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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF YELLOWSTONE

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|---|---|
| WESTERN NATIVE VOICE, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe,<br><br>Plaintiffs,<br><br>vs.<br><br>CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State,<br><br>Defendant. | Cause No. DV-21-0560<br><br>Hon. Donald Harris<br><br>**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR CONSOLIDATION** |

## INTRODUCTION

Plaintiffs in the instant action have asked this court to exercise its discretion and conserve judicial resources by consolidating this case with the pending case of *Montana Democratic Party et al. v. Jacobsen*, Cause No. DV 21-0451 (Thirteenth Judicial District Court, Hon. Michael Moses) (hereinafter "*MDP*"). Defendant Christi Jacobsen ("Jacobsen") objects, arguing that the current procedural postures of the two cases render this motion premature and that it is not yet clear whether there exist common issues of law and fact in the two cases. Defendant is wrong on both counts. As a review of Montana and Ninth Circuit case law illustrates, it is often appropriate to consolidate when a motion to dismiss is pending. And it is readily apparent that there are many common factual and legal issues in these cases. Consolidation at this point will further judicial economy, avoid unnecessary cost and delays, and will not result in prejudice against Defendant Jacobsen. Therefore, this court should grant Plaintiffs' Motion to Consolidate.

## ARGUMENT

### I. Consolidation promotes judicial economy, including at this stage of the proceedings.

Relying almost uniformly on cases outside of the state of Montana and the Ninth Circuit, Defendant Jacobsen argues that Plaintiffs' motion to consolidate is premature because a motion to dismiss is pending in *MDP*. *See* Def.'s Resp. to Pls.' Mot. Consolidation ("Def.'s Resp."). Defendant incorrectly asserts this is a bright-line rule. However, whether a motion to consolidate is appropriate before dispositive motions are resolved is a highly fact-specific determination. Courts in both Montana and the Ninth Circuit have found consolidation to serve judicial economy where the cases are substantially similar and at the beginning stages of litigation irrespective of pending motions in either action. Such is the case here. Therefore, consolidating

at this stage of the litigation is well within this Court's discretion. *Ass'n of Unit Owners of Deer Lodge Condo. v. Big Sky of Montana, Inc.*, 245 Mont. 64, 86, 798 P.2d 1018 (1990).

Defendant Jacobsen aptly notes that the "purpose of consolidation is to permit convenience and economy by avoiding unnecessary costs or delay," Def.'s Resp. 3, but goes on to urge a waste of judicial resources. *See also Park Cnty. Stockgrowers Ass'n Inc. v. Montana Dep't of Livestock*, 2014 MT 64, ¶ 11, 374 Mont. 199, 203, 320 P.3d 467 (quoting *Means v. Mont. Power Co.*, 191 Mont. 395, 401, 625 P.2d 32 (1981)); *Tucker v. Tucker*, 2014 MT 115, ¶ 6, 375 Mont. 24, 325 P.3d 413 (affirming district court decision to consolidate related family actions for judicial economy). Defendant suggests that consolidation at this point would lead to confusion, Def.'s Resp. 4, but this contention is unfounded. "Consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Park Cnty. Stockgrowers*, ¶ 11 (quoting *Johnson v. Manhattan R. Co.*, 289 U.S. 479, 496-97 (1933)). Defendants in consolidated actions retain their right to proceed with responsive pleadings. Moreover, considerations of convenience and economy weigh against considerations of confusion and prejudice, especially where, as here, the purported confusion is non-existent. *See Wilhite v. Littlelight*, No. CV 19-20-BLG-SPW-TJC, 2020 WL 6562109, at *1 (D. Mont. Nov. 9, 2020) (finding consolidation appropriate where it was not readily apparent that any party would suffer unfair prejudice).

Contrary to the bright-line rule asserted by Defendant, a pending motion to dismiss is not a bar to determination of a motion for consolidation pursuant to Mont. R. Civ. P. 42(a). *See, e.g., Farmers Coop. Ass'n v. Amsden*, 339 Mont. 452, 171 P.3d 684 (finding district court did not err by considering the motion to consolidate when granting a party's motion to dismiss); *Carr v. Bett*,

1998 MT 266, ¶ 13, 291 Mont. 326, 970 P.2d 1017 (noting in procedural history the grant of a motion to consolidate appeals despite pending motions to dismiss); *BNSF Ry. Co. v. O'Dea*, No. CV-07-137-BLG-CSO, 2008 WL 11415893, at *3 (D. Mont. Jan. 4, 2008) (consolidating actions for purposes of addressing pending motions to dismiss), *rev'd and remanded on other grounds*, 572 F.3d 785 (9th Cir. 2009). Where the motions to dismiss cover similar legal theories, as will likely be the case here, courts in the Ninth Circuit have found consolidation appropriate prior to rulings on dispositive motions. *See Boy 1, Boy 2, & Boy 3 v. Boy Scouts of Am.*, 2011 WL 13127154, at *2 (W.D. Wash. Apr. 5, 2011) (granting the motion to consolidate where the two motions to dismiss both "challenge[d] the core legal theory that undergird[ed] both of the actions"). Consolidation prior to deciding similar dispositive motions "prevent[s] inconsistent rulings on th[e] common legal and factual issue, [] conserve[s] judicial resources, [and] expedite[s] resolution." *Id.* Defendant's responsive pleading in this case "will likely include a motion to dismiss." Def.'s Resp. 2. Given the common issues of law and fact in both cases, the motions to dismiss will largely overlap with the pending motion to dismiss in the *MDP* case, which further supports consolidation. *See David Osher v. JNI Corp.*, 2001 WL 36176415, at *2 (S.D. Ca. July 10, 2001) (finding it preferable from a judicial economy standpoint to "deal with a single consolidated complaint and a single motion to dismiss.").

