IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

Montana Democratic Party, Mitch Bohn, Plaintiffs, Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe, Plaintiffs, Montana Youth Action; Forward Montana Foundation; and Montana Public Interest Research Group Plaintiffs, v. Christi Jacobsen, in her official capacity as Montana Secretary of State, Defendant.	Consolidated Case No. DV 21-0451 **PLAINTIFFS' JOINT TRIAL BRIEF**

COME NOW, the Plaintiffs in this consolidated action, and pursuant to Rule 10 of the Yellowstone County District Court Local Rules and the Parties' Joint Stipulation to Modify Pretrial Deadlines, hereby file and serve this Joint Trial Brief.[1]

INTRODUCTION

At issue in this case is the very foundation of our democracy. Without reason or need, and divorced from any factual basis, the 2021 Montana Legislature enacted four laws[2] that—independently and in concert—severely restrict the voting rights of large swaths of the Montana

[1] Local Rule 10 provides that the trial brief should set forth "a statement of the theory of their cause and the issues involved." Plaintiffs incorporate by this reference their Proposed Findings of Fact, Conclusions of Law and Order, filed August 8, 2022, which more fully sets forth the factual and legal authorities supporting their position.

[2] The four laws include House Bill 506, which this Court struck down on summary judgment on July 27, 2022.

electorate, particularly groups who have previously been targeted for disenfranchisement and face higher barriers to voting. House Bill 176 ("HB 176") eliminates Montana's popular and turnout-driving Election Day registration ("EDR"), a voting staple in Montana since 2006. Senate Bill 169 ("SB 169") ends Montana's nearly two-decade long practice of allowing voters to use out-of-state driver's licenses or Montana college or university IDs as sufficient identification at the polls. And Section 2 of House Bill 530 ("HB 530") effectively bans organized absentee ballot assistance efforts, even though just two years ago multiple courts struck down a substantially similar provision as unconstitutional. With scalpel-like precision, these laws target Native American voters, young voters, voters with disabilities, and other disadvantaged groups for disenfranchisement. HB 176, SB 169 and HB 530, Section 2 (collectively, "the challenged laws") thus deny Plaintiffs' right to vote, as well as their rights to equal protection, free speech, and due process. Because the challenged laws impede fundamental rights, Secretary Jacobsen ("the Secretary") must show that they serve a compelling state interest and are narrowly tailored to achieve it. The Secretary cannot because the laws do neither.

At trial it will become abundantly clear that the Secretary can articulate no interest—much less a compelling one—that the challenged laws further, and that the various, ever-shifting "state interests" she claims are merely pretextual. While the purported interests grasped at by the Secretary have changed repeatedly over the course of this case, one thing has not: despite the Court's entreaties, the Secretary has been unable to muster actual admissible evidence supporting those interests, and she instead continues to rely on speculative hypotheticals and vague anecdotes. Throughout this case, Plaintiffs have sought—via interrogatories, requests for production, and in 30(b)(6) deposition questioning—discovery on the evidentiary support for the purported state interests. The Secretary's responses have been vague, speculative, and ever-changing. For

example, when asked repeatedly at his deposition to identify evidence supporting the asserted state interests, Austin James, the Secretary's designee, continually provided hypothetical scenarios rather than actual facts and referenced supposed newspaper articles of uncertain content from unspecified newspapers at unknown times. The Secretary's utter inability to provide any support for the state interests she contends the challenged laws serve makes clear what Plaintiffs have alleged all along and will prove at trial: these laws do not further legitimate Montana interests but instead are deliberately intended to disenfranchise already-vulnerable subsets of the Montana electorate and are thus unconstitutional.

ARGUMENT

A. This Court should make an evidentiary finding that the challenged laws fail under both a strict scrutiny analysis and, separately, the federal *Anderson-Burdick* standard.

Over and over, the Secretary has argued that this Court should apply the federal *Anderson-Burdick* test to Plaintiffs' claims under Montana's constitutional right to vote.[3] This argument is baseless—the Montana Supreme Court has applied strict scrutiny in all voting rights cases since the *Anderson-Burdick* test was formulated, and indeed, as recently as two years ago, the Court expressly declined to "set forth a *new* level of scrutiny" in voting rights cases, *Driscoll v. Stapleton*, 2020 MT 247, ¶ 20, 401 Mont. 405, 473 P.3d 386 (emphasis added). Nevertheless, this Court can find that applying the federal test would not result in a different outcome. The reason the challenged laws fail *Anderson-Burdick* is straight-forward: the burdens that the challenged laws place on Plaintiffs' right to vote are severe, and the purported interests advanced by the challenged laws—administrative convenience, purported lines at elections offices, alleged voter fraud, allegedly cratering voter confidence—are unsupported by any evidence and thus do not constitute

[3] *Anderson-Burdick*, of course, only applies to right to vote claims; even if this Court were to find that *Anderson-Burdick* has applicability in Montana, Plaintiffs' other claims still would be examined under strict scrutiny.

legitimate state interests, much less compelling ones. Moreover, there is no fit between the purported interests and the challenged laws: The Secretary cannot show that the laws actually address the alleged interests.

