

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0172

CHRISTI JACOBSEN, in her official capacity
as Montana Secretary of State,

Defendant and Appellant,

v.

MONTANA DEMOCRATIC
PARTY and MITCH BOHN, WESTERN NATIVE VOICE et al., MONTANA
YOUTH ACTION, et al.,

Plaintiffs and Appellees.

**MONTANA DEMOCRATIC PARTY AND MITCH BOHN'S BRIEF IN
OPPOSITION TO RULE 22(2) MOTION TO STAY**

APPEARANCES:

Matthew Gordon
Perkins Coie LLP
1201 Third Avenue
Suite 4900
Seattle, Washington 98101-3099
(206)359-9000
mgordon@perkinscoie.com

Peter M. Meloy
Meloy Law Firm
P.O. Box 1241
Helena, Montana 59624
(406)442-8670
mike@meloylawfirm.com

John Heenan
Heenan & Cook PLLC
1631 Zimmerman Trail

Dale Schowengerdt
John M. Semmens
CROWLEY FLECK PLLP
P.O. Box 797
Helena, MT 59624-0797
(406) 449-4165
dale@crowleyfleck.com
Leonard H. Smith
David F. Knobel
CROWLEY FLECK PLLP
P.O. Box 2529
Billings MT 59103

Ian McIntosh
William McIntosh Morris
E. Lars Phillips
CROWLEY FLECK PLLP
1915 S. 19th Ave

Billings, MT 59102
(406)839-9091
john@lawmontana.com

Henry J. Brewster
Elias Law Group LLP
10 G Street NE Suite 600
Washington, DC 20002
(202)-968-4596
hbrewster@elias.law

Jonathan P. Hawley
Elias Law Group LLP
1700 Seventh Avenue
Suite 2100
Seattle, Washington 98101
206-656-0179
jhawley@elias.law

*Attorneys for Appellees
Montana Democratic Party and
Mitch Bohn*

Rylee Sommers-Flanagan
Upper Seven Law
P.O. Box 31
Helena, MT 59624
Phone: (406) 396-3373
rylee@uppersevenlaw.com

Ryan Aikin
Aikin Law Office, PLLC
P.O. Box 7277
Missoula, MT 59807
Phone: (406) 840-4080
ryan@aikinlawoffice.com

*Attorneys for Plaintiffs/Appellees
Montana Youth Action, et al.*

Bozeman MT 59719

David M.S. Dewhirst
Solicitor General
Kathleen Lynn Smithgall
Office of the Attorney General
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Austin Markus James
Chief Legal Counsel
Office of the Secretary of State
P.O. Box 202801
Helena, MT 59620-2801
Telephone: (406) 444-6197

Attorneys for Defendant and Appellant

Alex Rate
Akilah Lane
ACLU of Montana
P.O. Box 1968
Missoula, MT 59806
406-224-1447
ratea@aclumontana.org

Alora Thomas-Lundborg*
Jonathan Topaz*
Dale Ho*
ACLU
125 Broad Street
New York, NY 10004
(212) 519-7866

Samantha Kelty*
Native American Rights Fund
1514 P Street N.W. (Rear) Suite D
Washington, D.C. 20005
(202) 785-4166

Jacqueline De León*
Matthew Campbell*
Native American Rights Fund
1506 Broadway
Boulder, CO 80302-6296
(303) 447-8760

Theresa J. Lee*
Election law Clinic
Harvard Law School
6 Everett Street, Suite 5112
Cambridge, MA 02138
(617) 998-1010

*Attorneys for Appellees Western Native
Voice, et al.*

**Admitted pro hac vice*

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INTRODUCTION

The Secretary's request for a stay should be denied because she does not come close to meeting her burden for such extraordinary relief. The preliminary injunction preserves Montanans' long-standing ability to register on election day and use Montana college IDs to vote, and it protects against the unconstitutionally disenfranchising effects of HB 176 and SB 169. The Secretary's motion to stay rests on misguided speculation about voter confusion and election official training, misplaced reliance on inapt cases, and a mischaracterization of the evidence. Far from the seismic shift in law the Secretary's motion suggests, the injunction is unlikely to cause confusion and will require little of election administrators because it merely keeps in place the rules they operated under for many years. And contrary to the Secretary's repeated assertions, the evidence shows that HB 176 already disenfranchised numerous Montana voters in the low-turnout 2021 municipal elections; it threatens to disenfranchise far more if reinstated for the upcoming statewide election. Indeed, if the Secretary's motion is granted, the direct result will be the imposition upon Montanans of the precise harm this lawsuit sought to avoid.