Additionally, courts in the Ninth Circuit have found consolidation appropriate where both cases are in the early phases of litigation. *Compare Borteanu v. Nikola Corp.*, 507 F. Supp. 3d 1128, 1135 (D. Ariz. 2020) (finding judicial efficiency and economy weighing in favor of consolidation where "[c]ases are all in extremely early stages of litigation, and the potential for delay, confusion, and prejudice is very low.") *and Rollolazo v. BMW of N. Am., LLC*, 2016 WL 9173465, at *3 (C.D. Cal. Sept. 15, 2016) (reasoning that consolidation was unlikely to cause

significant inconvenience, delay, or expense were all cases where the court "ha[d] yet to set a trial date in any of the actions, and the parties ha[d] not started discovery.") *with Miesegaes v. Dep't of State Hosps. – Atascadero,* 2020 WL 5414827, at *2 (C.D. Cal. Aug. 6, 2020) (concluding that consolidation would cause significant delay because one case had been open over five years and the other was still at the pleading stage). And although Defendant's selective citations might have suggested otherwise, courts further afield than Montana and the Ninth Circuit have found the same as those within. *See, e.g., Albuquerque Pub. Sch. Bd. of Educ. v. Cabrera,* 2021 WL 2283799, at *2 (D.N.M. Apr. 29, 2021) (granting consolidation where "discovery [was] far from over" and the court had yet to rule on a pending motion to dismiss); *Troy Stacy Enterprises Inc. v. Cincinnati Ins. Co.*, 337 F.R.D. 405, 408 (S.D. Ohio 2021) (concluding that consolidation would "streamline the litigation of each case" where the plaintiffs filed four complaints and the defendants moved to dismiss each one). The current early stage of both the instant litigation and *MDP* weighs in favor of consolidation at this point and not, as Defendant would have it, against.

## II. It is already sufficiently clear that common issues of law and fact predominate between the two cases, rendering consolidation appropriate at this stage.

Montana has granted district courts the discretion to consolidate cases where the two cases "involve a common question of law or fact." Common issues of both law and fact predominate in the present case and the *MDP* case. The mere presence of some issues that are individual to one case or the other does not mean that the cases should not be consolidated.

Based on the complaints, *MDP* and the present case are factually very similar. As outlined in Plaintiffs' brief in support of the motion to consolidate, the cases challenge two of the same laws: HB 176 and HB 530. Defendant argues that the two cases concern two distinct populations—Native Americans and young Montanans—and therefore do not share factual overlap. This concern is misguided. First, the *MDP* complaint also explicitly identifies the harm caused by these laws to

Indigenous communities. *MDP* Amended Complaint, ¶ 2, 7. For example, Count II of the *MDP* Complaint explicitly argues that the Election Day Registration Ban "severely burdens the right to vote of Montana voters, [including] indigenous communities." *MDP* Amended Complaint, ¶ 130. Second, there is considerable overlap between students/young Montanans and Native Americans. Many Native Americans residing in Montana are also young voters between the ages of 18 and 29. *See* SEX BY AGE (AMERICAN INDIAN AND ALASKA NATIVE ALONE), TABLE ID B01001C, 2019 AMERICAN COMMUNITY SURVEY, U.S. CENSUS BUREAU (estimating that as of 2019, about 11,322 Montanans between the ages of 18 and 29 identified as American Indian or Alaska Native alone).

While Defendant obliquely states that "there is no need for immediate consolidation to allow parties to share written discovery or simultaneous depositions," Def.'s Resp. 5, they do not respond substantively to Plaintiffs' point that these cases will have very similar discovery requests. Plaintiffs in the instant action may well be witnesses in the *MDP* litigation. The same government officials and similar experts will be deposed and provide testimony in each of these cases. The government would be forced to defend the same set of laws in multiple cases. Consolidation would avoid this unnecessary duplication. And there is no risk of delay due to the cases being at "different stages of preparedness for trial." *Cf. Servants of Paraclete, Inc. v. Great Am. Ins. Co.*, 866 F. Supp. 1560, 1573 (D.N.M. 1994).

