IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0172

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

Plaintiffs and Appellees,

v.

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

Defendant and Appellant.

BRIEF OF *AMICUS CURIAE* RESTORING INTEGRITY & TRUST IN ELECTIONS IN SUPPORT OF DEFENDANT-APPELLANT

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INTERESTS OF THE AMICUS CURIAE

Restoring Integrity and Trust in Elections, Inc. ("RITE") respectfully submits this brief as *Amicus Curiae* in support of Defendant-Appellant, Christi Jacobsen ("Appellant"). RITE is a 501(c)(4) non-profit organization committed to the ensuring the rule of law in voting and election administration. Recognizing that Article I, Section 4 of the United States Constitution vests primary authority over the "Times, Places and Manner of Holding Elections for Senators and Representatives" in the various state legislatures, RITE has a particular interest in defending states' duly enacted election laws and supporting laws and policies that promote secure elections and enhance voter confidence in the electoral process. RITE's expertise and national perspective on voting rights and election law will assist the Court in reaching a decision consistent with national standards.

INTRODUCTION & SUMMARY OF THE ARGUMENT

The lower court's ruling represents a sharp departure from the well-accepted and constitutionally rooted balance between the right to vote and a state's responsibility to safeguard the integrity of that right through reasonable regulations on the administration of elections. The lower court makes several errors that—if left uncorrected—risk a disruption to the constitutional order and pose imminent danger to Montana's entire electoral system.

First, the lower court's ruling simply gets the law wrong. Without explanation, the lower court rejected the *Anderson-Burdick* standard in favor of strict scrutiny. In doing so, it departs from the national standard for evaluating the constitutionality of election administration laws and imposes an insurmountable hurdle for Montana to reform its election laws. This is incompatible with the Legislature's constitutional authority to enact laws that "insure the purity of elections and guard against abuses of the electoral process." Mont. Const. art. IV. § 3.

Second, in exercising its constitutional duty, the Legislature acted reasonably. Both SB 169 and HB 176 further Montana's "compelling interest in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its elections processes. . . ." *Larson v. Stapleton*, 2019 MT 28, ¶ 40, 394 Mont. 167, 434 P.3d 241. Because these judgments are reasonable, it would be an invasion of legislative decision-making to judicially interfere with such decisions, especially on the ground that a more convenient or less burdensome option may exist.

Third, the lower court's factual findings are clearly erroneous. Specifically, the order allows Plaintiffs to bypass their evidentiary burden to present concrete, quantifiable proof of a burden. The lower court also inexplicably shifts the factual burden of proof to the State to prove that it is protecting against actual instances of

fraud within Montana or that it could not accommodate some less burdensome alternative. Finally, the lower court largely disregarded the sound policy justifications supporting the challenged election reforms.

Accordingly, this Court should reverse the lower court's order.

ARGUMENT

I. The lower court erred as a matter of law by applying strict scrutiny.

The lower court was asked to decide whether several election procedures violated fundamental voting rights. Without much discussion, the lower court concluded that because the right to vote is a fundamental one, it must apply strict scrutiny to any alleged interferences with that right. Order at 32-33 ¶¶ 34-35. The lower court thus required a showing that the law furthered a compelling state interest and was the least restrictive path toward furthering that interest. *Id.* at 33 ¶ 35.

This decision was erroneous for two reasons: 1. the lower court should have applied the well-established *Anderson-Burdick* balancing test, and 2. in applying strict scrutiny, the lower court divests the Legislature of its constitutional mandate to make reasonable election laws.

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A. The lower court should have applied the Anderson-Burdick flexible standard.

The United States Supreme Court has rejected the notion that strict scrutiny applies when addressing challenges to election laws. Rather, election laws imposing "reasonable, nondiscriminatory restrictions" on the fundamental right to vote are assessed under the flexible, sliding scale *Anderson-Burdick* test. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 161, 189-91 (2008) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

"Under the *Anderson-Burdick* test, a court identifies the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate and then weighs the injury against the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule." *Mecinas v. Hobbs*, 30 F.4th 890, 902 (9th Cir. 2022) (citing and quoting *Burdick*, 504 U.S. at 434 and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (quotations omitted)). A diverse and overwhelming majority of jurisdictions around the country consistently employ the *Anderson-Burdick* sliding scale standard in determining whether election laws impermissibly burden fundamental voting rights. *See* Appendix A (survey of courts adopting the *Anderson-Burdick* standard, including the United States Supreme Court, eight circuit courts and the majority of state supreme courts).