FACTUAL BACKGROUND

I. HB 176 and Election Day Registration

House Bill 176 ("HB 176") eliminated Montana's popular and turnout-driving practice of election day registration ("EDR"), App. 211, which had been in place since 2006, *see* App. 8 ¶ 18. Extensive testimony detailed how many Montanans, and particularly Native Americans, students, the elderly, and disabled and low-income voters, have relied on EDR. *See* App. 34-35, 110-18.

II. SB 169 and Voter Identification

Senate Bill 169 ("SB 169") ended Montana's nearly two-decade long practice of allowing voters to show out-of-state driver's licenses or Montana college or

university IDs at the polls, App. 18 ¶ 56, relegating them to second-tier status and requiring additional documentation for using them to vote. App. 225-231.

STANDARD OF REVIEW

Under Rule 22(3) of the Montana Rules of Appellate Procedure, the Court may “grant, modify, or deny” a motion to stay pending appeal “in the interests of justice[.]” Because a stay is an “intrusion into the ordinary processes of administration and judicial review . . . [it] is not a matter of right, even if irreparable injury might otherwise result.” *Clark Fork Coal. v. Tubbs*, No. BDV-2010-874, 2015 WL 13614529, at *1 (Mont. 1st Jud. Dist. Ct. May 8, 2015) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)).

Montana courts look to the test under the analogous Rule 8 of the Federal Rules of Appellate Procedure, which requires the movant to show: (1) “a strong showing” of likelihood of success on the merits; (2) irreparable injury to the movant; (3) substantial injury to other parties; and “(4) where the public interest lies.”¹ *See, e.g., Clark Fork Coal*, 2015 WL 13614529, at *1 (quoting *Nken*, 556 U.S. at 434); *Taylor v. Mont. High Sch. Ass’n*, No. CDV-2015-719, 2015 Mont. Dist. LEXIS 68 (Mont. 1st Jud. Dist. Oct. 7, 2015). All four factors counsel against a stay here.

ARGUMENT

III. The Secretary will not be irreparably harmed absent a stay.

The Secretary’s motion fails in the first instance because she does not establish that irreparable harm, “the bedrock requirement” for obtaining a stay, *Leiva–Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011), is “probable.” *Doe #1 v. Trump*, 957

¹ The Secretary’s assertion that she need not show a likelihood of success on the merits if she demonstrates the presence of serious legal issues is incorrect. *See infra* Argument I.IV; *see also Clark Fork Coal*, 2015 WL 13614529, at *1 (refusing to stay order under Rule 22 where movant failed to show likelihood of success on the merits).

F.3d 1050, 1059 (9th Cir. 2020) (citing *Nken*, 556 U.S. at 434). Although a movant “cannot meet this burden” through “conclusory . . . assertions and speculative arguments,” *id.*, that’s precisely what the Secretary attempts to do.

The Secretary first argues she will be irreparably harmed because “[a]n order enjoining a duly-enacted statute” always results in irreparable harm. Mot. at 8. But an order preventing the Secretary from enforcing unconstitutional statutes does not cause irreparable injury—“there can be no irreparable harm to a [government] when it is prevented from enforcing an unconstitutional statute because ‘it is always in the public interest’” to protect constitutional liberties. *Joelner v. Vill. of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004). SB 169 and HB 176 are unconstitutional, *see infra* Argument Section IV, and the Secretary therefore will suffer no harm if the Court does not stay the preliminary injunction.

Next, the Secretary asserts that she will be irreparably injured because (1) she has invested time in implementing SB 169 and HB 176; (2) election officials will have to conduct elections without training; and (3) voters will be confused and have less confidence in Montana’s elections because of the preliminary injunction. Appellant’s Rule 22(2) Mot. Stay (“Mot.”) at 8-9. None of these assertions hold water. First, the Secretary’s complaints about administrative burdens—even if true—would not constitute irreparable harm. *Fish v. Kobach*, No. 16-2105-JAR, 2016 U.S. Dist. LEXIS 68727, at *8-9 (D. Kan. May 25, 2016). As the U.S. Supreme Court has noted, “[t]he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.” *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