The *Anderson-Burdick* test "requires strict scrutiny" when, as here, "the burden imposed [by the law] is severe." *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018). Because the challenged laws severely burden Plaintiffs' rights, the analysis under *Anderson-Burdick* and Montana precedent is identical. And the Secretary appears to be under the misapprehension that, if the challenged laws impose a burden that is less than severe, rational-basis review applies. Not so. Even for less than severe burdens, *Anderson-Burdick* is not a "rational basis test" but rather a "means-end fit framework" that requires more than speculative state concerns. *Soltysik v. Padilla*, 910 F.3d 438, 449 (9th Cir. 2018); *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016) (rejecting the notion that *Anderson-Burdick* calls for "rational basis review"). To justify such burdens, the state must "articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is *actually necessary*, meaning it actually addresses, the interest put forth." *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 545 (6th Cir. 2014), *vacated on other grounds*, *Ohio State Conference of NAACP v. Husted*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (emphasis added). Even a "minimal" burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* at 538 (internal citations omitted). The Secretary has failed to produce any evidence of even a "legitimate state interest," much less one that is "sufficiently weighty," and she has not explained why any of the challenged laws are "actually necessary."

When assessing a burden on the right to vote under *Anderson-Burdick*, "courts may consider not only a given law's impact on the electorate in general, but also its impact on

subgroups, for whom the burden, when considered in context, may be more severe." *Pub. Integrity All.*, 836 F.3d at 1025 n.2. The touchstone of the burden analysis is how significantly a restriction threatens the right to vote for voters who are harmed. *See Veasey v. Abbott*, 830 F.3d 216, 249 n.40 (5th Cir. 2016) (en banc) ("The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily.") (citations omitted). Evaluating the challenged laws' effect on Plaintiffs and the groups they represent is imperative here because the right to vote is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

The unrebutted evidence adduced at trial will demonstrate that the challenged laws severely burden Plaintiffs' constitutional right to vote. *See* Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Order, August 8, 2022. Moreover, as shown at the summary judgment hearing, the Secretary can muster virtually no competent evidence demonstrating the challenged laws advance the purported state interests. In short:

1. Voter fraud and election integrity: Voter fraud in Montana is vanishingly rare. Out of millions upon millions of votes cast in Montana elections, the Secretary has identified *two* voter fraud convictions in Montana's history, neither relating at all to EDR, third-party ballot assistance, or student IDs. And while the Secretary echoes the "election integrity" theme trumpeted by the "election-was-stolen" crowd, she and other elected officials have bragged that Montana leads the nation in election security and integrity. The Secretary has identified no evidence that EDR, third-party ballot assistance, or student IDs negatively affected election integrity, or that the challenged laws would increase it.

2. Lines and administrative convenience: There is no evidence that EDR itself causes long lines for voters who are not registering on Election Day. Wait times in Montana are far lower than the national average and have *decreased* with EDR's increasing popularity. Many election

administrators have testified that EDR does not create any administrative burden and/or that HB 176 will add more work for election administrators, because EDR helps catch registration errors and serves as a failsafe for voters.

3. Voter confidence: Overall, voter confidence in Montana has been high, and remarkably stable over time—74% of Montana voters in 2012, 76% in 2016, and 72% in 2020 were "very confident" that their vote had been counted as intended. Less than two years ago, the then-Secretary's expert witness testified that "Montana's strong election ecosystem encourages and supports voter participation and results in generally high turnout and high voter confidence." The Secretary has demonstrated no actual connection between the challenged laws and voter confidence. In particular, she has adduced no evidence that EDR, third-party ballot assistance, or student IDs negatively affected voter confidence or that any challenged law is likely to increase confidence.

While Plaintiffs have been clear and consistent throughout this litigation that binding precedent requires application of strict scrutiny, they nevertheless seek an express finding from the Court that the challenged laws fail under any standard. Accordingly, Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Order set forth sections that address application of the *Anderson-Burdick* standard to the particular facts of this case.

EVIDENTIARY ISSUES

A. Deposition Designations

1. In General

The use of deposition designations is well established. Mont. R. Civ. P. 32 provides that at a trial "all or part of a deposition may be used against a party" if certain conditions are met and it falls under one of the allowable uses. Mont. R. Civ. P. 32(a)(1). "An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer,

director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)." Mont. R. Civ. P. 32(a)(3). This practice is common in Montana under both state and federal law.[4] Moreover, Mont. R. Civ. P. 32(a)(4)(B) provides that "[a] party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: . . . (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States." Several of Plaintiffs' witnesses—and in particular the tribal witnesses—reside more than 100 miles from Billings, Montana. Accordingly, deposition designations from those witnesses may be used for "any purpose."

The opposing party may object to deposition designations "that would be inadmissible if the witness were present and testifying." Mont. R. Civ. P. 32(b). However, the opposing party waives their right to object to a designated officer's qualifications if the objection is not made before the deposition begins or promptly after the basis for disqualification becomes known or could have been known. Mont. R. Civ. P. 32(d).

2. From an Earlier Action

The Rules also permit the use of deposition designations from an earlier action "to the same extent as if taken in the later action" where the later action "involve[es] the same subject matter between the same parties, or their representatives or successors in interest." Mont. R. Civ. P. 32(a)(8). While Montana courts have not defined "the same subject matter" or "same parties," the Ninth Circuit interprets the nearly identical Federal Rule 32(a)(8) to provide courts with wide latitude to determine whether to admit deposition designations from an earlier action. The fact-based focus of the inquiry rests on whether there was a similar motive for cross examination between the actions and the guiding principle that Rule 32 should be liberally construed.

[4] *See, e.g.*, D. Mont. L.R. 16.4(b)(2). The rule is also in keeping with Federal Rule of Civil Procedure 32(a), which allows "use of a deposition of a person designated by a corporation or other organization, which is a party, to testify on its behalf . . . the deposition is in substance and effect that of the corporation or other organization which is a party."

