

**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY**

<p>Montana Democratic Party, Mitch Bohn, Plaintiffs, WESTERN NATIVE VOICE, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe, Plaintiffs, Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group, Plaintiffs, v. Christi Jacobsen, in her official capacity as Montana Secretary of State, Defendant.</p>	<p>Consolidated Case No.: DV 21-0451 Judge Michael G. Moses ORDER RE: DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND YOUTH PLAINTIFFS’ CROSS MOTION FOR SUMMARY JUDGMENT</p>
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The Defendant, Montana Secretary of State Christi Jacobsen (“the Secretary”) moved for summary judgment on all counts of all Plaintiffs’ complaints. (Dkt. 78, Dkt.

79, Dkt. 154, Dkt. 155). Along with this motion, the Secretary submitted her Statement of Undisputed Facts (Dkt. 80; Dkt. 156). Consolidated Plaintiffs Montana Democratic Party and Mitch Bohn (“MDP”); Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe (“WNV”); and Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group (“MYA”) (collectively, “Plaintiffs”) submitted their responses. (Dkt. 117; Dkt. 120; Dkt. 166; Dkt. 168). Plaintiffs also submitted their response to the Secretary’s Statement of Undisputed Facts. (Dkt. 119; Dkt. 169). The Secretary submitted her reply. (Dkt. 181). Plaintiffs Forward Montana Foundation, Montana Youth Action, and Montana Public Interest Research Group (collectively, “Youth Plaintiffs”) submitted a cross motion for summary judgment. (Dkt. 117; Dkt 118; Dkt 152; Dkt. 153). The Secretary submitted her response brief. (Dkt. 161). Youth Plaintiffs submitted their reply. (Dkt. 181). The Court held a hearing concerning these motions on July 11, 2022. (Dkt. 187).

The Court has considered the briefs, evidence presented, and oral arguments made by counsel. These motions are ripe for decision.

Factual Background

During 2021, the Montana Legislature passed four laws: House Bill 176 (“HB 176”), Senate Bill 169 (“SB 169”), House Bill 506 (“HB 506”), and House Bill 530 (“HB 530”). HB 176 amends § 13-2-304, MCA, by moving the deadline to register for the

election to “noon the day before the election.” Thus, HB 176 removed election day registration, which had been in effect for more than fifteen years. SB 169 amended § 13-2-110, MCA, and, *inter alia*, relegated the use of a student ID, to that of a secondary form of identification that must be presented in conjunction with “a current utility bill, bank statement, paycheck, government check, or other government document that shows the individual's name and current address” in order to register to vote. Prior to SB 169, a student ID was acceptable as a primary ID and no additional documentation was necessary to register to vote. HB 506 amended § 13-2-205, MCA, and requires that ballots cannot issue to voters until they meet residence and age requirements. Lastly, HB 530 provides that:

[T]he secretary of state shall adopt an administrative rule in substantially the following form:

(a) For the purposes of enhancing election security, a person may not provide or offer to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots.

(b) "Person" does not include a government entity, a state agency as defined in 1-2-116, a local government as defined in 2-6-1002, an election administrator, an election judge, a person authorized by an election administrator to prepare or distribute ballots, or a public or private mail service or its employees acting in the course and scope of the mail service's duties to carry and deliver mail.

(2) A person violating the rule adopted by the secretary of state pursuant to subsection (1) is subject to a civil penalty. The civil penalty is a fine of \$100 for each ballot distributed, ordered, requested, collected, or delivered in violation of the rule.

Legal Standards

A. Summary Judgment

A party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), M.R.Civ.P. In a summary judgment proceeding, “[t]he evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences are to be drawn in favor of the party opposing summary judgment.” *Thornton v. Flathead County*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395. A trial on the merits is always preferable to summary judgment “if a controversy exists over a material fact.” *Richards v. JTL Group*, 2009 MT 173, ¶ 12, 350 Mont. 516, 212 P.3d 264. “In evaluating cross motions for summary judgment, the District Court...must evaluate each party's motion on its own merits.” *Hajenga v. Schwein*, 2007 MT 80, ¶ 19, 336 Mont. 507, ¶ 19, 155 P.3d 1241, ¶ 19; *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, ¶ 7, 403 P.3d 664, ¶ 7.

