 survives strict scrutiny. 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 530 furthers this interest by regulating the influence of money in politics. *See generally W. Tradition P'Ship, Inc.*, ¶ 25. HB 530 is narrowly tailored to furthering this interesting because it allows ballot collection to continue while regulating only some individuals who receive a "pecuniary benefit" for engaging in those practices. Plaintiffs do not meaningfully address the intersection between HB 530 and this compelling interest, and they do not present any reasoned argument as to why this compelling state interest does not exist or why HB 530 is not narrowly tailored to the same. Thus, HB 530 survives application of strict scrutiny.

G. Plaintiffs' argument that HB 530 violates due process is contradicted by the record and conflicts with the plain language of HB 530's rulemaking requirement.

Plaintiffs simply ignore the Secretary's position that the rulemaking process envisioned by HB 530 renders their claimed due process violation void. Indeed, Plaintiffs do not, and cannot,

offer any argument to contradict the fact that the purpose of rulemaking under the Montana Administrative Procedures Act is to afford interested persons with due process. *See Matter of Peila*, 249 Mont. 272, 280–81, 815 P.2d 139, 144 (1991) ("Procedural due process requires that parties be given reasonable notice and a reasonable opportunity to be heard; these due process requirements are reflected in MAPA[.]"). Instead, Plaintiffs reiterate the arguments they have previously made to this Court: HB 530 violates due process because it is allegedly vague. MDP Br. at p. 21; WNV Br. at 16. They further accuse the Secretary of failing to provide an "adequate definition for any of the ambiguities Plaintiffs have raised," referencing terms such as "governmental entity" and "pecuniary benefit." MDP Br. at 21; *see also* WNV Br. at 17.

Plaintiffs' protestations concerning their alleged inability to understand specific terms in HB 530, such as "governmental entity," are contradicted by the record. For example, every Tribal Plaintiff in this case has described itself as a governmental entity. Exh. 1–35, Rule 30(b)(6) Dep. Trans. Northern Cheyenne Tribe at 82:18–24; Exh. 1–49, Rule 30(b)(6) Dep. Trans. Fort Belknap Indian Community Council at 5:22-25 (describing the Fort Belknap Indian Community Council as a tribal government); Exh. 1–45, Rule 30(b)(6) Dep. Trans. Confederated Salish and Kootenai Tribes at 18:14-24 (describing the CSKT's Tribal Council as a governmental entity); Exh. 1–34, Rule 30(b)(6) Dep. Trans. Blackfeet Nation at 180:3–181:25 (describing the Blackfeet Nation as a fully functioning sovereign government). Further, several Tribal plaintiffs testified that they routinely engage in administrative rulemaking process. *See e.g.* Exh. 1–35, Rule 30(b)(6) Dep. Trans. Northern Cheyenne Tribe at 44:17–45:2, 45:3–46:7. And the Northern Cheyenne Tribe, for example, acknowledged the administrative rulemaking process could be used to define the terms contained in HB 530, such as "governmental entity" and "pecuniary benefit." Exh. 1–

35, Rule 30(b)(6) Dep. Trans. Northern Cheyenne Tribe at 84:4–23; *see also* Exh. 1–47, Dep. Trans. Spotted Elk at 51:5–16.

Mere argument that the language of HB 530 is vague is not enough to establish that there is a genuine issue of material fact precluding summary judgment on Plaintiffs' due process allegations targeting HB 530. Particularly here, where the statute itself is not actionable and requires the completion of administrative rulemaking—which may further define those terms—in order to be complete.

V. Plaintiffs lack Standing

The Secretary continues to assert Plaintiffs' lack of standing in this case to preserve the issue for appeal. *See* Dkt. 11, pp 5-10; Dkt. 19, pp. 2-9. MDP does not meaningfully contest the Secretary's arguments—based on facts developed during discovery following this Court's initial order on the Secretary's motion to dismiss—challenging Plaintiff Mitch Bohn's standing. Dkt. 155 at pp. 5–7. Further, Western Native Voice contends it has standing because it has expended additional resources to hire organizers earlier in the election cycle in order to mobilize turnout and because HB 530 "effectively ends their ballot collection and assistance work[.]" WNV Br. at 4. Again, for the reasons stated previously, these allegations are unsupported by the record and are insufficient to confer standing.

