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IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

Montana Democratic Party and Mitch Bohn,

Plaintiffs,

Western Native Voice, *et al.*,

Plaintiffs,

Montana Youth Action, *et al.*,

Plaintiffs,

vs.

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

Defendant.

Consolidated Case No. DV 21–0451

Hon. Michael Moses

DEFENDANT'S TRIAL BRIEF

Pursuant to this Court's Order Granting Joint Stipulation to Modify Pretrial Deadlines, Dkt. 147, Defendant Secretary of State Christi Jacobsen submits this Trial Brief and states as follows:

I. The Separation of Powers precludes this Court from requiring the Secretary to present evidence of "a problem" the Legislature intended to fix before a law can be held constitutional.

1. The procedure guiding this Court's evaluation of the laws at issue in this case is two-part: first, this Court must determine the appropriate level of scrutiny to apply; second, this Court must apply that level of scrutiny. This second step requires an analysis of the interests furthered by these laws: strict scrutiny requires the interests to be compelling; middle-tier scrutiny requires only that the laws be reasonable; rational basis requires only that the interest be "legitimate." *Montana Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 18, 366 Mont. 224, 286 P.3d 1161.

2. Requiring the Secretary to present evidence of "a problem" that the Legislature was attempting to fix by passing the laws at issue in this case imposes an additional burden on the State outside of this well-established method.

3. The Secretary intends to object to Plaintiffs arguing that the Secretary must present evidence that the Legislature was aware of a specific problem in Montana before passing the laws at issue in this case because it limits the power vested in the Legislature by Article V, Section 1, and Article IV, Sections 2–3, of Montana's Constitution.

4. Further, Plaintiffs' proposal subjugates the Legislature's ability to pass law to the judiciary, by requiring the courts to evaluate that evidence of a specific problem that the Legislature intended to remedy through the legislation prior to engaging in an analysis of whether that law is constitutional.

5. "Absent language to the contrary, a direct power conferred upon one necessarily excludes the existence of such power in the other. This fundamental premise lies at the very root of the constitutional system of government." *Board of Regents v. State*, 2022 MT 128, ¶ 19, ___

Mont. ___, 512 P.3d 748 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803)) (emphasis added).

6. Application of this principle prohibits this Court from furthering Plaintiffs' argument that the Legislature must proffer specific evidence of a "problem" before the Legislature can regulate Montana's elections or pass laws concerning the administration of Montana elections.

7. Article V, § 1, of Montana's Constitution states "[t]he legislative power is vested in a legislature consisting of a senate and a house of representatives." It does not say the Legislature may only pass laws when it identifies "a problem" that must be fixed.

8. This interpretation is consistent with decades of precedent. When passing laws, the Legislature "has the power to do as it pleases, save and except as limited expressly or by necessary implication by some constitutional provision." *Mulholland v. Ayers*, 109 Mont. 558, 99 P.2d 234, 239–240 (Mont. 1940); *see also Larson v. State By & Through Stapleton*, 2019 MT 28, ¶ 40, 394 Mont. 167, 434 P.3d 241. Instead of an express or implied limitation, the legislation at issue in this case is a product of an express constitutional grant of authority: "The 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; *see also* Mont. Const. art. IV, § 2 (granting the Legislature the power to determine registration and residence requirements an individual must meet before being entitled to vote). Just as it empowers the Board of Regents to regulate college campuses, Montana's Constitution explicitly empowers the Legislature to regulate Montana's elections.

9. The judiciary "has no license to psychoanalyze" the Legislature or engage "in a lengthy examination of the evidence presented to the Legislature"; the role of a district court "is not to determine the prudence of a legislative decision." *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 20, 354 Mont. 133, 227 P.3d 42. "[T]he fact finding process and motivation of legislative bodies is entitled to a presumption of regularity and deferential review by the judiciary." *Id.*, ¶ 18 (citations omitted). "Adherence to this principle is not fawning or groveling before the legislature, it is respect for the role of the policymaking body in our system of government." *Id.* Contrary to Montana law, Plaintiffs invite the Court to inquire into the "prudence" of the legislation, the "fact finding process and motivation" of the Legislature, and the propriety of the Legislature's "policymaking" role. Plaintiffs' argument disregards the well-established principle that "it is for the legislature to pass upon the wisdom of a statute." *Id.*, ¶ 20 (citing *McClanathan v. Smith*, 186 Mont. 56, 66, 606 P.2d 507, 513 (1980).