The initial burden is on the movant to prove the nonexistence of all genuine issues of material fact and entitlement to judgment as a matter of law. *Estate of Willson v. Addison*, 2011 MT 179, ¶ 13, 361 Mont. 269, 258 P.3d 410; *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 29, 356 Mont. 417, 234 P.3d 79. The moving party has the burden of

extinguishing “any real doubt as to the existence of any genuine issue of material fact by making a ‘clear showing as to what the truth is.’” *Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 12, 380 Mont. 495 (quoting *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 36, 345 Mont. 12, 192 P.3d 186).

Once the movant has satisfied this initial burden, the nonmoving party must “prove, by more than mere denial and speculation, that a genuine issue of material fact exists and that the moving party is not entitled to judgment as a matter of law.” *Ehrman v. Kaufman*, 2010 MT 284, ¶ 10, 358 Mont. 519. It is essential that the nonmoving party “present facts of a substantial nature showing that genuine issues of material fact remain for trial.” *Cape v. Crossroads Corr. Ctr.*, 2004 MT 265, ¶ 12, 323 Mont. 140, 99 P.3d 171. “To raise a genuine issue of material fact, the proffered evidence must be ‘material and of a substantial nature, not fanciful, frivolous, gauzy or merely suspicious.’” *Estate of Willson*, ¶ 14 (quoting *Elk v. Healthy Mothers, Healthy Babies, Inc.*, 2003 MT 167, ¶ 16, 316 Mont. 320, ¶ 16, 73 P.3d 795, ¶ 16).

B. Constitutional Issue

Statutes enacted by the Legislature “are presumed to be constitutional, and it is the duty of this Court to avoid an unconstitutional interpretation if possible.” *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, ¶ 32, 488 P.3d 548, ¶ 32 (quoting *Hernandez v. Bd. of Cty. Comm’rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, ¶ 15, 189 P.3d 638, ¶ 15)(internal quotations omitted). Constitutional challenges to statutes require that the challenging

party prove that the statute is “unconstitutional ‘beyond a reasonable doubt’ and, if any doubt exists, it must be resolved in favor of the statute.” *Hernandez*, ¶ 15 (quoting *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, ¶ 13, 15 P.3d 877, ¶ 13).

Discussion

A. Issues the Court has previously ruled on

1. Standing

The Secretary, for the third time, argues that Plaintiffs do not have standing. The Court has previously ruled on this issue. The Secretary conceded during oral argument that she is merely preserving the issue of standing for appeal, which the Secretary has now achieved thrice over. The Court addressed this issue first in its Order Re Defendant’s Motion to Dismiss (Dkt. 32) and second, in its Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs’ Motions for Preliminary Injunctions. (Dkt. 124 at ¶¶ 7-32). The Court hereby incorporates both its Order Re Defendant’s Motion to Dismiss and its Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs’ Motions for Preliminary Injunctions. The Court has previously ruled that Plaintiffs have standing. The Secretary has raised no new arguments in support of her contention that warrant further analysis by the Court. Thus, the Court again finds based on the reasons stated in its Order Re Defendant’s Motion to Dismiss and its Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs’ Motions for Preliminary Injunctions that all Plaintiffs have standing.

2. Ripeness of HB 530

The Secretary again argues that HB 530 is not ripe for judicial review because it directs the Secretary to adopt a rule that is “in substantially the same form” as that presented in HB 530. In addition to the same arguments already made, the Secretary adds that the Court “does not—and cannot—know what specific types of ballot assisting activities ultimately will be prohibited, or how such a rule might actually affect Plaintiffs.” (Dkt. 155 at 46).