Ultimately, Rule 32(a) should be liberally construed "in light of the twin goals of fairness and efficiency," requiring only a "substantial identity of issues" rather than "identical issues and parties." *Hub v. Sun Valley Co.*, 682 F.2d 776, 778 (9th Cir. 1982); *see also United States v. RAJMP, Inc.*, No. 17-cv-515, 2020 WL 5754915, *1-2 (S.D. Cal. Mar 12, 2020); *Bank of N.Y. Mellon v. Nev. Ass'n Servs.*, No. 17-cv-22, 2020 WL 3118413, *2-3 (D. Nev. May 27, 2020).

Plaintiffs seek to admit deposition designations of the Secretary of State's Rule 30(b)(6) designee, Dana Corson, from two prior cases involving substantially similar issues: *W. Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020) ("*WNV*"); *Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. Sept. 25, 2020) ("*Driscoll*"). *WNV* and *Driscoll* involved constitutional challenges to the Ballot Interference Prevention Act, a law that severely restricted organized ballot collection in Montana. The parties in the case were (among others) Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and the Montana Democratic Party (Plaintiffs), and the Montana Secretary of State (Defendant). The parties were represented by, among others, Alex Rate of the ACLU of Montana, Samantha Kelty of the Native American Rights Fund, and Matthew Gordon of Perkins Coie, LLP, on behalf of the Plaintiffs, and the Montana Attorney General on behalf of the Secretary of State. During the litigation, Mr. Corson was deposed as the Secretary of State's Rule 30(b)(6) designee. Stuart Segrest, the Montana Attorney General's Civil Division Bureau Chief, defended the deposition.[5]

Plaintiffs seek to designate Mr. Corson's deposition testimony on topics that are virtually identical to those at issue in the instant action, namely the mission and purpose of the Montana Secretary of State's election division, the integrity of Montana elections and absence of voter

[5] In the instant action the Secretary of State is represented by, among others, David Dewhirst with the Montana Attorney General's office.

fraud, the history and effect of ballot collection, and the intent and impact of a restriction on ballot collection. This subject matter is, if not the same, then so substantially similar that admission of the testimony under Rule 32(a) is warranted. Moreover, the parties, law firms, and even the individual attorneys are virtually identical. Given the requirement that Rule 32 must be liberally construed, and "in light of the twin goals of fairness and efficiency," Mr. Corson's *WNV* and *Driscoll* deposition is properly designated and should be admitted at trial. *Hub*, 682 F.2d at 778.

Plaintiffs also seek to introduce, via designation or exhibit, portions of Mr. Corson's testimony at the *Driscoll* trial on behalf of the Secretary of State's office. Mr. Corson's testimony is admissible as the statement of a party opponent under Montana Rule of Evidence 801(d).

B. Exhibits

At the outset of the proceeding, this Court should admit the exhibits neither party has objected to. Montana Rule of Evidence 402 provides that relevant evidence is admissible "except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state." To exclude relevant evidence, a party must make a timely objection and state the specific ground of objection. Mont. R. Evid. 103(a)(1); *see also Gibson v. Swanson* (1989), 239 Mont. 380, 382, 780 P.2d 1137, 1138 ("[E]vidence is admissible unless a timely objection to its admission is raised."). Absent a rule-based objection, the Court should admit the parties' proposed exhibits. Requiring a witness to admit each exhibit will create needless inefficiencies.

C. Judicial Notice

To be judicially noticed, a fact must "be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Mont. R. Evid. 201(a)(b). Judicial notice is mandatory when a party requests it and supplies the court "with the necessary information." *Id.* 201(d). In adopting current Mont. R. Evid.

201, the Commission explained it was meant to "encourage the expansion of the use of judicial notice to expedite the trial process," and explicitly rejected the narrower Federal Rule's limit on judicial notice to adjudicative facts. Mont. R. Evid. 201, Commission Comment.

If not already otherwise admitted, this Court should take judicial notice of (1) the transcripts of legislative proceedings; (2) census and American Community Survey ("ACS") data, presented in Exhibits P196-P199, P299, P307, and in the tables in Plaintiffs' expert reports; (3) government reports, *see* Exhibits P239-P241, P320; and (4) the Secretary of State's own data on turnout and the use of late registration, *see* Exhibits P179-P183, P187-P190, P192-P195. The Court should take judicial notice of all these materials at the outset of trial to "expedite the trial process." Mont. R. Evid. 201, Commission Comment.

The transcripts of legislative proceedings were created from video and audio recordings provided on the Montana State Legislature's website, a source whose accuracy cannot be reasonably questioned. *Cf. Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (holding that it was appropriate to take judicial notice of information "made publicly available by government entities" on their websites where neither party disputed "the authenticity of the web sites or the accuracy of the information displayed"). The transcripts were created for this Court's convenience, and they are not reasonably subject to dispute because their accuracy can be readily determined by referencing the corresponding video or audio recording.