Under this standard, courts have upheld many voting regulations designed to serve a state's "important interest in preventing voter fraud." *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 707-09 (9th Cir. 2018). For instance, in *Reagan*, the 9th Circuit upheld restrictions on third-party ballot collection (aka "ballot harvesting") on the grounds that these restrictions impose "minimal" burdens on voters' First and Fourteenth Amendment rights, while at the same time "prevent absentee voter fraud" and "improve[] and maintain[] public confidence in election integrity." *Reagan*, 904 F.3d at 705; *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2347 (2021) (explaining that ballot harvesting may promote voter intimidation).

Even some courts that ostensibly employ a higher burden than *Anderson-Burdick* similarly evaluate what standard to apply based on the level of "burden" imposed by a particular voting regulation. *See Weinschenk v. State*, 203 S.W.3d 201, 216 (Mo. 2006) (imposing a heightened standard but noting that regulations which "do not impose a heavy burden on the right to vote" are subject to lower scrutiny, similar to the *Anderson-Burdick* framework).

Ignoring this nationwide standard, the lower court's application of strict scrutiny appears to arise from a misreading of *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996). *See* Order at 33 ¶ 35. Namely, the lower court relied on *Wadsworth* to support its untenable conclusion that *any* statute that interferes with

the exercise of a fundamental right is subject to strict scrutiny, regardless of whether those restrictions were actually discriminatory or the degree to which the right is infringed. Moreover, the lower court seems to imply that this strict scrutiny standard would broadly apply to any indirect or speculative burden.

Wadsworth lends no support to these conclusions. In fact, *Wadsworth* held the opposite: "The extent to which the Court's scrutiny is heightened depends both on the nature of the interest *and the degree to which it is infringed*." *Wadsworth* at 302, 911 P.2d at 1173 (quoting *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254-56 (1974)) (emphasis added).

Similarly, the lower court seems to misconstrue *Driscoll v. Stapleton*, 2020 MT 247, 401 Mont. 405, 473 P.3d 386's consideration of the *Anderson-Burdick* test as somehow indicating that this Court has rejected the test altogether. Order at 33 ¶ 36. That is not the case. In *Driscoll*, this Court simply determined that it was "unnecessary to set forth a new level of scrutiny" because it "is not dispositive to the issues presented on appeal." *Driscoll*, ¶ 20. Here, the application of the correct legal standard is dispositive and essential to the Court's review.

Application of strict scrutiny is inconsistent with existing Montana common law. When Montana courts evaluate laws that implicate competing constitutional rights and obligations, they engage in a balancing test. For example, Montanans have a constitutional right of privacy, which might conflict with the constitutional

right to access documents and observe the deliberations of all public bodies or agencies of state government. Mont. Const. art. II, §§ 9 and 10. Consequently, Montana courts utilize a well-developed test for balancing these competing interests, embodied in article II, section 9: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

Such balancing of competing interests applies in many contexts. *See, e.g.*, *Nelson v. City of Billings*, 2018 MT 36, ¶ 40, 390 Mont. 290, 412 P.3d 1058 (McKinnon, J., concurring) (noting that courts "routinely balance" constitutional rights "in the context of other weighty and compelling interests"); *State v. Laster*, 2021 MT 269, ¶ 13, 406 Mont. 60, 497 P.3d 224 (in assessing a traffic stop, a key principle of constitutional reasonableness is balancing public safety against freedom from unreasonable search and seizure); *Bozeman Daily Chronicle v. City of Bozeman*, 260 Mont. 218, 229, 859 P.2d 435, 442 (1996) (in assessing disclosure of information, district courts must balance individual privacy against public right to know); *State v. Mont. First Judicial Dist. Court*, 361 Mont. 536, ¶ 10, 264 P.3d 518 (2011) ("court determines whether to grant a stay by balancing competing interests and considering whether public welfare or convenience will be benefitted by a stay").

The *Anderson-Burdick* "balancing of interests" analytical approach is no different from the approach Montana courts employ in other contexts—because it protects competing constitutional rights and necessary governmental functions to the maximum extent possible to ensure an effective democracy. *See Crawford*, 553 U.S. at 193-94 (citing with approval a report's conclusion that "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters").

Application of *Anderson-Burdick* and its progeny here combined with a correct reading of *Wadsworth* reveals that SB 169 and HB 176 are not "voter-suppression laws," as critics might describe them. On the contrary, these well-reasoned laws are entirely within the norm nationally, enhance citizen confidence in the process, and thus encourages participation in the democratic process.