Second, the Secretary’s speculative and generalized assertions about voter confusion and confidence are insufficient to demonstrate irreparable injury. *Doe #1*, 957 F.3d at 1059; *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 953 (S.D. Miss. 2014). The Secretary fails to identify anything about the injunction that would

lead to voter confusion or decreased confidence. That’s unsurprising, as the injunction *restores* Montana’s long-standing practices of allowing voters to use a student ID and register on election day. The Secretary ignores the fundamental differences between the three cases she relies on and this one: in two of her cases, the preliminary injunctions would have *changed* long-standing practices. *See Stapleton v. Thirteenth Judicial District Court*, OP 20-0293 at 2, 3 (May 27, 2020) (staying injunction to preserve ballot receipt deadline that had been “in place for many years”); *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 950-51, 952 (9th Cir. 2020) (staying injunction to preserve voter registration deadline that had been in place for 20 years). And in the third, the injunction would have required the state “to create and institute a new procedure” shortly before an election. *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1085, 1086 (9th Cir. 2020).

In contrast, this preliminary injunction *restores* practices that were in effect for *more than fifteen years*. The injunction thus does not impose the sort of seismic changes the Secretary suggests—it requires only that officials maintain the familiar rules they have comfortably operated under for many years. Indeed, unless election administrators have been in their jobs for more than 15 years, in the case of EDR, or 19 years, in the case of student IDs, they’ve *never* administered a statewide election without EDR or that did not permit the use of student IDs to vote. *See* App. 8 ¶ 18, 18 ¶ 56, 589 (126:15-19). And to the extent election workers need training on how to conduct EDR or permit student IDs, the administrators wouldn’t need to reinvent the wheel—they could use training from previous elections. *See* App. 581. As the District Court aptly noted: “the Court does not see the massive effort alleged by the Secretary that is required to let election officials and workers know that voters can now . . . vote . . . the same [way] as they have been for the last fifteen years.” *Id.*

Likewise, voters are unlikely to be confused by being able to vote in the same ways they have for more than a decade. *See id.* And even if some voter confusion resulted, it would not cause disenfranchisement because the injunction *expands* voting opportunities. *See id.* But if the order is stayed, voters confused about EDR or ID requirements “would be unable to cast their vote” if they did not register prior to election day or did not have qualifying forms of identification. *See id.*

The Secretary’s failure to show a probability of irreparable harm alone dooms her motion. *See, e.g., In re Extradition of Mathison*, 974 F. Supp. 2d 1296, 1305 (D. Or. 2013) (“a stay cannot issue unless the moving party meets its burden on the second factor, irreparable harm”). But her motion also fails the other three criteria.

IV. The Secretary is unlikely to succeed on the merits.²

The Secretary’s motion also fails because she does not make the requisite “strong showing” that she will succeed on the merits. *Taylor*, 2015 Mont. Dist. LEXIS 68, at *3. Attempting to avoid this, the Secretary argues that she need establish only “serious legal questions,” Mot. at 7, relying on “the minimum quantum of likely success necessary to justify a stay,” *Leiva-Perez*, 640 F.3d at 967. But under the Ninth Circuit’s sliding-scale approach, the presence of “serious legal questions” suffices only where “the balance of harm tips decidedly in favor of the [movant].” *Benda v. Grand Lodge of Int’l Ass’n of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978). Otherwise, a movant must make a more “robust . . . likelihood of success on the merits” than the minimum quantum. *See id.*

Here, because the balance of harms weighs strongly *against* a stay, the Secretary must show much more than the minimum quantum—she must show she

² Plaintiffs incorporate by reference Background Sections I-III of their Memorandum in Support of Motion for Preliminary Injunction, App. 110-20, and Argument Sections II.A-B, App. 478-487, III.A-D, App. 494-504, III.F, App. 506-07, of their Response to Defendant’s Motion for Summary Judgment.

is likely to succeed on appeal. *See id.* But she cannot make this showing, particularly because where, as here, courts consider “the ‘extraordinary request’ to stay a preliminary injunction granted by a district court[,]” they “exercise restraint in assessing” the likelihood of success. *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 661 (9th Cir. 2021) (quoting *Barr v. E. Bay Sanctuary Covenant*, 140 S.Ct. 3, 4 (2019) (Sotomayor, J., dissenting)). The Secretary does not contend that she could succeed under Montana’s precedent applying strict scrutiny to statutes implicating fundamental rights; instead, her argument rests on discarding those precedents and arguing for a much lower standard, never before applied to voting restrictions challenged under the Montana Constitution.