Similarly, any census data, including that from the ACS, is not subject to reasonable dispute and should be judicially noticed. *United States v. Esquivel*, 88 F.3d 722, 727 (9th Cir. 1996) (holding that census documents "are 'not subject to reasonable dispute' because they are 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned'" (quoting Fed. R. Evid. 201(b)); *see also Hollinger v. Home State Mut. Ins. Co.*, 654

F.3d 564, 571–72 (5th Cir. 2011) ("United States census data is an appropriate and frequent subject of judicial notice."); *Evans v. Enterprise Prods. Partners*, 426 F. Supp. 3d 397, 405-06 (S.D. Tex. 2019) (taking judicial notice of ACS data). Montana courts regularly take judicial notice of data from the Census Bureau. *See, e.g.*, *Kills On Top v. State* (1995), 273 Mont. 32, 56, 901 P.2d 1368, 1384 (taking judicial notice of census data); *Hartman v. Dor*, Cause No. BDV-92-1744, 1993 Mont. Dist. LEXIS 603, *12 (Mont. Dist. Ct. June 21, 1993).

Likewise, both government reports and data published by the Secretary's Office itself are not subject to reasonable dispute and this Court should thus take judicial notice of these exhibits for judicial efficiency. For example, the Court in *WNV* took judicial notice of the documents now offered as P240 and P320, as they are just the sort of documents that are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." This Court should do the same.

D. Improper Objections

While the Secretary's objections to Plaintiffs' exhibits generally appear to be boiler-plate cut-and-paste, Plaintiffs note the impropriety of certain sets of objections.

1. Rule 901 Authentication

The Secretary objects to 172 of Plaintiffs' Exhibits on the basis of Mont. R. Evid. 901 Authentication.[6] Many, if not most of the exhibits to which the Secretary objects are her own documents that were produced by her attorneys in the ordinary course and scope of discovery. Documents produced during discovery by a party opponent are deemed authentic. *In re Homestore.com Sec. Litig.*, 347 F. Supp. 2d 769, 781 (C.D. Cal. 2004); *see also* Wright & Gold, 31 Fed. Practice & Procedure: Evid. § 7105 at 39 ("Authentication can also be accomplished

[6] Mont. R. Evid. 901 and 902 are identical to Fed. R. Evid. 901 and 902.

through judicial admissions such as . . . production of items in response to . . . [a] discovery request.").

In addition, the vast majority of Plaintiffs' exhibits are properly authenticated under Mont. R. Evid. 901(b)(4) and (b)(7) and are also self-authenticating documents under Mont. R. Evid. 902. Rule 901(b)(4) provides that evidence sufficient for authentication may include "[d]istinctive characteristics and the like. Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances." Mont. R. Evid. 901(b)(7) likewise provides that documents may be authenticated when they are "[p]ublic records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept." Plaintiffs have proffered dozens of exhibits that are either public reports or are properly authenticated based on their appearance, content, and substance. Plaintiffs' Exhibit 2, for example, is a copy of House Bill 190 from the 58th Session of the Montana Legislature and was prepared by the Legislative Services Division. This exhibit is readily authenticated as a public record and, under the clear language of Mont. R. Evid. 902, is both a domestic public document and an official publication. *See also, e.g.*, P003 (House Bill 406); P012 (Senate Bill 280); P013 (Senate Bill 302); P014 (Senate Bill 352); P016 (Montana Legislature publication on bill actions for House Bill 406). Likewise—by way of example—Plaintiffs' Exhibit 168 is a "Notice of Public Hearing on Proposed Amendment" published in the Montana Administrative Register ("MAR") by the Montana Department of Public Health and Human Services and signed by the DPHHS director, Adam Meier. Clearly, this document is self-authenticating. *See also, e.g.*, P167 (MAR "Notice of Adoption of Temporary Emergency Rule").

The authenticity of such documents cannot reasonably be questioned, and the Court should overrule the Secretary's boilerplate Mont. R. Evid. 901 objections to Plaintiffs' exhibits and find, in the interests of judicial economy, that these documents are readily authenticated or self-authenticating and therefore admissible.

2. Surprise

The Secretary also objects on the basis of "surprise" to 30 of Plaintiffs' Exhibits. Her argument appears to be that the documents should be excluded because they were not produced in discovery. Once again, these objections are without merit. Each and every one of these exhibits is a publicly available document to which the Secretary had, and has, ready access. For example, Plaintiffs' Exhibits 322-329 are trial transcripts from the district court proceedings in *WNV* and *Driscoll*, where the Secretary of State was a *party*. It defies comprehension that the Secretary would claim to be surprised by trial testimony from two cases that have been repeatedly cited by the Plaintiffs throughout this litigation. The Secretary also objects on this basis to legislative hearings (P033-34, P038-41, P045, P096, P107), which have been cited repeatedly in filings in this case, and for which the audio and video recordings are all readily accessible on the Legislature's website. Perhaps most outrageously, she objects on the basis of "surprise" even to documents the Secretary herself authored and to documents from her own website (P116, P182, P188, P190). The Secretary's boilerplate objections should be closely scrutinized and overruled where it is self-evident that she had ready access to publicly available documents.

E. The Secretary's expert witnesses are not credible and accordingly their testimony should be discredited.

In the context of expert evidence, "[w]hen the district court sits as the finder of fact, there is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018). For this reason, Plaintiffs

have not sought to exclude the testimony of the Secretary's proffered expert witnesses. Instead, here they flag issues of credibility—which may have merited a motion to exclude in a jury trial—for the Court to consider in assessing the reliability of the witnesses in question and weight of their testimony. *See id.* ("[W]here the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702.").