However, as previously described in ¶¶ 47-48 of its Conclusions of Law granting Plaintiffs’ Motions for Preliminary Injunctions, Plaintiffs already provided evidence that HB 530 was causing Plaintiffs to stop their ballot collection activities. The Secretary’s cite to testimony that Plaintiffs have testified that HB 530 is not being enforced against them as proof of no injury is concerning given that was the expected result of the preliminary injunction. Moreover, the plain language of HB 530 is clear that whatever rule ultimately does get adopted, it will reach ballot collection activities and impose a civil penalty. Thus, the effects of HB 530 are not “speculative.” In sum, the Court finds that HB 530 is ripe.

B. The Elections Clause of the U.S. Constitution

The Secretary asserts she is entitled to judgment as a matter of “United States constitutional law” because “[t]he Court may not interfere with the Legislature’s constitutional obligation to regulate federal elections because that authority has been

strictly delegated to the Legislature—not the State at large—by the U.S. Constitution.” (Dkt. 155 at 57-58). The Secretary further describes, that because SB 169, HB 176, HB 506, and HB 530 were enacted by the Legislature “pursuant to authority delegated to it exclusively by the U.S. Constitution” that Plaintiffs’ requested relief inappropriately conflicts with “the Legislature’s constitutional obligation to regulate elections.” (Dkt. 155 at 58-59).

The U.S. Supreme Court has already rejected the Secretary’s interpretation of the Elections Clause. Specifically, the Court described, “[w]e find no suggestion in the Federal constitutional provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the **constitution of the State** has provided that laws shall be enacted.” *Smiley v. Holm* (1932), 285 U.S. 355, 367-68, 52 S. Ct. 397, 399 (emphasis added); *see also* *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n* (2015), 576 U.S. 787, 817-18, 135 S. Ct. 2652, 2673 (stating “[n]othing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State’s constitution.”); *Harper v. Hall* (2022), 380 N.C. 317, 391, 868 S.E.2d 499, 551 (describing a similar argument made under the Elections Clause was “repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences.”).

In sum, the Court finds that the Elections Clause does not prohibit judicial override of the challenged state laws as represented by the Secretary and that the Secretary is not entitled to “judgment as a matter of United States constitutional law.” (See Dkt. 155 at 59).

C. HB 506

The Secretary submitted her Motion for Summary Judgment as to all claims made by all Plaintiffs. Youth Plaintiffs submitted their Cross Motion for Summary Judgment on Counts Three, Four, and Five of their Complaint. Youth Plaintiffs’ Complaint, originally filed in DV 21-1097 prior to consolidation, alleges in Count Three that HB 506 “impermissibly restricts Plaintiffs’ fundamental right of suffrage, Mont. Const., art., II, § 13, by making it more difficult for a subset of registered voters to access their ballots.” (DV 21-1097, Dkt. 1 at 38-39). In Count Four, Youth Plaintiffs allege that “HB 506 impermissibly violates Plaintiffs’ fundamental right not to be discriminated against on the basis of youth, Mont. Const., art. II, § 15, by making it more difficult for young people just becoming adults to access their ballots.” *Id.* at 40. Lastly, in Count Five, Youth Plaintiffs allege “HB 506 violates Plaintiffs’ right to equal protection of the laws, set forth as part of the right to individual dignity. Mont. Const., art. II, § 4.” *Id.* at 41.

In regard to Counts Three through Five of Youth Plaintiffs’ Complaint, both the Secretary and Youth Plaintiffs assert there are no genuine issues of material fact

precluding summary judgment and thus the Court “is not called upon to resolve factual disputes, but only to draw conclusions of law[.]” *Bud-Kal v. City of Kalispell*, 2009 MT 93, ¶ 15, 350 Mont. 25, ¶ 15, 204 P.3d 738, ¶ 15 (citing *Merlin Myers Revocable Trust v. Yellowstone County*, 2002 MT 201, P12, 311 Mont. 194, 53 P.3d 1268).