A. HB 176 and SB 169 burden fundamental rights.

The right to vote is a fundamental right. *See State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 206, 113 P.3d 281, 288. Statutes that implicate fundamental rights “must be strictly scrutinized[,]” and can survive only “if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path . . . to achieve the State’s objective.” *Mont. Env’t Info. Ctr. v. Dep’t of Env’t Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 225, 988 P.2d 1236, 1246. Strict scrutiny also applies to a statute that treats similarly situated classes differently in the exercise of a fundamental right. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 154, 104 P.3d 445, 450.

The evidence establishes that HB 176 and SB 169 burden the fundamental right to vote. HB 176 eliminates EDR, which more than 70,000 Montanans have utilized. *See App.* 336. EDR boosts turnout—nationally and in Montana, *see App.* 335-38—in part because election day is unique: registration on every other day is available only during working hours, *see* § 13-2-201, MCA, and many voters rely on election day-specific amenities like time off work, organized transportation, and extended hours, in addition to the one-stop option afforded by EDR. *See App.* 156-

158 ¶¶ 16, 22-23, 169 ¶ 7, 192-93 ¶¶ 7-10, 290 (31:1-7), 291 (42:9-19). Eliminating EDR will make it harder—perhaps impossible—for some citizens to vote, especially elderly, disabled, low-income, rural, young, and Native voters. *See* App. 56 ¶ 4, 155-58 ¶¶ 9, 11-19, 22-23, 162-63 ¶¶ 2-4, 192-93 ¶¶ 7-10, 288 (20:16-18), 289 (21:5-23), 290 (31:1-7, 32:2-12), 291 (42:9-19), 298 (7:17), 299 (9:18), 339-40, 386 ¶¶ 7-13. Moreover, HB 176 eliminates a failsafe: voters who discover errors in their registration on election day can no longer update their registration and cast a ballot. *See* App. 163 ¶¶ 4-5, 179-80 ¶¶ 7-9, 185-86 ¶¶ 4, 9, 197-98 ¶ 3, 300 (14:12-17, 15:6-22), 301 (19:13-21). Indeed, HB 176 *already* disenfranchised numerous voters in the off-year, low-turnout, non-statewide election for which it has been in effect. *See* App. 148 ¶ 21, 179-80 ¶¶ 7-9, 185-86 ¶ 7, 192-93 ¶¶ 8-10, 198-99 ¶ 8. HB 176 would undoubtedly disenfranchise many more in higher turnout elections.

For its part, SB 169 burdens the fundamental right to vote for young voters by devaluing out-of-state drivers' licenses and student IDs and violates young voters' right to equal protection. Young voters are far less likely to have one of the primary forms of identification that SB 169 requires, *see* App. 313 (14:16-15:5), 315 (11:1-12:21), 317 (19:6-8), 341, 370 ¶ 3, 377 ¶¶ 7-10, 392 ¶ 5, 430-31, and are far more likely to rely on college IDs as their primary form of ID. *See* App. 135-38 ¶¶ 6-10, 13, 315-16 (11:1-12:21, 17:17-23), 341, 377 ¶¶ 7-10. But under SB 169, voters can use these IDs only with secondary forms of ID, which young voters are also less likely to have. App. 341, 372 ¶ 11, 377 ¶ 9, 392 ¶ 5, 431. SB 169's burden on young voters is no accident: during a hearing on SB 169, Senator Galt wondered "if you're a college student in Montana and you don't have a registration, a bank statement, or a W-2, it makes me kind of wonder why you're voting in this election anyway." App. 341. He concluded that young voters have "little stake in the game. *Id.*

B. The Secretary’s purported justifications for those burdens do not pass constitutional muster.

The burdens imposed by HB 176 and SB 169 are neither justified by a compelling state interest nor narrowly tailored to meet such an interest. The Secretary claims the laws enhance election integrity and boost voter confidence, but Montana does not have a problem with election integrity or voter fraud. *Driscoll v. Stapleton*, No. DV 20-408, 2020 WL 5441604, at *5 (Mont. 13th Jud. Dist. May 22, 2020), Affirmed in Part, Vacated in Part by *Driscoll v. Stapleton*, Mont., Sept. 29, 2020 (finding Secretary failed to present evidence sufficient to uphold purported interest in preventing voter fraud); *W. Native Voice v. Stapleton*, No. DV-20-0377, 2020 WL 8970685, at *27 (Mont. 13th Jud. Dist. Sept. 25, 2020) (same). More to the point, there is no evidence that EDR or student IDs have compromised election integrity or resulted in decreased voter confidence. *See* App. 185-87 ¶¶ 5, 8, 11, 12, 198-99 ¶¶ 4-7, 9, 259, 262, 290 (30:17-20), 292 (45:24-48:8), 299 (10:7-10, 11:13-16), 332-34 (HB 176 will not prevent voter fraud or administrative problems because EDR has not led to either), App. 186 ¶ 11, 199 ¶ 10, 312 (13:15-19), 318 (22:5-21), 332-34. (SB 169 will not prevent voter fraud because there is no evidence that use of student IDs or registration confirmations has led to fraud).