1. Sean Trende

Montana Rule of Evidence 702 provides that if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Of course, political scientists have specialized knowledge that is often likely to be useful to the trier of fact in voting cases, but Mr. Trende is not a qualified political scientist. Based on his education and training, he cannot qualify as an expert. Mr. Trende has not completed his Ph.D. Trende Tr. 36:14-17, 21-22.[7] Mr. Trende has never published an article in a peer reviewed journal, or even submitted an article regarding voting to be considered for publication in a peer reviewed journal. *Id*. 38:13-40:17. He could not even remember writing any articles at all related to the issues in this case. *Id.* 40:21-41:18. He is a student of political science, not an expert in the field. While experts can be qualified on bases other than education and training, Mr. Trende does not seek to offer opinions based on his experience working in political analysis, but instead offers opinions in the field of political science, which he is not qualified to do. Mr. Trende's lack of qualification undermines the weight of any evidence he offers. *Comm'r of Political Practices for*

[7] Plaintiffs file excerpts of the deposition transcripts cited herein along with this Trial Brief.

Mont. v. Wittich, 2017 MT 210, ¶ 51, 388 Mont. 347, 364, 400 P.3d 735, 748 (indicating that "degree of the expert's qualifications goes to the weight of the evidence").

More importantly, Mr. Trende's proffered opinions are not the result of applying the accepted standards and methods of the field of political science. Indeed, rather than apply those standards and methods, Mr. Trende mainly seeks to undermine and question them. Accordingly, his opinion is not "premised on a reliable methodology," *Hulse v. DOJ, Motor Vehicle Div*., 1998 MT 108, ¶ 53, 289 Mont. 1, 27, 961 P.2d 75, 90, as Montana law requires. While a literature review is an ordinary part of political scientists' repertoire, Mr. Trende offers a notably selective and misleading representation of existing scholarly research. His account of the scholarly literature is "incomplete and, potentially, misleading," Street Rebuttal Rep. at 2 (Dkt. 121), as he fails to note that the political science literature finds, with remarkably consistency, that "EDR tends to increase turnout, and, correspondingly, that eliminating EDR is likely to reduce turnout," *id.* at 5. And Mr. Trende flatly mischaracterizes some of the literature he does cite. *See* Trende Rep. at 12 (Dkt. 89) (asserting that two studies found ID laws were "effective in reducing fraud"); Trende Tr. 135:8-16; Street Rebuttal Rep. at 16.

A focus of Mr. Trende's opinions appears to be that political scientists rely on observational data—rather than double-blind randomized controlled experimental trials—to understand behavior. Trende Rep. at 8. But this is neither novel nor relevant, and Mr. Trende's focus is a critique of the entire field of political science, plus many other fields of both social and natural scientific pursuit. While political scientists agree that there are some limitations in relying upon observational data, Mr. Trende offers nothing to reflect "the ways in which researchers have risen to these challenges, nor does he acknowledge that the great majority of the scholarly literature on voters and elections uses observational data." Street Rebuttal Rep. at 3. And he undermines his

own contention later by citing favorably to studies that use observational data. *See* Trende Rep. at 10-12; *see also* Street Rebuttal Rep. at 3. Accordingly, the Court should not credit Mr. Trende's unqualified, unreliable testimony.

2. Scott Gessler

"The test for the admissibility of expert testimony is whether the matter is sufficiently beyond common experience that the opinion of the expert will assist the trier of fact to understand the evidence or to determine a fact in issue." *Hulse*, ¶ 48. While Mr. Gessler is a former elections official from another state, actual Montana elections administrators are fact witnesses in this case, and thus more capable of testifying about *Montana* election administration than Mr. Gessler. As such, his testimony will not "assist the trier of fact," Mont. R. Evid. 702, and must not be credited.

Further, for an expert witness to be credited, "there must be a preliminary showing that the expert's opinion is premised on a reliable methodology." *Hulse*, ¶ 53. Mr. Gessler offers speculative opinions premised on no apparent methodology at all, much less a reliable one. And while he sometimes cites political science articles, Mr. Gessler is not a political scientist and lacks the expertise necessary or useful for making the Court aware of that literature.[8] Rather, Mr. Gessler himself does not seem to understand the point of many of the articles he cites, misrepresenting their conclusions and offering utterly unreliable "statistical" conclusions. For example, Mr. Gessler misstates the conclusion of the Government Accountability Office ("GAO") report he cites, incorrectly equating no statistically significant effects with a finding of evidence of the absence of an effect. *See* Gessler Decl. ¶ 28 (Dkt. 87); GAO, *Issues Related to Registering Voters and Administering Elections* at 88, https://www.gao.gov/assets/gao-16-630.pdf; Street Rebuttal Rep. at 1-2; *see also* Gessler Decl. ¶ 29; Street Rebuttal Rep. at 7 (explaining that Mr. Gessler's

[8] Mr. Gessler's report and opinions also rely on various conspiratorial online "news sources" of questionable reliability whose assertions he takes at face value.

unfounded assertion about the positive effect of EDR was based on making statistical conclusions contrary to the standards of the political science field).

Additionally, Mr. Gessler's opinions related to HB 176 and EDR in Montana are all premised on an incorrect assumption. At his deposition, he testified "my opinions are based on the assumption that Election Day registration is available wherever people can vote in person on Election Day." Gessler Tr. 188:1-4. This assumption is wrong, thus undermining all of his opinions regarding EDR. Prior to HB 176, in Montana, EDR occurred at a centrally designated location, often county clerk's offices, and did not occur in the vast majority of the state's polling places. *See* Mont. Admin. R. 44.3.2015(1)(b)(iv); *see* Ellis Tr. 156:13-157:12.