As described above, “legislative enactments are presumed constitutional, and the party challenging a statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt.” *Alexander v. Bozeman Motors, Inc.*, 2012 MT 301, ¶ 27, 367 Mont. 401, ¶ 27, 291 P.3d 1120, ¶ 27 (citing *Elliot v. State Dept. of Revenue*, 2006 MT 267, ¶ 11, 334 Mont. 195, 146 P.3d 741; *Stavenjord v. Mont. State Fund*, 2003 MT 67, ¶ 45, 314 Mont. 466, 67 P.3d 229). Because Youth Plaintiffs bring a facial challenge, they “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.’” *Mont. Cannabis Indus. Ass’n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, ¶ 14, 368 P.3d 1131, ¶ 14 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008)).

HB 506 amends § 13-2-205(2), MCA, to provide that “[u]ntil the individual meets residence and age requirements, a ballot may not be issued to the individual and the individual may not cast a ballot.” Youth Plaintiffs and the Secretary agree that, prior to HB 506, election administrators in Montana were “providing absentee ballots to individuals who did not yet meet Montana’s age or residency requirements, and some

election administrators were waiting until those individuals satisfied Montana’s age or residency requirements before providing them with absentee ballots.” (Dkt. 169 at ¶ 92).

The Secretary submits three primary arguments as to why summary judgment as to the claims regarding the constitutionality of HB 506 is appropriate. The Secretary first offers that Youth Plaintiffs cannot show HB 506 causes injury to them because the right to vote absentee is not encompassed by the right of suffrage under Mont. Const., art. II, § 13. Next, the Secretary argues that Youth Plaintiffs equal protection claim fails because Youth Plaintiffs cannot show that HB 506 treats similarly situated groups unequally and even if they can, HB 506 would be subject to rational basis review and survive this constitutional muster. Lastly, the Secretary contends HB 506 does not violate Article II, § 15.

The Montana Constitution provides that “[a]ll 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.” Mont. Const., Art. II § 13. This constitutional right of suffrage is a fundamental right. *Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, ¶ 32, 325 P.3d 1204, ¶ 32.

The Secretary asserts that HB 506 is not inconsistent with the right of suffrage because that right is “explicitly limited by the Montana Constitution’s (i) voter qualification standards; and (ii) mandate that the Legislature set the ‘requirements for residence, registration, absentee voting, and administration of elections.’” (Dkt. 155 at

38 (quoting Mont. Const. Art. IV, §§ 2-3)). The Secretary argues that the changes HB 506 made were necessary to ensure only qualified electors were receiving ballots and mailing them in. Moreover, the Secretary contends that even if the right of suffrage encompasses the right to vote absentee, that Youth Plaintiffs' constitutional challenge still fails because fundamental rights are not absolute, and the changes made by HB 506 are reasonable.

However, as pointed out by Youth Plaintiffs, HB 506 forecloses voters turning eighteen in the month before the election from an avenue of voting available to all others in the electorate on the basis of the date that their birthday falls. Specifically, under HB 506, everyone qualified to vote in the election, apart from these voters turning eighteen in the month before the election, has the opportunity to receive their ballot in the mail, consider their voting options, and return their ballot via mail or some other means. As illustrated by Youth Plaintiffs, HB 506 will require this specific subgroup of the electorate—those turning eighteen in the month before the election—to only have the opportunity to submit their vote in-person and, depending on when their birth date falls, they may have to have the knowledge they can pre-register to vote, given the interplay between HB 506 and HB 176 (which removes election day as an option for registering to vote in the election). Not only that, but this specific subgroup of the electorate is the only subgroup of the electorate required to vote in person based on HB 506.