B. The lower court's application of strict scrutiny usurps the Legislature's constitutional authority to make reasonable judgments about election procedures.

A foundation of a strong democracy is the balance between making voting accessible and convenient and ensuring the integrity and reliability of the voting process. Because there is no "clear" answer regarding the "best" balance between these two important pillars, variations in voting laws among states are an integral "product of our democratic federalism." *Public Integrity Alliance v. City of Tucson*, 836 F.3d 1019, 1028 (9th Cir. 2016). This is exactly why the framers of

the United States Constitution delegated authority over election procedures to the states. U.S. Const. art. I, § 4, cl. 1.

Under the Montana Constitution, the Legislature is required to enact election laws that "insure the purity of elections and guard against abuses of the electoral process" without impermissibly interfering with the constitutional right to vote. *Compare* Mont. Const. art. IV § 3 *with* Mont. Const. art. II § 13; *see also* Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, p. 450 (noting Delegates' intent to grant "very broad" authority to the Legislature to enact fraud-preventing election laws). Crafting such laws is a quintessential legislative function, not a judicial one. And "absent a truly serious burden on voting rights, [courts] have . . . respect for governmental choices in running elections. . . ." *Reagan*, 904 F.3d at 728 (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1115 (9th Cir. 2011) (internal quotation marks omitted)).

Just as a "person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot," *Marston v. Lewis*, 410 U.S. 679, 680 (1973), the Montana Constitution also provides no guarantee of election-day registration. To the contrary, it vests the Legislature with the discretion to provide one: the Legislature "*may* provide for a system of poll booth registration." Mont. Const. art. IV, § 3 (emphasis added).

Application of strict scrutiny is incompatible with these constitutionally delegated legislative functions. For instance, the Legislature may choose to pass convenience-based laws, such as early voting programs, that enhance residents' baseline right to vote. But, in requiring the Legislature to accommodate the "least restrictive alternative" the lower court transforms prior convenience-based election administration laws into a baseline vested right. In other words, passage of prior convenience laws would not be able to be replaced with reasonable, but less convenient alternatives.

In doing so, the lower court creates a "one-way ratchet" divesting the Legislature's power to modify laws, unless the judiciary can subjectively conclude the change would be decisively less burdensome. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016) (in upholding Ohio's elimination of same day registration, noting "[a]dopting plaintiffs' theory of disenfranchisement would . . . discourage states from ever increasing early voting opportunities. . . . ").

The lower court confuses mere voter inconvenience with an actual burden on the right to vote. But "inconvenience" "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198. A court should not judge the burden stemming from a state's election practice based on what the state had previously allowed, but rather it should consider what burden that law places "over the usual burdens of

voting." *Id.* The United States Supreme Court has correctly rejected this sort of reasoning and so should Montana courts. *Brnovich*, 141 S.Ct. at 2345-46 (rejecting the court of appeals' reasoning in a Voting Rights Act case that the state failed to provide "a less restrictive alternative would threaten the integrity of precinct-based voting").

Failing to correct the lower court's error will render the Legislature's constitutional duty and discretion in passing reasonable election laws illusory.

II. The Montana Legislature made reasonable legislative judgments in the provisions at issue.

Allowing state and local governments room to craft their own election administration laws "allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting [s]tates in competition for mobile citizenry." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2652, 2673 (2015) (internal citations and quotation marks omitted). Election administration is constantly evolving and the law should allow for adjustments based on lessons learned from past elections, examples from other jurisdictions, and new policy ideas.

That is exactly what the Montana Legislature did here; expanding some voting procedures while relaxing others—in effect rebalancing the important

interests of election administration, ballot access, and election security to reflect Montana's current needs. *Stapleton*, ¶ 40 ("Montana has a compelling interest in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its elections processes. . . .").

In SB 169, Montana modified the voter ID law to expand acceptable forms of primary voter ID to include military ID cards, tribal photo ID cards, state concealed carry permits, and U.S. passports. The law also required that secondary voter IDs, such as student ID cards, be accompanied by other verifiable documentation to corroborate the voter's identity and residence. Importantly, SB 169 § 2 provides that to receive a ballot an elector may provide a secondary ID (like student ID cards) and a "government document that shows the elector's name and current address." *See* Appendix 2 at SecretaryApp. 0896. One such "government document" is a voter registration card that is provided by the State to all voters upon registering—thus, an individual may vote in an election as long as they have a student ID and have registered to vote. *See id.; see also id.* at SecretaryApp. 0660.