Mr. Gessler also claims that HB 530 "serves important anti-fraud purposes" because paid ballot collection "adds a profit motive to this aspect of the voting process" and "a ballot collector's financial interest in maximizing ballot collection also creates a temptation to cut corners or perhaps blatantly violate the law." Gessler Decl. ¶¶ 47-48. This analysis should be ignored and discounted entirely for several reasons. First, Mr. Gessler "provides no evidence to support these claims." Street Rebuttal Rep. at 14. His report includes no citations to support this argument, Gessler Decl. ¶¶ 47-48, and in his deposition, he could not identify any specific evidence from Montana that would support his claim, Gessler Tr. 290:7-291:4; *see also* Gessler Tr. 277:21-278:13 (testifying that the bases for his claims about HB 530 are all included in his report, other than unspecified "knowledge and experience."). Second, Mr. Gessler appeared unaware that neither WNV nor MDP pays its organizers per ballot, Horse Aff. ¶¶ 9-10 (Dkt. 50), undercutting his evidence-free claim that HB 530 "creates a financial motive for individuals to collect as many ballots as possible," Gessler Decl. ¶ 47. Third, Mr. Gessler ignores the fact that Montana already criminalizes precisely the conduct about which he speculates. *See* Street Rebuttal Rep. at 14-15. The same is true for Mr.

Gessler's testimony regarding voter confidence. He claims HB 530 "helps foster confidence in elections," but provides no basis for this assertion. Gessler Decl. ¶ 54; *see* Street Rebuttal Rep. at 14. In his deposition, he could not identify any support for this claim, other than unspecified "knowledge and experience." Gessler Tr. 277:21-278:13.

Mr. Gessler offers these conclusions without basis, and certainly without reliance on any "reliable methodology," *Hulse*, ¶ 53, making his opinions classic "*ipse dixit*" testimony which should not be credited. *State v. Clifford*, 2005 MT 219, ¶ 63, 328 Mont. 300, 316, 121 P.3d 489, 501 (Nelson, J., concurring) (quoting *GE v. Joiner*, 522 U.S. 136, 146 (1997)).

Finally, Mr. Gessler is simply not a credible witness. He testified, for example, that the results of the 2020 presidential election "were not valid," Gessler Tr. 325:5-11, and repeatedly refused to state or agree that President Biden was legitimately elected as President of the United States in 2020, Gessler Tr. 323:6-326:7.

For these reasons, the Court should not credit Mr. Gessler's expert testimony.

CONCLUSION

The purpose of Plaintiffs' trial brief is to preview important legal arguments and evidentiary issues that will arise during the course of trial. Plaintiffs respectfully request that the Court:

1) Make specific findings that the challenged laws fail under both Montana precedent and the *Anderson-Burdick* test;
2) Admit certain deposition designations and exhibits;
3) Take judicial notice of certain facts not reasonably subject to dispute;
4) Overrule the Secretary's boilerplate objections on the basis of authentication and surprise; and
5) Discredit the testimony of the Secretary's expert witnesses.

DATED THIS 8th day of August, 2022.

Respectfully submitted,

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MONTANA 13TH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

MONTANA DEMOCRATIC PARTY AND MITCH BOHN; WESTERN NATIVE VOICE; MONTANA NATIVE VOTE; BLACKFEET NATION; CONFEDERATED SALISH AND KOOTENAI TRIBES; FORT BELKNAP INDIAN COMMUNITY; NORTHERN CHEYENNE TRIBE; 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.	)

REMOTE DEPOSITION OF SEAN TRENDE
APRIL 21, 2022

REPORTED BY: Tina Alfaro, RPR, CRR, RMR

DIGITAL EVIDENCE GROUP
1730 M Street, NW, Suite 812
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enhance my knowledge base.

Q. And do you think having a doctorate will add to your qualifications?

MR. MORRIS: Objection, vague. Go ahead, Sean.

A. To testify. I mean, I think it's a credential that courts look at.

Q. And how close are you to completing your doctorate?

A. I had hoped to be done by this semester, and then things got crazy with redistricting with all the litigation going at once because of the late census. So I should defend this summer.

Q. So it's fair to say you will not be awarded your doctorate in May 2022 as you asserted in your report?

A. That's right. When I wrote the report my application to graduate had been approved and my advisor and I were hopeful I would finish things up, but that's just not going to happen.

Q. Are you done drafting your dissertation?

A. No.

expert in the effect of voting laws on turnout?

A. Yes.

Q. Okay. And what is your basis for describing yourself as an expert as it relates to the effect of voting laws on turnout?

A. Well, I've been admitted in multiple courts testifying to that subject matter. I have a general -- you know, an understanding of the political science literature in this. I teach a class called voter participation in turnout. There's probably other things, but off the top of my head I think those are the -- the highlights.

Q. Have you authored any publications in a journal that is peer reviewed by political scientists concerning whether voting laws have an effect on the turnout of different racial groups?

A. No.

Q. Have you authored any publications in a peer-reviewed journal concerning whether voting laws have an effect on turnout generally?

A. No.

Q. Have you authored any publications in a

peer-reviewed journal concerning election day registration?