Thus, while the Secretary points to the fact that the Legislature is mandated to set requirements for absentee voting pursuant to Article IV, §§ 2-3, HB 506 mandates that some electors can vote absentee while others cannot. The Secretary counters with the fact that, as described in a concurring opinion, absentee voting is an “indulgence.” (Dkt. 155 at 41 (quoting *Crawford v. Marion Cty. Election Bd.* (2008), 553 U.S. 181, 209, 128 S. Ct. 1610, 1627 (Scalia, J., concurring))). However, under HB 506, most of the electorate is permitted this “indulgence” while a few have been excluded from the opportunity to similarly indulge.

The Court finds, first, that HB 506 severely interferes with the right of suffrage given it prevents this subgroup of the electorate from exercising their right of suffrage in ways the remainder of the electorate is not similarly prevented. Specifically, HB 506 needlessly forces one subgroup of the electorate to vote in person and impermissibly denies this subgroup access to an avenue of voting that all others in the electorate can avail themselves of. Given the substantial interference with a fundamental right, the Secretary must, even under the *Anderson-Burdick* standard discussed below, “demonstrate that the challenged statute survives strict scrutiny.” *Driscoll*, ¶ 39. A statute only survives strict scrutiny if it is “narrowly tailored to further a compelling government interest.” *Id.* at ¶ 40 (citing *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997); *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993)). Thus, even on a showing of a compelling government interest, the government

“must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective.” *Wadsworth v. State* (1996), 275 Mont. 287, 911 P.2d 1165, 1174.

Rather than apply the constitutional analysis that Montana Courts have applied for decades, the Secretary asks the Court to apply a “flexible standard” adopted by federal courts referred to as the “*Anderson-Burdick* standard” from *Anderson v. Celebrezze* (1983), 460 U.S. 780, 103 S. Ct. 1564, and *Burdick v. Takushi* (1992), 504 U.S. 428, 112 S. Ct. 2059. Under this standard, when voting rights are “subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063 (quoting *Norman v. Reed* (1992), 502 U.S. 279, 289, 112 S. Ct. 698, 705). However, when the restrictions imposed by the law are “‘reasonable’” and “‘nondiscriminatory,’” “‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick*, 504 U.S. 428, 434, 112 S. Ct. 2059, 2063 (quoting *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1569). When this issue came before the Montana Supreme Court during its review of a preliminary injunction, the Court declined to “set forth a new level of scrutiny[.]” describing that “for purposes of resolving the instant preliminary injunction dispute, the level of scrutiny is not dispositive to the issues presented on appeal.” *Driscoll v. Stapleton*, 2020 MT 247, ¶ 20, 401 Mont. 405, ¶ 20, 473 P.3d 386, ¶ 20. Thus, the federal *Anderson-Burdick* standard has not been applied by Montana courts to date.

The interests identified by the Secretary in support of HB 506 include that “providing ballots only to those individuals who meet the constitutional prerequisites to vote is clearly reasonable.” (Dkt. 155 at 41). Moreover, that the State’s interest “in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes....” is “a compelling interest.” *Id.* at 42 (quoting *Larson v. State*, 2019 MT 28, ¶ 40, 394 Mont. 167, ¶ 40, 434 P.3d 241, ¶ 40). The Secretary cites to six specific interests furthered by HB 506:

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

(Dkt. 155 at 42 (citations omitted)). These interests are compelling. However, as

evidenced by the unadopted version of HB 506 that passed in the House of

Representatives, there are less onerous ways to achieve the above objectives.

Specifically, the unadopted version of HB 506 that was passed by the House provided

that “[u]ntil the individual meets residence and age requirements, a ballot submitted by

the individual may not be processed and counted by the election administrator.” (See Dkt. 153, ex. B). This unadopted version of HB 506 would have permitted everyone in the electorate to have the same access to their ballots and to the “indulgence” that is absentee voting while ensuring electors turning eighteen in the month prior to the election are treated uniformly throughout the counties and meeting the other interests outlined by the Secretary. The version of HB 506 that the Legislature ultimately passed arbitrarily subjects a subgroup of the electorate to different requirements and irrationally forecloses an avenue of voting available to all others in the electorate.