In HB 176, Montana ended election day registration ("EDR") by moving up its deadline to register to vote from the day of the election to noon the day before the election.

SB 169 and HB 176 expand the types of acceptable voter ID, are minimally burdensome, and are justified by important state interests. Regarding the EDR provisions in HB 176, as noted *supra* Section I.B, the Constitution defers to the Legislature on whether to permit same day registration. Changing the EDR protocol helps to reduce poll lines on election day and increases voter confidence and integrity. Order at 37 ¶ 44. The minor inconvenience of registering the day prior to election day does not constitute an impermissible burden—less than half of the states even allow for election-day registration.[1] The remaining majority of states have rationally determined that allowing EDR is either not feasible with the state's resources or that setting an earlier registration deadline promotes other state interests related to the effective administration of an election. *See* Appellant's Opening Br. at 38-42 (collecting cases); 52 U.S.C. § 20507(a) (expressly permitting voter registration deadlines not lesser than 30 days prior to federal elections). Appellees have claimed that ending EDR will burden Native Americans' right to vote due to the expense of traveling to polling or registration areas. But outside of self-serving discovery responses and speculative statements in expert reports, Appellees have not provided any serious evidence that Native

[1] https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx

Americans actually cannot either: 1. register and vote on the same day during early voting or, 2. make two, rather than one, trips to the polls.

Changing the voter ID law helps officials properly determine the identity and eligibility of all individuals who present themselves to vote. Order at 35 ¶ 41; *cf. Crawford,* 553 U.S. at 194-202. Unlike a driver's license or a U.S. passport which depict an individual's full legal name, photograph, date of birth and (for driver's licenses) residential address, student IDs typically only include a name and photo.[2] As a result, they do not establish both identity and residency at the polls. Moreover, "student IDs" could include private school IDs, thus there would be no guarantee that the voter has a government-issued ID. That is why most states do not allow student IDs to serve as a valid voter ID. Of the fifteen states that even allow a student ID to serve as a voter ID, most of those states require additional safeguards. SecretaryApp. 0764; *see also https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx* (explaining requirements for a student ID to be considered valid in various states).

Upholding the lower court's ruling would usurp this reasoned legislative decision-making.

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[2] https://www.umt.edu/griz-card/get-your-griz-card/

III. The lower court's factual analysis is flawed and impermissibly shifts the burden of proof to the Secretary.

When a court applies the proper *Anderson-Burdick* standard, plaintiffs have the burden to prove that an election law *actually* burdens voters and the magnitude of the burden. *Crawford*, 553 U.S. at 201 (requiring "concrete evidence of the burden imposed on voters"). When plaintiffs allege a burden on a subgroup (rather than the entire electorate), the plaintiff must still present "evidence sufficient to show the size of the subgroup and *quantify* how the subgroup's special characteristics makes the election law more burdensome." *Reagan*, 904 F.3d at 703 (emphasis added). It is well accepted that it is clear error and contrary to equality in voting practices for a court to consider "the burden that the challenged provisions uniquely place on" the subgroup when "the record [] is devoid of quantifiable evidence from which an arbiter could gauge the frequency with which this narrow class of voters has been or will become disenfranchised." *Ne. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016).

Simply, the lower court erred in granting the injunction because Plaintiffs failed to meet their burden to present quantifiable or credible evidence of a burden on a subgroup.

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A. Plaintiffs did not meet their burden in showing SB 169 burdens the right to vote.

Without providing any factual witness testimony, Plaintiffs allege that SB 169 somehow disproportionately affects an unrecognized subgroup of "young voters." Specifically, Plaintiffs' expert Kenneth Mayer testified that "young voters are less likely to have the standalone primary forms of ID acceptable under SB 169" and students who only have a student ID "are less likely to have the secondary form of ID now required to be used in conjunction with a student id." Order at 34 ¶ 38. The lower court found this testimony established an impermissible burden on the right to vote. Order at 34-35 ¶¶ 38, 40. This is clearly erroneous for four reasons.

First, the lower court relied on Mayer's sweeping generalization about "young voters" being "less likely" to have proper forms of ID. Order at 4 ¶ 5. But this is irrelevant. As explained *supra* Section II, a voter registration card will suffice as a secondary form of identification and every registered voter—including college and university students—receives such a card prior to the election.