A. No.

Q. Have you authored any publications in a peer-reviewed journal concerning voter identification?

A. No.

Q. Have you authored any publications in a peer-reviewed journal concerning youth voting?

A. No.

Q. Have you authored any publications in a peer-reviewed journal concerning native voting?

A. No.

Q. Have you authored any publications in a peer-reviewed journal concerning absentee ballot assistance?

A. No.

Q. Have you published anything at all in a peer-reviewed journal?

A. No.

Q. Have you ever submitted an article seeking publication in a peer-reviewed journal?

A. Yes.

Q. What journal?

A. So I was contacted by a couple of epidemiologists at the beginning of COVID doing some work on the seasonality of COVID, and I did the statistical analysis for that. I don't -- we submitted to two journals and the second one sat on it for six months and during that six-month time frame someone else published the same work, but I don't remember which journals it was.

Q. And so was that article that you discussed ever published?

A. No.

Q. And correct me if I'm -- was that to epidemiology journals?

A. Oh, yes, yes. Not a political science journal.

Q. Have you ever served on the editorial board of a peer-reviewed journal?

A. No.

Q. Have you ever published any articles outside of the peer review context concerning

whether voting laws have a differential effect on turnout of different racial groups?

A. Gosh, I don't know. I've written a lot of articles, but not as I sit here can I remember one.

Q. Okay. And have you published any articles, again, outside of the peer reviewed context, concerning whether voting laws have an effect on turnout overall?

A. Again, not as I sit here can I remember.

Q. Okay. Have you published any articles whatsoever concerning the effect of election day registration?

A. Again, I can't remember anything as I sit here.

Q. Have you published any articles concerning the effect of voter identification laws?

A. Again, as I sit here, I can't remember any.

Q. Have you published any articles concerning youth voting?

A. I can't remember one way or the other. That one I would be surprised if it didn't come up

A. Yeah. That was unfortunate. Street got it right in his report.

Q. Okay. Great. That was my next question, if those were -- the correct citations had been identified in the Street rebuttal report?

A. Yeah.

Q. Okay.

Isn't it the case that both of these articles look at public opinion?

A. Yes, that's my recollection.

Q. Isn't it the case that neither of these articles assess the impact of photo ID laws on fraud?

A. The actual impact?

Q. Yes.

A. Yeah.

Q. Okay. And so you cited both of these articles for the sentence "After all, even studies that are critical of photo identification laws find these laws to be popular and effective in reducing fraud." Do you think that's an accurate description of the Atkeson and Stewart articles?

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

MONTANA DEMOCRATIC PARTY AND 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,	: Cause No. DV 21-0451
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.	:

Deposition of SCOTT GESSLER
Conducted Remotely
Friday, April 22, 2022
9:03 a.m.

Reported by: Matthew Goldstein, RMR, CRR

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My opinions are based on the assumption that Election Day registration is available wherever people can vote in person on Election Day.

BY MR. GORDON:

Q. In Montana?

A. I hope that's helpful.

Q. Sure.

Just to clarify that last -- your assumption, that was relative to Montana; correct?

A. That is correct.

Q. Paragraph 20 --

A. Frankly, that would apply in Colorado too. I don't think there's any places in Colorado where you can show up and vote yet not register to vote that day.

Q. Paragraph -- I'm sorry. I don't mean to cut you off. I keep thinking you stopped.

Paragraph 21 says, "Reducing election day work volume also reduces confusion and mistakes."

We talked about this earlier, but just

MR. MORRIS: Object to the form.

THE WITNESS: I don't know enough about tribal IDs to really give you a good opinion on that. My guess is that they're strong evidence because, you know, tribal lands in Montana are, you know, relatively compact and form their own political jurisdictions and oftentimes own cultural -- have their own cultural -- strong cultural and senses of community. So my guess is definitely, yes, but I don't know enough.

BY MR. GORDON:

Q. And you say you don't know much about concealed carry permits, so am I right to assume that you don't know whether Montana concealed carry permits actually prove residency?

A. Yeah, I don't know the requirements for getting a Montana concealed carry permit.

Q. Back to paragraph 41 -- actually, let's move on to paragraph 42, Subsection C of your report at the bottom of page 23.

Here C says, "By prohibiting individuals from receiving compensation for collecting voted

ballots, Montana's law imposes little burden on voters, reduces opportunity for fraud, and fosters confidence in elections."

That's your opinion with respect to HB530?

A. Yes.

Q. And the bases for that opinion and the support for that opinion are contained in the balance of your report through page 28; is that correct?

MR. MORRIS: Object to the form.

THE WITNESS: Yes, that plus my knowledge and experience.

BY MR. GORDON:

Q. What methodology did you apply in reaching the conclusion reflected on page 23 of your report?

A. I would say the same methodology as before. I looked at the laws. I looked at how they operated. I applied my knowledge. I applied my experience. And I relied on the sources cited in there. I would have to look at those sources

paragraph on that page.

MR. MORRIS: I'm sorry. Matt, which paragraph did you say?

MR. GORDON: Paragraph 47 now.

THE WITNESS: Okay. I'm tracking now.

BY MR. GORDON:

Q. You say HB530 "serves important antifraud purposes."

A. Yes.

Q. Okay. And what's that conclusion based on?

A. That conclusion is based on -- I have seen when election workers, volunteers, I analogize to signature collectors, get paid, that creates a new incentive to people who sometimes want to cut corners or do things incorrectly so that they can either increase their efficiency or their monetary compensation.

Q. Any evidence -- I'm sorry. Go ahead.

A. So that's what it's based on.

Q. Any evidence of that phenomenon occurring in Montana that you're aware of?

A. I know I had reviewed some instances of voter fraud in Montana. I don't specifically remember if they applied to that situation. So I don't specifically recall.

