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**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY**

Montana Democratic Party, Mitch Bohn, *Plaintiffs*, Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe, *Plaintiffs*, Montana Youth Action; Forward Montana Foundation; and Montana Public Interest Research Group, *Plaintiffs*, vs. CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State, *Defendant*.	Cause No. DV 21-0451 Hon. Michael Moses **REPLY BRIEF IN SUPPORT OF YOUTH PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT**

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House Bill 506 unconstitutionally burdens new voters and discriminates against them based on their status as minors pre-election. The Secretary's response to Youth Plaintiffs' motion for summary judgment as to HB506 simply attempts to justify the decision to deny certain eligible voters normal access to their ballots. This is not so easy. The Montana Constitution unequivocally guarantees the right of suffrage, the right to equal protection, and the right of minors to access on equal terms with adults at least every fundamental right that Article II secures. The Montana Constitution also expressly obligates the legislature to implement the right of suffrage—an obligation logically subject to, contingent on, and consistent with Montanans' fundamental rights.

Limiting or complicating ballot access without narrowly tailoring the law to serve a compelling government interest violates the right of suffrage. Distinguishing between identically situated classes to limit ballot access constitutes impermissible discrimination in violation of the right of equal protection. And premising limited ballot access on an individual's status as a minor pre-election violates the equal rights of minors. The Secretary reduces to word games the right that most directly underpins our republican system of representative government. Only by distorting and downplaying the fundamental rights at issue can the Secretary make haphazard sense of the legislature's decision to complicate ballot access for certain new voters.

In Montana, a person need meet only citizenship, age, and residency requirements—*by election day*—to vote. Arbitrarily barring certain qualified voters from accessing the ballot before election day violates the Montana Constitution.

ARGUMENT

HB506 creates two classes: 1) individuals who turn 18 in the month before or on election day, and 2) individuals who turn 18 at any time before the month before election day. As the Secretary puts it, "both groups indisputably can vote." Dkt. 161, Def's Br. in Opp'n to Youth Ps' Renewed Mot. for SJ, 9 (hereinafter "Opp'n"); *see also* Mont. Const., art. II, § 13; Mont. Const., art. IV, § 2. Precisely. And HB506 needlessly narrows access to the ballot for the first class of indisputable voters by reducing the time for early in-person and absentee voting.

I. The right to vote is fundamental and HB506 interferes with it.

The Secretary agrees that the "'right of suffrage' is fundamental under Montana's Constitution.'" Opp'n, 4 (quoting *Willems v. State*, 2014 MT 82, ¶ 32). Because HB506 interferes with the right of suffrage and cannot survive any level of scrutiny, let alone strict scrutiny, discussed *infra*, Youth Plaintiffs' motion for summary judgment should be granted.

The Montana Constitution's suffrage-related provisions coherently set forth the right of suffrage and define relevant terms and powers related to it. Article II, § 13 guarantees the right of suffrage—"elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage"—thus protecting the right to vote, the right to free elections, and access to those rights without interference. Article IV, § 2 defines a "qualified elector" as "[a]ny citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law." Article IV, § 3 requires the legislature to

"provide by law the requirements for residence, registration, absentee voting, and administration of elections." The rest of Article IV provides more implementation guidance, protecting electors from arrest and providing for secret ballots, eligibility for public office, and how to determine election results. Mont. Const., art. IV.

Thus, summarizing, Article II, § 13 defines and guarantees the right, while Article IV, § 2 defines the "qualified elector" who may exercise the right, and Article IV, § 3 gives specific legislative assignments (to set residence, registration, and absentee voting requirements) and uses the broader phrase "administration of elections," to give the legislature discretion—which is necessarily cabined by other constitutional provisions. *See Bd. of Regents of Higher Ed. v. Knudsen*, 2022 MT 128, ¶ 12 ("Montana's Constitution is a prohibition upon legislative power, rather than a grant of power."); *Bd. of Regents of Higher Ed. v. Judge*, 168 Mont. 433, 444 (1975) ("Constitution[al provisions] bearing on the same subject matter are to receive appropriate attention and be construed together."). Interpreting these provisions, the Secretary inverts their relationship, and attempts to portion out the right to suffrage between Articles II and IV. *See, e.g.*, Opp'n, 7 (arguing that Article IV, § 2 grants "the ability to vote").[1] But understanding these provisions requires no strained