Because the burdens imposed by HB 176 and SB 169 are not justified by a compelling interest and the laws are not narrowly tailored, the Secretary’s appeal will not succeed on the merits, and the Court should deny her motion for a stay.

V. The issuance of a stay will substantially injure the Plaintiffs.³

Although this Court need not consider any other factors to deny the Secretary’s motion, *Sierra Club v. Trump*, 929 F.3d 670, 687 (9th Cir. 2019), it should also be denied because a stay would substantially injure Plaintiffs. The

³ Plaintiffs incorporate by reference Argument Sections II.A-B of their Response to Defendant’s Motion for Summary Judgment (Doc. 120), App. 478-87.

Secretary largely ignores the extensive evidence demonstrating that Plaintiffs, and countless Montanans, will be irreparably harmed if the Court issues a stay except to complain that Plaintiffs' evidence comes in part from expert data analysis and incorrectly claim that Plaintiffs have identified no voters disenfranchised by HB 176 or SB 169.

The Secretary first takes issue with Plaintiffs' use of data analysis informed by academic literature, among other things, to determine the probable effects of HB 176 and SB 169 on Montanans. *See* Mot. at 1. But this sort of evidence is routinely accepted and credited by courts—including this Court. *See Driscoll v. Stapleton*, 2020 MT 247, ¶¶ 26, 29-30, 401 Mont. 405, 473 P.3d 386; *Ravalli Cnty. Republican Cent. Comm. v. McCulloch*, No. CV-14-58-H-BMM, 2015 WL 7566678, at *2 (D. Mont. Nov. 24, 2015).

Next, the Secretary makes unfounded—and demonstrably untrue—characterizations of Plaintiffs' evidence, asserting that it is speculative and that Plaintiffs cannot demonstrate that any voters were prevented from voting in the 2021 elections by any of the laws they challenge. Mot. at 5, 9. But Plaintiffs have produced substantial evidence of concrete harms, including that particular voters *were* prevented from voting by HB 176. *See supra* Argument Section IV.A.

The Secretary also asserts Plaintiffs cannot be irreparably injured by a stay because, she says, Plaintiffs unreasonably delayed seeking a preliminary injunction. Mot. at 9. But they did not. Plaintiffs filed a complaint the same day SB 169 and HB 176 were signed into law and went into effect. App. 27. They then filed their motion for a preliminary injunction on January 12, 2022, in accordance with the parties' agreed-upon schedule—and well before the first state-wide election since enactment of SB 169 and HB 176. App. 398, 403. *See Native Ecosys. Council v. Marten*, 334 F. Supp. 3d 1124, 1133 (D. Mont. 2018) (rejecting argument that ten-month delay in filing motion for preliminary injunction warranted denial of motion). Even in

election-related cases, months—or even years—long delays in seeking preliminary injunctions do not preclude issuance of injunctions. *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016) (thirty-month delay); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1326 (11th Cir. 2019) (year-long delay); *Pavek v. Simon*, 467 F. Supp. 3d 718, 753 (D. Minn. 2020) (year-long delay).

In any event, even if Plaintiffs had delayed their motion for a preliminary injunction—and they did not—that does not neutralize the evidence of irreparable injury to them and other Montanans. *Cf. Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (quoting *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984) (“[D]elay is but a single factor to consider in evaluating irreparable injury; courts are ‘loath to withhold [an injunction] solely on that ground.’”).