Q. In paragraph 47 and paragraph 48, you talk about the financial motivation and the profit motive to this aspect of the voting process.

Do I have that correct?

A. Yes.

Q. And do I correctly understand that your concerns about introducing the financial motivation or profit motive based on ballot collection is at the heart of your concern -- or I should say at the heart of your contention that placing this prohibition on paid ballot collection is a -- is something that serves an important antifraud purpose?

A. Correct.

Q. And so for people to whom this prohibition applies who do not have a financial motive or a profit motive to collect ballots, HB530 wouldn't have much effect on their incentive

MR. MORRIS: I'll just object to the compound.

THE WITNESS: I don't have enough evidence to conclude that.

BY MR. GORDON:

Q. Are you confident saying that Joe Biden was legitimately elected president of the United States?

A. How do you define "legitimately"?

Q. How do you define it? Are you unwilling -- let me just ask you this: Mr. Gessler, you're unwilling to say that Joe Biden was legitimately elected president of the United States in 2020?

MR. MORRIS: Object to the form.

THE WITNESS: Let me explain my answer. I do think there are serious, serious concerns of certainly what happened in Wisconsin and other jurisdictions with hundreds of millions of dollars spent, through government agencies, to target specific demographics to assist and help Joe Biden get elected. I have very serious concerns about

that. And that recent report from Wisconsin I think validates and creates many of those concerns.

I do think there are many concerns with respect to Pennsylvania when you have such a large number of an overvote and the level of, frankly, incompetence that was displayed through their mail ballot elections.

I do have deep concerns in Nevada from some of the procedures that were witnessed by some of the affidavits -- affiants in the case that was ultimately unsuccessful. I have very deep concerns about that. So those are certainly three states that I have concerns about.

BY MR. GORDON:

Q. And I didn't ask you if you had concerns about states.

I asked you, in your opinion, was President Biden legitimately elected president of the United States in the 2020 election, or do you consider that outcome to be illegitimate?

A. So when you asked me about legitimacy,

you asked me to define the term, which is what I did in answering you. If you ask me to opine on a different approach to legitimacy that you seek to define, I'm certainly willing to do that.

Q. Do you believe that the results of the 2020 presidential election were valid?

A. I think the results were not valid. That does not necessarily mean I think that Joe Biden should not be elected, but I don't think the results were valid in Pennsylvania, Nevada and Wisconsin.

I'm not sure --

Q. Are you contending --

A. Let me finish.

Q. Let me just --

A. I don't have evidence and I'm not sure that when you say "valid" that means the result should have been different as far as the overall declared winner. But the actual validity as to whether or not they accurately reflected the voters' will, I don't think -- I have serious concerns whether or not they were valid.

Q. Mr. Gessler, have you shared your concerns and your allegations about the 2020 election and your concerns about its validity and legitimately [sic] on public forums?

A. I'm trying to think about that. I don't believe so, but some of my concerns may have been publicized on a public forum.

Q. Do you believe that spreading concerns about the legitimacy or validity of the 2020 election is helpful or damaging to democracy?

MR. MORRIS: Object to the form.

THE WITNESS: I believe it's helpful.

BY MR. GORDON:

Q. How is it helpful?

A. Because it's important to discuss and air and debate and analyze these issues rather than sweep them under the rug. And when people sweep these under the rug, that creates greater suspicion and concerns, and it reduces the ability or willingness of people to reform our election processes to respond to concerns.

And it creates more suspicion and

IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

Montana Democratic Party and 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 Group,
Plaintiffs,

vs. Cause No. DV-56-2021-451

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

_____

DEPOSITION UPON ORAL EXAMINATION OF

DOUG ELLIS

BE IT REMEMBERED, that the deposition upon oral examination of DOUG ELLIS, appearing at the instance of the Plaintiffs, was taken via Zoom on April 20, 2022, beginning at 9:30 a.m., pursuant to Montana Rules of Civil Procedure, before Robyn Ori English, Court Reporter - Notary Public.

A. Yes.
Q. What is the basis for your belief?
A. Observation.
Q. Did you time how long it took anybody to vote in that election?
A. No, I did not.
Q. Did you ask anybody how long they stood in line to register and vote in that election?
A. No, I did not.
Q. So this is your estimate based on what you observed?
A. It is.
Q. And to be clear, when you're talking here in paragraph 19, you're talking about election day registrants at your office, correct?
A. Correct.
Q. You don't contend, do you, that election day registration affects line length at any of the other polling locations in Broadwater County where most of the people who vote in person vote?
MR. MORRIS: Object to the form.
THE WITNESS: No.
Q. (By Mr. Gordon) In fact, election day registration has no effect on the lines at the five precincts and three polling locations in Broadwater

County other than your election office. Isn't that true?

MR. MORRIS: Objection, misstates.

THE WITNESS: Yes.

Q. (By Mr. Gordon) Paragraph 20 you talk about voters complaining to you about how long they waited in lines to vote. These are voters who voted at your office?

A. Correct.

Q. Not voters who voted at the other polling sites, correct?

A. Correct.

Q. And when you say, "Ironically, it is usually the voters who want to register to vote on election day that complain the most about the lines," that reflects that most of the people who come to vote at your office on election day are people who are there for election day registration, correct?

A. Correct.

Q. And in paragraph 21 when you talk about election day registration substantially increasing wait times for other voters, again, you're just talking at your county election office, correct?

A. Correct.

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