[1] Article II, § 13 unquestionably guarantees the right to vote. *See, e.g.*, Mont. Const. Conv., III Verbatim Tr., at 445 (Feb. 17, 1972) ("[I]n the Bill of Rights, we've been working with a number of areas which we consider sacred . . . [T]he right to vote is certainly the most sacred right of them all.") (Delegate Campbell) (emphasis added). By contrast, Article IV, § 3 implements the right of suffrage. *Id.* at 400 ("This section . . . allows the Legislature to determine the time that all elections are held . . . It is the committee's considered opinion that the Legislature is capable of scheduling and providing administration for all elections.") (Delegate Etchart).

reading of their "interplay." *See id.* at 1. They simply comport with one another. *Cf. Cross v. VanDyke*, 2014 MT 193, ¶ 11 ("[W]e must implement [the framers'] intent by viewing the plain meaning of the words used and applying their usual and ordinary meaning."). Article IV does not and could not empower the legislature to undermine Article II, § 13. *See Knudsen*, ¶ 12.

Yet HB506 undermines the right of suffrage by pointlessly complicating voting for a subset of qualified electors. In defense, the Secretary sets up one strawman after another, *see* Opp'n 3–8, claiming: that the state can impose residency requirements—it can, *Emery v. State*, 177 Mont. 73, 79 (1978); that minors can be excluded from the franchise—undoubtedly, *see id.* (citing *Gray v. Sanders*, 372 U.S. 368, 380 (1963)); and that constitutional provisions should be interpreted not as solo acts, but as harmony, *see City of Missoula v. Cox*, 2008 MT 346, ¶ 11 ("[O]ur rules of construction require . . . giving effect to each constitutional provision—our role is not to insert what has been omitted or to omit what has been inserted.") (cleaned up).[2] These contentions are true, but do not support the Secretary's conclusions.

[2] The Secretary also contends that "the right of suffrage is not an absolute right to vote." Opp'n, 4. Of course; no right is absolute. *See, e.g.*, *Nelson v. City of Billings*, 2018 MT 36, ¶ 13 ("Like other constitutional rights, however, the right to know is not absolute.") (collecting cases); *Orient Ins. Co. v. Daggs*, 127 U.S. 557, 566 (1899) ("It would be idle and trite to say that no right is absolute."). Moreover, applying strict scrutiny does not render a right absolute. *See, e.g.*, *Ramsbacher v. Jim Palmer Trucking*, 2018 MT 118, ¶ 14 ("To withstand a strict-scrutiny analysis, the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest."). Nor does applying strict scrutiny to laws that infringe on voting usurp meaning from Article IV—as the framers reflected, Article IV did not replace, but "supplemented" the right of suffrage. Mont. Const. Conv., V Verbatim Tr., at 1745 (March 8, 1972) (Delegate Sullivan).

The Secretary also argues that § 13-13-222(3), MCA, provides a reason not to distribute ballots to qualified electors. Opp'n, 3. Subsection 13-13-222(1) requires election administrators to "permit an elector to apply for, receive, and mark an absentee ballot" (emphasis added) as soon as official ballots become available for in-person absentee voting. Subsection (3) then provides that for "purposes of this section, an official ballot is voted when the ballot is received at the election administrator's office." The Secretary claims that this statute means the House version of HB506 would have allowed unqualified electors to cast votes. Opp'n, 3. But this is the Secretary's misreading of Article IV, § 2, brought to bear on another statute: Article IV, § 2 makes no reference to *when* a qualified elector can vote. And § 13-13-222(3) simply defines the act of voting, which is helpful for plenty of administrative reasons, *see, e.g.*, § 13-13-204, MCA (providing circumstances for issuing a replacement ballot), and not at all helpful for determining who may vote in a specific election. Indeed, subsection (1) refers to "electors," i.e., individuals who are qualified to vote in a given election under Article IV, § 2.