In sum, the Court finds that HB 506 does not meet strict scrutiny (which is also required under the *Anderson-Burdick* standard given the severe restriction) because it is not narrowly tailored as evidenced by the less restrictive version of HB 506 that was considered by the Legislature. Moreover, the Court finds that Youth Plaintiffs have proven beyond a reasonable doubt that HB 506 unconstitutionally infringes the fundamental right of suffrage. The Court will grant Youth Plaintiffs Cross Motion for Summary Judgment as to Count Three. Because the Court has found HB 506 unconstitutional under the right of suffrage, the Court need not address the Secretary’s motion for summary judgment and Youth Plaintiffs Cross Motion for summary judgment as to Counts Four and Five of Youth Plaintiffs Complaint.

D. SB 169, HB 176, and HB 530

1. Article IV, § 3

The Secretary contends that summary judgment is appropriate as to HB 176 because first, pursuant to Article IV, § 3, the Legislature has the authority to enact or repeal election day registration (“EDR”), second, it does not violate the right to vote, and third, it is facially neutral and does not violate equal protection.

The Secretary has maintained that pursuant to Mont. Const. Art. IV, § 3, it is within the Legislature’s discretion to enact or repeal EDR. Article IV, § 3 states: “[t]he legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process.” Mont. Const., Art. IV § 3.

The Court has no doubt that the Legislature had the discretion to choose whether or not to enact EDR, however, the Montana Constitution does not speak to the Legislature’s discretion to revoke EDR given its implementation for the past fifteen years and the significant evidence submitted by Plaintiffs showing that Montanans make significant use of EDR. Thus, judgment as a matter of law pursuant to Art. IV, § 3 is inappropriate at this stage.

2. Right to Vote

Next, concerning the right to vote, under the standard applied in Montana, when the exercise of a fundamental right is interfered with, “[t]he most stringent standard, strict scrutiny, is imposed...” *Wadsworth*, 275 Mont. 287, 911 P.2d 1165, 1174. Strict scrutiny review of a statute “requires the government to show a compelling state interest for its action.” *Mont. Envtl. Info. Ctr. v. Dep’t of Envtl. Quality*, 1999 MT 248, ¶ 61, 296 Mont. 207, ¶ 61, 988 P.2d 1236, ¶ 61 (quoting *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 (internal quotations omitted)). “In addition to the necessity that the State show a compelling state interest for invasion of a fundamental right, the State, to sustain the validity of such invasion, must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective.” *Mont. Envtl. Info. Ctr.*, at ¶ 61 (quoting *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 (internal quotations omitted)). On the other hand, as described above, the Secretary requests the Court, concerning the right to vote, to apply the federal *Anderson-Burdick* standard.

Plaintiffs have alleged that HB 176, HB 530, and SB 169 each unconstitutionally burden the right to vote. Under both the precedential standard and the *Anderson-Burdick* standard, the Court must “determine the level of scrutiny to apply to the infringement of that right.” *Wadsworth*, 275 Mont. 287, 911 P.2d 1165, 1173; *see also*, *Nader v. Brewer* (9th Cir. 2008), 531 F.3d 1028, 1034 (describing under *Anderson-Burdick*, “the severity of the burden the election law imposes on the plaintiff’s rights dictates the

level of scrutiny applied by the court.”). In making that determination, the Court considers “the nature of the interest and the degree to which it is infringed.” *Wadsworth*, 275 Mont. 287, 911 P.2d 1165, 1173 (quoting *Mem’l Hosp. v. Maricopa Cty.* (1974), 415 U.S. 250, 253, 94 S. Ct. 1076, 1080)(internal quotations omitted). Under *Anderson-Burdick*, “[t]he severity of the burden that an election law imposes ‘is a factual question on which the plaintiff bears the burden of proof.’” *Feldman v. Reagan* (9th Cir. 2016), 843 F.3d 366, 387 (quoting *Democratic Party of Haw. v. Nago* (9th Cir. 2016), 833 F.3d 1119, 1122-24).