10. *McLaughlin v. Montana State Legislature*, 2021 MT 178, ¶ 8, 405 Mont. 1, 493 P.3d 980, which concerned the subpoena power of the Legislature is instructive. There, the Court considered a secondary authority of the Legislature: the "power to secure needed information in order to legislate." *Id.*, ¶ 6 (internal quotations and citations omitted). When considering this subsidiary aspect of the Legislature's ability to pass laws, the Court found the judiciary "generally must indulge a presumption that the legislative activity has as its object a legitimate goal toward possible legislation[.]" *Id.*, ¶ 8 (citation omitted). Plaintiffs' position defies this presumption. In doing so, Plaintiffs necessarily contend that legislative subpoenas are entitled to a greater presumption of validity than the Legislature's duly passed laws.

11. The Constitution is not only a limitation on the Legislature; it likewise limits the power of the executive and judicial branches. *See State ex rel. Woodahl v. Straub*, 164 Mont. 141, 147–148, 520 P.2d 776, 780 (Mont. 1974) (a statute is invalid if it "contravene[s] some express or implied limitation" found in the Constitution); *see also North Star Dev., LLC v. Montana Pub. Serv. Comm'n*, 2022 MT 103, ¶ 22, __ Mont. __, 510 P.3d 1232 (defining subject matter jurisdiction of courts). Under the Montana Constitution, "each branch of government is separate and distinct and is immune from the control of the other two branches of government in the absence of express constitutional authority to the contrary." *Powder River Cty. v. State*, 2002 MT 259, ¶ 111, 312 Mont. 198, 60 P.3d 357 (citing Mont. Const. art III, § 1).

12. With respect to the legislation at issue in this case, the Legislature was not only executing its core policymaking function, Mont. Const. art. V, § 1, but acting in accordance with the Constitution's express command that it set registration and residency requirements that an individual must meet in order to be entitled to vote, Mont. Const. art. IV, § 2, establish the "requirements for residence, registration, absentee voting, and administration of elections," Mont. Const. art. IV, § 3, exercise its discretion to decide whether to "provide for a system of poll booth registration," Mont. Const. art. IV, § 3, and "insure the purity of elections and guard against abuses of the electoral process," Mont. Const. art. IV, § 3. Because the legislation at issue arises as a result of a direct delegation of constitutional authority to the Legislature, recent Montana Supreme Court precedent instructs that the exercise of power over that authority by both the executive and judicial branches of government is necessarily limited. *See Board of Regents*, ¶ 19.

13. Enforcement of the separation of powers "isn't about protecting institutional prerogatives or governmental turf," it is about—in this case—respecting Montana citizens' choice to vest legislative power in the Legislature. *See Gundy v. United States,* 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).

14. Allowing Plaintiffs' to argue at trial that the statutes at issue may be held constitutional only if the State presents evidence of a specific "problem" in Montana elections that the statutes are meant to solve is contrary to well-established law, misleading, and will unduly prejudice the Secretary. *See Montana Auto. Ass'n v. Greely,* 193 Mont. 378, 383–384, 632 P.2d 300, 303–304 (1981) (finding the compelling need for the legislation at issue was demonstrated by both common understanding and judicial precedent so no additional evidence was required). All such evidence or argument should be excluded as irrelevant and unduly prejudicial pursuant Mont. R. Evid. 401-403. *See Gordon v. Kuzara*, 2012 MT 206, ¶ 13, 366 Mont. 243, 286 P.3d 895; *see also* Mont. R. Evid. 402 (irrelevant evidence is not admissible).