Article IV, § 2 says nothing about when a qualified elector can vote. Consider an alternate reality where voting is permitted only on election day. There is no question that, in such a universe, a voter's age, citizenship, or residency on any day before election day would be meaningless and irrelevant. The Secretary's argument boils down to the view that when absentee voting and early in-person voting are made available, that obvious truth changes and pre-election age becomes relevant. But the voting that happens before election day is all in service of the same election. And a

qualified elector is not a status attained once that remains static over life because it depends on meeting "the registration and residency requirements provided by law" for every election. *See* Mont. Const. art. IV, § 2. That is, a qualified elector is qualified for purposes of a specific election day.

HB506 is not premised on whether a voter is qualified but turns instead on the timing of meeting certain requirements, which is irrelevant so long as they are met before election day. As a result, HB506 narrows the timeframe during which newly 18-year-olds can exercise their right to vote in elections where they are registered and qualified to vote. Nehring Decl., Dkt. 70, Ex. I, ¶¶ 7–8; Herron Report ¶¶ 39–42 (describing limitations on individuals with 18th birthdays in the week before election day). The Secretary cannot dispute that Isaac Nehring was always, for purposes of the June 7, 2022 primary, a qualified elector. Her only response is that it is acceptable to narrow his opportunity to vote because, despite being an eligible voter and qualified elector, Mr. Nehring is younger than other Montana voters.

II. HB506 unconstitutionally targets a subset of new voters.

Under HB506, new Montana voters can only access their ballots when they have actually turned 18, even when they are qualified electors for purposes of a given election, while older Montana voters may access their ballots at any time in the thirty days preceding election day. *See supra* at 2. "Montana's equal protection guarantee embodies 'a fundamental principle of fairness: that the law must treat similarly situated individuals in a similar manner.'" *Gazelka v. St. Peter's Hosp.*, 2018 MT

152, ¶ 7 (quoting *McDermott v. State Dep't of Corr.*, 2001 MT 134, ¶ 30). HB506 violates this fundamental principle of fairness.

The Secretary claims Youth Plaintiffs' identified classes are distinguishable because those who turn 18 in the month before the election are "unqualified electors (who may not receive absentee ballots until qualified)" and because "the free exercise of the right of suffrage is only granted to qualified electors, who, by definition, must be 18 or older." Opp'n, 10. But this argument is a tautology that relies on the text of HB506, *id.* at 9, and fails to consider *when* an elector must be 18—or have established residency—to qualify for purposes of a given election. The classes are identically situated because both are made up of qualified electors who, as the Secretary agrees, "indisputably can vote" in the relevant election. *Id.* What distinguishes one class from the other is when individuals turn 18 in proximity to that election. *See Gazelka*, ¶ 16 ("[T]wo groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination."). Age—before election day—bears no rational relationship to voter eligibility. *See Jaksha v. Butte-Silver Bow Cty.*, 2009 MT 263, ¶ 23–24 (holding statute unconstitutional because age "bore no rational relation to the [statute's] purported objective").

HB506 is discriminatory on its face because it necessarily turns on distinguishing between individuals based on when they meet residency and age requirements—not at the time when it is necessary to meet those requirements, but at an arbitrary moment in time pre-election. *See, e.g.*, *Roosevelt v. Mont. Dep't of Rev.*, 1999 MT 30, ¶ 46 ("To violate equal protection on its face means that the law

by its own terms classifies persons for different treatment.") (quotation marks omitted).[3] Moreover, a facial challenge is appropriate because there is no valid application of HB506—it can only be used to deprive qualified electors from receiving their ballots at the same time as other qualified electors. *See Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 17 (facial challenge requires showing that "no set of circumstances exists under which the statute would be valid") (cleaned up).

Even if HB506 were not facially discriminatory, which it is, there is evidence that discriminatory purpose animated the legislature's decision to pass the Senate version of HB506. *See* Bromberg Report at 33 (describing testimony opposing HB506) (citing House State Admin. Hrg. Video on HB506, at 10:32:08); *see also* House State Admin. Hrg. Video on Kortum amendment to HB506, at 8:38:43 (Feb. 26, 2021); *see also* HB506 Legislative History; *see also Veasey v. Abbott*, 830 F.3d 216, 262 (5th Cir. 2016) (passing discriminatory ID law despite disparate impact testimony "supports a conclusion of lack of responsiveness"). And HB506 narrows the window during which certain new voters can exercise the right to vote—the degree of narrowing varying on a person-by-person basis, dictated purely by birthdate—and will naturally prevent some young people from voting. *See, e.g.*, Nehring Decl. ¶ 23 ("Many of my peers will not or cannot go to the trouble of prioritizing voting above all else."); ¶ 26 ("I know that other new adults will be unable to overcome the obstacle that House Bill 506