In considering HB 176, HB 530, and SB 169 under either standard, it is evident there are genuine issues of material fact in dispute. For example, under SB 169, the Secretary’s contentions that SB 169 made “minor” changes to the law and that voters have “a wide variety of options to identify themselves for voting purposes” is disputed by MDP and MYA with facts concerning the apparent likelihood of college-age students to possess these other forms of identification. (Dkt. 169 at ¶¶ 117-118). The reduction of the impact on voters by the option to fill out a “Declaration of Impediment for an Elector” affidavit is also disputed by MYA and MDP as they cite to the fact that that affidavit “is only available to voters who lack an accepted form of photo ID, not those who lack other forms of secondary ID.” (See Dkt. 169 at ¶¶ 120-121.).

Under HB 176, the consideration of the burden on election staff is highly factually disputed given the statements from some administrators describing that HB 176 will assist in reducing the lines and election staff’s workload on election day versus

the statements from other administrators describing that ending election day registration would not assist their jobs in administering elections. (*See id.* at ¶¶ 50-56). Under HB 530, it is disputed as to whether HB 530 places restrictions on unpaid ballot collection given the language concerning receiving a “pecuniary benefit” for collecting a ballot. (*Id.* at ¶ 104). Not to mention, the burden on voters is disputed with the Secretary describing it “imposes little burden on voters” and Plaintiffs asserting it “places a substantial burden” given the reliance on ballot collection particularly by Native American voters and the high costs to voting that they face. (*Id.* at ¶¶ 105).

In sum, the above examples illustrate just a few genuine issues of material fact that are disputed in this case that preclude this Court from granting summary judgment. Specifically, there are genuine issues of material fact as relating to the nature and extent of the burdens imposed by HB 530, SB 169, and HB 176. Additionally, the Secretary’s interests in enforcing these laws, whether they are subjected to heightened scrutiny under the precedential standard or *Anderson-Burdick*, are genuine issues of material fact precluding the Court from granting summary judgment.

3. Right to Equal Protection

The Secretary asserts summary judgment is appropriate as to Plaintiffs equal protection claims relating to SB 169, HB 176, and HB 530. Concerning SB 169, HB 176, and HB 530, the Secretary argues first that the laws treat all voters the same and second, that Plaintiffs cannot prove disparate impact or discriminatory intent.

The Equal Protection Clause of the Montana Constitution aims to “ensure that Montana's citizens are not subject to arbitrary and discriminatory state action.” *Mont. Cannabis Indus. Ass’n v. State*, 2016 MT 44, ¶ 15, 382 Mont. 256, ¶ 15, 368 P.3d 1131, ¶ 15. The clause specifically declares: “[n]either the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.” Mont. Const., Art. II § 4. Additionally, while the Legislature must be given deference when it enacts a law, “it is the express function and duty of this Court to ensure that all Montanans are afforded equal protection under the law.” *Davis v. Union Pac. R.R.* (1997), 282 Mont. 233, 240, 937 P.2d 27, 31. Moreover, “[a] law or policy that contains an apparently neutral classification may violate equal protection if “in reality [it] constitutes a device designed to impose different burdens on different classes of persons.” *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, ¶ 16, 104 P.3d 445, ¶ 16 (quoting *State v. Spina*, 1999 MT 113, P85, 294 Mont. 367, P85, 982 P.2d 421, P85).

Concerning the challenged laws, the Secretary presents as factual the claim that “[t]he Montana Legislature did not enact the Legislation to ‘harm or disadvantage any particular class or group of voters.’” (Dkt. 169 at ¶ 62 (internal citations omitted)). The Secretary also asserts that “[t]he Legislation is nondiscriminatory.” *Id.* at ¶ 63. Plaintiffs dispute these claims asserting that the first claim “refers only to the personal opinions