Defendant also disputes the argument that the cases share common legal questions. This is despite the fact that the two cases share allegations that the same laws violate the same constitutional provisions, charges to which Defendant will likely respond with the same defenses. Further, Defendant claims that the two cases present "conflicting legal cases." Def.'s Resp. 5 n.2. However, the arguments that these laws harm—and were enacted due to their harm to—both Native communities and young Montanans are not mutually exclusive. The laws can and do harm

multiple communities—as explicitly stated in the *MDP* case. *See MDP* Amended Complaint, ¶ 2. And a showing of intentional discrimination—necessary to the equal protection challenges—does not require that the discriminatory purpose alleged be the *sole* or *primary* purpose in enacting the law in question—it must merely have played a role in the action. *Losleben v. Oppedahl*, 2004 MT 5, ¶ 22, 319 Mont. 269, 83 P.3d 1271 ("Intentional discrimination means that a defendant acted at least in part because of a plaintiff's protected status. . . . To avoid summary judgment, [the claimant] must produce evidence . . . that the decision was racially motivated." (internal quotation marks omitted)). A law might intentionally discriminate against multiple classes.

Defendant also attempts to make hay of the fact that the level of scrutiny applied in equal protection cases varies based on the classification of the group in question. Def.'s Resp. 6. However, any potential difference in the applicable level of scrutiny impacts only one of the multiple claims at issue in these two cases—those brought under the Equal Protection Clause. And elsewhere in these cases, the fundamental rights at issue in these cases should all be subject to strict scrutiny. *Butte Community Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986) (overruled on other ground after the constitution was amended in 1988 regarding welfare); *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445; *State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 206, 113 P.3d 281, 288; *see also*, *Oberg v. Billings*, 207 Mont. 277, 674 P.2d 494 (1983) ("Examples of fundamental rights include privacy, freedom of speech, freedom of religion, right to vote and right to interstate travel."). The possibility that varying scrutiny may be applied to one of the several claims brought by plaintiffs does not mean that common legal issues do not nonetheless predominate throughout the cases.

Finally, Defendant argues that *MDP* presents a facial challenge, while the *WNV* case is an as-applied challenge, and that therefore the two ought not be consolidated. However, "the

distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 331 (2010). Rather, the distinction "goes to the breadth of the remedy employed by the Court." *Id.* Here, the two Plaintiffs have sought similar relief: declarations that HB 530 and 176 violate the Montana Constitution and permanent injunctions against enforcement of the two bills. *WNV* Complaint, p. 42–43; *MDP* Amended Complaint, p. 47. Furthermore, in at least one instance, both cases explicitly do advance facial challenges: both allege that the language regarding "pecuniary benefit" in HB 530 is unconstitutionally vague on its face. *WNV* Complaint, ¶ 195–204; *MDP* Amended Complaint, ¶ 154.

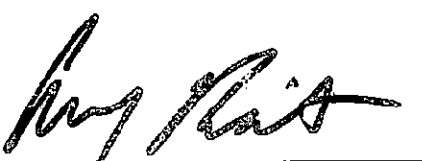
Even if this court were to conclude that the legal questions presented are not identical, the cases still merit consolidation. *Guild Assocs., Inc. v. Bio-Energy (Washington), LLC,* 309 F.R.D. 436, 440 (S.D. Ohio 2015) (stating that "questions of law and fact need not be identical" for purposes of Rule 42 consolidation). The Montana Supreme Court has previously consolidated cases that shared issues of fact even when they did not share identical legal questions. *See, e.g., State ex rel. Great Falls Tribune Co. v Montana Eighth Judicial District,* 238 Mont. 310, 777 P.2d 345 (1989). It is entirely acceptable for there to be some legal issues that only certain parties are involved with in the resulting consolidated case—as discussed above, consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Park Cnty. Stockgrowers,* ¶ 11 (quoting *Johnson v. Manhattan R. Co.*, 289 U.S. 479, 496-97 (1933)). And it is the plaintiffs in each case who would potentially become involved or burdened with discovery or motions beyond their own claims. *See MacLean v. Evans, Mechwart, Hambleton & Tilton, Inc.*, No. 2:09-CV-521, 2009 WL 2983072,

at *2 (S.D. Ohio Sept. 14, 2009). Given that it is those same plaintiffs who support consolidation, this potential—small—burden should not discourage the court from granting Plaintiffs' motion. Where consolidation will lead to convenience and economy while avoiding costs or delay, as here, the court should take advantage of this tool.

## CONCLUSION

Based on the complaints and initial motions in *MDP* and *WNV*, it is clear that common issues of law and fact predominate. There is need to wait until any motions to dismiss are reviewed. And there will be substantial gains in judicial economy and convenience if these cases are consolidated. For this reason, Plaintiffs respectfully request that the Court grant their motion for consolidation.

DATED THIS 26th day of July, 2021.



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**Subject:** DV-56-2021-0000560-DK - Western Native Voice vs. Jacobsen, Christi As Secretary Of State Of MT;
**Attachments:** 2021-7-26 - Reply in support of consolidation (Harris).pdf

Dear Clerk of District Court:

Attached for filing, please find the Plaintiffs' Reply Brief in Support of Motion to Consolidate. I am filing a similar pleading in the associated case: Cause No. DV 21-0451, in a few moments. Will you please confirm receipt of this filing? If you have any questions you may reach me at 406.396.8222.

I appreciate your assistance and hope you have a wonderful afternoon.

Thank you,
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