[3] That HB506 is facially discriminatory should not be in dispute because "[j]ust as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, so may a statute discriminatory on its face be nondiscriminatory in its operation." *See Ford v. Burlington N. R. Co.*, 250 Mont. 188, 197 (1991). HB506 is discriminatory in both respects, but it is simply true that it classifies persons for different treatment.

creates."); Caudle Decl., Dkt. 70, Ex. B, ¶ 15 ("If I had waited until election day, I would not have been allowed to vote."); Lockwood Decl., Dkt. 70, Ex. G, ¶ 4 ("While I clearly recall the important issues in the 1968 presidential election, I did not vote because I was unsure how to go about it."); *cf. Big Spring v. Jore*, 2005 MT 64, ¶ 18 ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.").

HB506 is a facially discriminatory law, motivated by discriminatory intent. It disparately impacts newly 18-year-olds by reducing their opportunity to access their ballots, rendering an already new and sometimes bewildering process all the more confusing, and so increasing the cost of voting for many young people that they may be deterred from voting at all. Herron Report ¶¶ 11–12 (describing the calculus of voting and noting that "an individual will turn out to vote only if the benefits of doing so outweigh the costs"); *id.* at ¶¶ 53, 61, 64 (identifying the number of registered voters who turned 18 in the 30 days before election day for primary and general elections in 2014, 2016, 2018, and 2020).

III. HB506 violates minors' right to equal access to all fundamental rights.

HB506 expressly prohibits nearly-18-year-olds from accessing their ballots when they are qualified to vote in an upcoming election, only because they are nearly but not yet 18. This does not enhance minor Montanans' rights. *See Matter of S.L.M.*, 287 Mont. 23, 35 (Mont. 1997) (exceptions to Section 15's guarantee "must not only show a compelling state interest but must show that the exception is designed to enhance the rights of minors"). HB506 is unconstitutional.

The Montana Constitution's guarantee of minors' rights intentionally went beyond the existing status quo relating to the rights of minors nationally at the time. *See* Bromberg Report, 13 ("Convention delegates were attuned to the shift of the United States Supreme Court, which had 'issued a series of decisions gradually affording greater protections to minors, thereby reconsidering and reframing the relationship between minors and the government.'") (quoting Rebecca Stursberg, *Still-in-Flux: Reinterpreting Montana's Rights-of-Minors Provision*, 79 Mont. L. Rev. 259 (2018)). Incredibly, the Secretary cherry picks several examples from the discussions during the Constitutional Convention to argue that Article II, § 15 only promises equal access to selected fundamental rights. Opp'n 14–15. But the Bill of Rights Committee Proposal describing the motivation behind Article II, §§ 14 and 15 to the larger convention, belies any notion that Section 15 is limited to select rights:

> The committee adopted, with one dissenting vote, this statement explicitly recognizing that persons under the age of majority have <u>all the fundamental rights</u> of the Declaration of Rights. . . . The committee took this action in recognition of the fact that young people have not been held to possess basic civil rights. . . . [T]he Supreme Court has not ruled in their favor under the equal protection clause . . . . What this means is that persons under the age of majority have been accorded certain specific rights which are felt to be a part of due process. However, the broad outline of the kinds of rights young people possess does not yet exist. This is the crux of the committee proposal: <u>to recognize that persons under the age of majority have the same protections from governmental and majoritarian abuses as do adults</u>.

Mont. Const. Conv., II Verbatim Tr., at 635–36 (Feb. 22, 1972) (emphasis added). Introducing Article II, § 15 verbally, Delegate Monroe explained that the purpose was to "help young people reach their full potential," and that while they wanted to preserve existing rights and privileges, "whatever rights and privileges might be

given to [juveniles] in the future, we also want to protect them," and, importantly, "we do not want them to lose any rights that any other Montana citizen has." Mont. Const. Conv., V Verbatim Tr., at 1750 (March 8, 1972) (emphasis added).

Treating minors differently because they are minors is an affront to Article II, § 15.[4] Voters' age pre-election is irrelevant to their eligibility and qualification to vote. Youth Plaintiffs' motion should be granted.