II. Plaintiffs' must prove, beyond a reasonable doubt, that the laws at issue are unconstitutional and that the laws at issue are unconstitutional in all of their applications.

15. The party challenging the constitutionality of a statute bears "the heavy burden of proving" each statute "is unconstitutional 'beyond a reasonable doubt.'" *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548 (citations omitted).

16. Statutes are presumed to be constitutional, *Board of Regents*, ¶ 10, and "if any doubt exists, it must be resolved in favor of the statute." *State v. Lamoureux,* 2021 MT 94, ¶ 14, 404 Mont. 61, 485 P.3d 192, *cert. denied,* 142 S. Ct. 860 (2022)

17. Further, Plaintiffs bring facial challenges to HB 176, SB 169, and HB 530. A facial challenge "'to a legislative act is . . . the most difficult challenge to mount successfully'" because

the challenger "must show that 'no set of circumstances exists under which the [challenged sections] would be valid, i.e., that the law is unconstitutional in all of its applications.'" *Mont. Cannabis Indus. Ass'n v. State (MCIA II)*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

III. An Equal Protection Claim Requires Evidence of Discrimination

18. Because the laws are facially neutral, Montana law requires Plaintiffs to present substantial evidence of discrimination to prove a valid equal protection claim.

19. "[I]t is a basic equal protection principle that the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose." *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421.

20. "The principal purpose of Montana's Equal Protection Clause is to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action." *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 16, 302 Mont. 518, 522, 15 P.3d 877, 882.

21. Proving discriminatory intent requires showing "more than mere awareness of consequences," it requires proof that the Legislature enacted the laws at issue in this case "because of, not merely in spite of, [their] adverse effects upon an identifiable group" *Rack Room Shoes v. U.S.*, 718 F.3d 1370, 1376 (Fed. Cir. 2013) (citations omitted).

22. The Secretary intends to move for judgment as a matter of law at the conclusion of Plaintiffs' case due to their inability to present substantial evidence of a discriminatory intent towards the alleged class, to the extent Plaintiffs have identified any "class." *See Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002, 1010 (Mont. 1981).

IV. The Secretary intends to exclude speculative evidence regarding the Legislature's intent in passing the legislation at issue in this case.

23. "A verdict cannot rest upon conjecture, however shrewd, nor upon suspicion, however well grounded." *Kuiper v. Goodyear Tire & Rubber Co.*, 207 Mont. 37, 53, 673 P.2d 1208, 1217 (1983).

24. The Secretary intends to object to the introduction of any speculative evidence regarding the Legislature's intent in passing the legislation at issue in this case.

25. Primarily, these objections will target Plaintiffs' continued attempts to reference litigation relating to the Ballot Interference and Protection Act as well as Plaintiffs' attempts to argue that this legislation was connected to claims that the 2020 presidential election was stolen.

V. The Secretary intends to object, on due process grounds, if not given sufficient time to present their defense in this case.

26. "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *Draggin' Y Cattle Co., Inc. v. Addink*, 2016 MT 98, ¶ 15, 383 Mont. 243, 371 P.3d 970 (quotation omitted); *Halldorson v. Halldorson*, 175 Mont. 170, 573 P.2d 169, 171 (Mont. 1977) (notice and opportunity to be heard are essential elements of due process).

27. Trial in this case is set for 10 days. Based on communications regarding the scheduling of witnesses, Plaintiffs intend to continue their case in chief until at least Tuesday, August 23, 2022, potentially leaving Defendant only three days to present her defense to all of Plaintiffs' claims against all of the challenged laws.

28. Depriving the Secretary of sufficient time to present her defense of the laws challenged in these consolidated cases deprives her of a fair trial and a meaningful opportunity to be heard.

29. Defendant will object on due process ground if not granted sufficient time at trial in this matter.

Dated this 8th day of August, 2022.

/s/ Leonard H. Smith

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