VI. Staying the preliminary injunction will injure the public.

The Secretary’s motion should also be denied because enforcement of SB 169 and HB 176 during the upcoming elections will substantially harm the public by unconstitutionally burdening the right to vote. *See supra* Argument Section IV.A; App. 549 ¶ 37. For that reason, staying the injunction is against the public interest. *See Am. Beverage Ass’n v. City & Cnty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.”)). The public interest unquestionably favors enfranchisement of Montana voters, including those Native, elderly, disabled, rural, working, and young voters who disproportionately relied on Election Day registration, and student IDs as identification at the polls, and who would have a harder time voting if the Order were stayed. Moreover, because EDR and student IDs have not, in their many years of use, caused any problems with election integrity or decreased voter confidence, leaving the injunction in effect would cause no harm to the public.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny the Secretary's motion for a stay pending appeal.

Respectfully submitted this 9th day of May, 2022.

/s/ Matthew P. Gordon

Matthew P. Gordon
PERKINS COIE, LLP
1201 Third Ave., No. 4900
Seattle, WA 98101
mgordon@perkinscoie.com

Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, MT 59624
mike@meloylawfirm.com

John Heenan
HEENAN & COOK PLLC
1631 Zimmerman Trail
Billings, MT 59102
(406)839-9091
john@lawmontana.com

Henry J. Brewster
ELIAS LAW GROUP LLP
10 G Street NE Suite 600
Washington, DC 20002
(202)-968-4596
hbrewster@elias.law

Jonathan P. Hawley
ELIAS LAW GROUP LLP
1700 Seventh Avenue
Suite 2100
Seattle, Washington 98101
Telephone: 206-656-0179

E-mail: jhawley@elias.law

*Attorneys for Appellees Montana
Democratic Party and Mitch Bohn*

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is ** words, excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 9th day of May, 2022.

/s/ Matthew P. Gordon

Matthew P. Gordon

CERTIFICATE OF SERVICE

I, Matthew Prairie Gordon, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-09-2022:

Peter M. Meloy (Attorney)
2601 E. Broadway
2601 E. Broadway, P.O. Box 1241
Helena MT 59624
Representing: Bohn, Mitch, Montana Democratic Party
Service Method: eService

John C. Heenan (Attorney)
1631 Zimmerman Trail, Suite 1
Billings MT 59102
Representing: Bohn, Mitch, Montana Democratic Party
Service Method: eService

Jonathan Patrick Hawley (Attorney)
1700 Seventh Avenue
Suite 2100
Seattle WA 98101
Representing: Bohn, Mitch, Montana Democratic Party
Service Method: eService

Rylee Sommers-Flanagan (Attorney)
40 W. Lawrence Street
Helena MT 59601
Representing: Forward Montana Foundation, Montana Public Interest Research Group, Montana Youth Action
Service Method: eService

Ryan Ward Aikin (Attorney)
1018 Hawthorne St.
Missoula MT 59802
Representing: Forward Montana Foundation
Service Method: eService

Clayton H. Gregersen (Attorney)
P.O. Box 2529
Billings MT 59101

Representing: Christi Jacobsen
Service Method: eService

David Francis Knobel (Attorney)
490 N. 31st St., Ste 500
Billings MT 59101
Representing: Christi Jacobsen
Service Method: eService

John Mark Semmens (Attorney)
900 N. Last Chance Gulch
Suite 200
Helena MT 59601
Representing: Christi Jacobsen
Service Method: eService

E. Lars Phillips (Attorney)
1915 S. 19th Ave
Bozeman MT 59718
Representing: Christi Jacobsen
Service Method: eService

William McIntosh Morris (Attorney)
1915 S. 19th Ave.
P.O. Box 10969
Bozeman MT 59719
Representing: Christi Jacobsen
Service Method: eService

Leonard Hudson Smith (Attorney)
P.O. Box 2529
Billings MT 59103
Representing: Christi Jacobsen
Service Method: eService

Austin Markus James (Attorney)
1301 E 6th Ave
Helena MT 59601
Representing: Christi Jacobsen
Service Method: eService

Ian McIntosh (Attorney)
1915 S. 19th Ave
P.O. Box 10969
Bozeman MT 59719
Representing: Christi Jacobsen
Service Method: eService

Dale Schowengerdt (Attorney)

900 N. Last Chance Gulch
Suite 200
Helena MT 59624
Representing: Christi Jacobsen
Service Method: eService

David M.S. Dewhirst (Govt Attorney)
215 N Sanders
Helena MT 59601
Representing: Christi Jacobsen
Service Method: eService

Kathleen Lynn Smithgall (Govt Attorney)
215 N. Sanders St.
Helena MT 59601
Representing: Christi Jacobsen
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: Western Native Voice
Service Method: eService

Electronically Signed By: Matthew Prairie Gordon
Dated: 05-09-2022