IV. Strict scrutiny applies and HB506 cannot survive.

HB506 clearly interferes with a fundamental right—the right of suffrage—by burdening the right to vote. *See Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 60 (strict scrutiny applies when a law interferes with exercise of a fundamental right) (quoting *Wadsworth v. State*, 275 Mont. 287, 302 (1996)). HB506 also violates the right to equal protection by burdening newly-18-year-olds' right to vote for no reason other than that they are younger pre-election than other voters. *See Gazelka*, ¶ 7. And HB506 violates the fundamental right of minors to equal access to all rights guaranteed in Article II. *See S.L.M.*, 287 Mont. at 35.

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[4] It is worth repeating that youth access to voting is extremely valuable. *See* Bromberg Report at 15 (voting is habit forming; "[d]eliberately making it more difficult for *new* voters to build that habit of political participation quite literally threatens the future of participatory democracy" (quoting Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 Syracuse L. Rev. 653, 676 (2017)); *cf. Mont. Auto. Ass'n v. Greely*, 193 Mont. 378, 387 (1981) ("The only real influence that most voters can exert upon elected officials is to give or withhold their vote."). To this, the Secretary has no response but to selectively highlight quotes from the Constitutional Convention that do not contradict the broad purpose of Article II, § 15, and instead only draw attention to areas of particular force and applicability. *See* Opp'n 13–15.

Satisfying strict scrutiny requires showing "the law is narrowly tailored to serve a compelling government interest," *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 16, and that the challenged law charts "the least onerous path . . . to achieve the State's objective," *Mont. Envtl. Info. Ctr*, ¶ 63. The Secretary cannot carry this burden not least because HB506 would fail even rational basis review. *See Jaksha*, ¶ 23–24 (age "bore no rational relation to the [statute's] purported objective").

The Secretary gestures at general principles of integrity and fairness in the State's election process. *See* Opp'n 17. But there is no evidence that election integrity is a problem in Montana, as the Secretary's own witnesses confirm. *See, e.g.*, Ex. E. ("No, I don't believe there's voter fraud in any of the counties."); Ex. F. (unaware of any voter fraud related to underage individuals voting in Flathead County). Moreover, there is no evidence or even any logical inference supporting the view that HB506 has anything to do with election integrity—and it actively promotes unfairness.

The Secretary primarily argues, however, that HB506 created uniformity across counties and provided clarity to election officials. *See* Opp'n 17–18 (listing six advanced "interests" that boil down to two plus a claim that newly-18-year-olds are not qualified voters). But HB506 could have advanced every interest the Secretary lists without burdening voters or discriminating against new voters. *See generally* House State Admin. Hrg. Video on HB506, at 10:46:03 (Feb. 24, 2021) (Plettenberg testimony); McLarnon Decl., Dkt. 81, ¶¶ 6(f), (g). Indeed, had the legislature passed the version of HB506 that treated new 18-year-olds the same as older voters, election

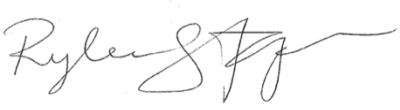
officials would not have to hold back the absentee ballots of individuals until their specific birthdays and could instead treat all nearly 18-year-olds' ballots the same way—that is, by distributing them in the normal course and holding them until election day at the back end, instead of holding them for distribution on random dates that change every year on the front end. HB506 is thus the worse alternative not only because it unconstitutionally burdens Youth Plaintiffs' rights, but also because it is a more complicated, less administrable way to distribute ballots.

So, HB506 is subject to strict scrutiny thrice over, and was also the result of arbitrary decision-making in the face of known disparate impact. *See Mont. Cannabis Indus.*, ¶ 38 ("The question under rational basis review . . . is not whether the provision is necessary, but whether the provision is arbitrary or whether it has a 'reasonable relation to some permitted end of governmental action.'") (quoting *Powder River Cty. v. State*, 2002 MT 259, ¶ 79). HB506 cannot survive.

CONCLUSION

For the reasons set forth above, Youth Plaintiffs respectfully request that this Court grant Youth Plaintiffs' Motion for Summary Judgment on Counts Two, Five, and Seven of their Complaint.

Respectfully submitted this 6th day of July, 2022.



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