of two legislators who do not claim to represent the views of the entire legislature” and that “HB 530 was passed in the waning days of the legislative session, with no hearing or opportunity for the public to be heard.” *Id.* at ¶ 62. Moreover, Plaintiffs describe that concerning HB 530, “[t]he legislature had knowledge that a very similar law was found by multiple courts less than two years prior to harm and disadvantage Native voters among others. The legislature also heard extensive testimony about how HB 176 and HB 530 would harm Native American voters.” *Id.* at ¶ 62. Concerning the intent behind SB 169, Plaintiffs point out that “comments from the sponsor of SB 169 indicate an intent to reduce student voting.” *Id.* at ¶ 62. These are just a few examples of the genuine issues of material fact concerning whether the challenged laws “constitute[] a device designed to impose different burdens on different classes of persons.” *See Snetsinger*, ¶ 16. Even moving forward from that aspect of the equal protection analysis, as described above, there are genuine issues of material fact concerning the Secretary’s interests in implementing these challenged laws.

Thus, the Court finds that there are genuine issues of material fact precluding summary judgment as to Plaintiffs claims concerning the right to equal protection.

4. Free Speech & Vagueness

The remaining issues concern Plaintiffs claims that HB 530 violates their right to free speech and is unconstitutionally vague. The Secretary argues that HB 530 does not implicate the right to free speech because it does not prohibit the activity of collecting

ballots but merely prohibits receiving a pecuniary benefit for doing so. Plaintiffs assert that the ballot collecting activities the organizations they represent engage in provides them with the opportunity to “express their beliefs in the importance of civic engagement” and for MDP, its GOTV efforts enable it to communicate its mission to voters. (Dkt. 168 at 20). Plaintiffs describe CSKT, WNV, and Blackfeet Nation all engage in ballot collecting and that they coordinate with each other to encourage civic engagement among their members. (Dkt. 166 at 16). When this issue was raised in another case, the District Court described that “[b]y collecting and conveying ballots, [Plaintiffs] are engaged in the ‘unfettered interchange of ideas for the bringing about of political and social changes desired by the people,’ which is at the heart of freedom of expression protections.” Courts Findings of Fact, Conclusions of Law, and Order, *Western Native Voice*, ¶ 30, No. DV 20-0377 (quoting *Dorn v. Bd. Of Trustees of Billings Sch. Dist. No. 2* (1983), 203 Mont. 136, 145, 661 P.2d 426, 431).

Moreover, concerning the issue of vagueness, while the Secretary is correct in pointing out that the rule making process required in HB 530 has not been undertaken and could potentially resolve some of the alleged ambiguities, Plaintiffs point to the disputed issues of fact as to whether “pecuniary benefit” would encompass their activities. Moreover, it is disputed as to whether HB 530 places restrictions on unpaid ballot collecting activities given that “HB 530 restricts giving a ‘pecuniary benefit’ for

collecting a ballot” which could encompass more than just monetary benefits. (Dkt. 169 at ¶ 104).

In sum, regarding claims concerning free speech and vagueness, there are genuine issues of material fact concerning the extent to which the constitutional rights are implicated that preclude summary judgment.

The Court, being fully informed, having considered all briefs on file and in-court arguments, makes the following decision:

IT IS HEREBY ORDERED:

1. Youth Plaintiffs Cross Motion for Summary Judgment as to Count

Three is **GRANTED**; this order constitutes a summary judgment that HB 506 is unconstitutional;

2. The Secretary’s Motions for Summary Judgment are **DENIED**.

DATED July 27, 2022

/s/ Michael G. Moses
District Court Judge

cc: E. Lars Phillips
David M.S. Dewhirst
Kathleen Smithgall
Dale Schowengerdt
Ian McIntosh
Leonard H. Smith
John M. Semmens
Mac Morris
David Knobel
Ryan Aikin
Rylee Sommers-Flanagan
Matthew Gordon
Jonathan Hawley

Henry Brewster
John Heenan
Peter Meloy
Alex Rate
Clayton Gregersen
Jonathan Topaz
Niki Zupanic
Marilyn Gabriela Robb