VI. The Elections Clause of the United States Constitution requires that Montana's legislative process be allowed to function.

Plaintiffs mischaracterize the Secretary's citation to the Elections Clause of the U.S. Constitution as an attempt to give the Legislature "unchecked power." WNV Br. at 25; MDP Br. at 32-33. This deliberately obtuse interpretation of the Secretary's argument is far from the mark. As used in the Elections Clause, the term "legislature" generally encompasses the

legislative process prescribed by a certain state. *See Smiley*, 285 U.S. at 369. Thus, the Elections Clause refers to Montana's Legislature, as defined by Montana's Constitution. *See id.*, at 368. And, just as Montana's Constitution defines the powers granted to the Legislature, and similarly limits the same, *see e.g. Board of Regents of Higher Ed. v. Judge*, 168 Mont. 433, 444, 543 P.2d 1323, 1330 (1975) (explaining that the constitutional grant of power to the Legislature must be harmonized with other provisions of the Constitution), the Constitution also requires that each branch of government play a specific role, Mont. Const. art. III, § 1.

By advocating for application of the most stringent level of scrutiny—commonly described as strict in law and fatal in fact—Plaintiffs attempt to erode this separation of powers. They would have this Court conclude that strict scrutiny must always be applied to election legislation—an application that almost always results in the law being declared void—before that law is even in draft form. And against this backdrop, Plaintiffs baldly claim the Secretary's citation to the United States Constitution is "radical." WNV Br. at 25. Not so. The only radical assertion is Plaintiffs' contention that any law touching on election regulation, regardless of its terms, must be subjected to strict scrutiny. Blanket application of such a standard to all statutes regulating elections would have dramatic consequences. By law, a polling place having fewer than 400 registered electors who intend to vote need only be open from noon to 8.p.m. on election day, § 13-1-106(2)(a), MCA, in contrast to the general rule that polling places must be open from 7 a.m. to 8 p.m., § 13-1-106(1), MCA. This is precisely the type of "time, place, and manner" "procedural regulation[]" that state legislatures are empowered to adopt to protect the fundamental right to vote, as well as to ensure "elections are 'fair and honest,' and that 'some sort of order, rather than chaos, is to accompany the democratic process.'" *Cook*, 531 U.S. at 524

(citations omitted); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995). But could such a regulation withstand application of strict scrutiny?

Election regulations necessarily demand a more flexible approach, which is precisely why the *Anderson-Burdick* standard has been adopted by federal courts. *See Burdick*, 504 U.S. at 433-435. The Elections Clause of the United States Constitution demands that the legislative process of a state be allowed to function. Adopting Plaintiffs' assertion that any election regulation passed by the Legislature must pass strict scrutiny in order to survive would set the stage for the piecemeal dismantling of Montana's election system. Such a result must not be allowed—which is precisely why the Montana Supreme Court has routinely required district courts to evaluate the burden posed by the challenged regulation before determining the appropriate level of scrutiny to apply, *Wadsworth*, 275 Mont. at 302.

Conclusion

Plaintiffs have alleged SB 169, HB 176, HB 506, and HB 530 place impermissible burdens on Montanans' ability to vote. "'The right to vote, however, 'can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012) (citation omitted). These election laws advance the State's various compelling interests, and place minimal burdens (if any) on voters. Boiled down, Plaintiffs have failed to produce the evidence necessary to sustain their constitutional challenges.

There only are legal questions for the Court to answer—not genuine issues of material fact—and the Secretary is entitled to judgment as a matter of law. Accordingly, the Court should grant the Secretary's pending motion in full.

Dated this 6th day of July, 2022, in Bozeman, Montana.

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