Even ignoring this, Mayer's reasoning is a flawed apples-and-oysters comparison. Instead of citing data on the percentage of *college students* who hold driver's licenses, Mayer relies on data for *all persons aged 18-24*, whether college students or not, to conclude college students are statistically less likely to hold a driver's license than older voters. Order at 4 ¶ 5. This is significant because college

age students are only a subset of all persons aged 18-24. U.S. Department of Education, Institute of Education Sciences, *College Enrollment Rates*, NATIONAL CENTER FOR EDUCATION STATISTICS (last visited June 9, 2022)[3] (noting the 2020 enrollment rate of persons aged 18-24 was 40%). Mayer's creative rationale would allow a never-ending subset of a subset to eventually get to a perceived violation.

Second, Mayer admits that he does not possess, and his analysis is not based on, any authoritative data on how many students use or attempt to use a student ID to vote. Further, Mayer does not point to any Montana-specific data in his analysis. This is significant because Montana ranks eighth in the nation for the number of licensed drivers per capita. Federal Highway Administration, *Highway Statistics Series* (last visited June 9, 2022).[4] It logically follows that Montana college students would correspondingly hold a higher percentage of driver's licenses per capita than speculated by Mayer. Without this data, Mayer is unable to prove or analyze any actual burden that the law places on Montanans.

Third, even if Mayer's testimony about the "young voters" subset being less likely to possess proper ID is accepted at face value, the lower court inexplicably ignores the testimony from Sean Trende, the Secretary's expert on the interaction between election laws and voting rights, that the correlation between the two does

[3] https://nces.ed.gov/programs/coe/indicator/cpb
[4] https://www.fhwa.dot.gov/policyinformation/statistics/2019/dl1c.cfm

not imply causation. Trende was recently recognized by the Virginia Supreme Court as a "neutral" expert in voting rights law and appointed a special master of the state's redistricting process.[5] Similarly, the bipartisan Arizona Independent Redistricting Commission retained Trende as its Voting Rights Act expert. *See* SecretaryApp. 0756.

Trende testified that "the linkage between photographic identification laws and [voter] turnout is fairly weak" and "mixed at best." Order at 7 ¶ 10; *see also* SecretaryApp. 0762. Trende further testified that despite SB 169's new requirements, "voting in Montana remains easy." SecretaryApp. 0757. For instance, if a voter does not have the correct ID, "they may still vote a provisional ballot, with the signature matched to the file after election" and most states do not permit the use of Student IDs—even as a secondary form of ID—as acceptable ID. SecretaryApp. 0764.

Fourth, as recognized by other jurists, Mayer's lack of empirical or scientific methodology in rendering his conclusory opinions discounts any evidentiary value. *See Driscoll*, ¶¶ 41–42 (Sandefur, J., dissenting) (sharply criticizing Mayer's lack of empirical or scientific methodology in rendering his conclusory opinions on the Ballot Interference Prevention Act in a ballot harvesting case).

[5]https://www.vacourts.gov/courts/scv/districting/redistricting_appointment_order_2021_1119.pdf.

Accordingly, Plaintiffs clearly did not meet *their* burden to show quantifiable burden on the "young voters" subset. They could not present testimony of even a single young voter who was actually burdened, versus just inconvenienced, by the law. Appellant's Opening Br. at 23-24 (discussing student testimony). Instead, they relied on unsupported generalizations that some correlation between the law and decreased turnout exists—despite evidence presented to the contrary by a politically neutral expert that there is no link between photo ID laws and turnout. This is exactly the type of circumstantial, convenience-type evidence rejected by courts. *See Crawford*, 533 U.S. at 200-01 (finding the record insufficient when it did not include "the number of registered voters without photo identification"); *Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1057, 1080-81 (9th Cir. 2016) (rejecting broad assertions of inconvenience as insufficient to establish "concrete evidence" of the subgroup's burden); *see also Brnovich*, 141 S.Ct. at 2338 ("Mere inconvenience cannot be enough to demonstrate a violation of § 2 [of the Voting Rights Act].").

Even worse, the lower court inappropriately flipped the burden suggesting that the *Secretary* had not sufficiently shown that actual fraud in Montana exists to justify the election procedure. Order at 34 ¶ 38. But "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich*, 141 S. Ct. at 2348. States are

"permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986); *see also Crawford*, 553 U.S. at 194 (quoting with approval the Carter-Baker Commission's finding that although "[t]here is no evidence of extensive fraud in U.S. elections or of multiple voting, [] both occur, and [] could affect the outcome of a close election"); *Brnovich*, 141 S.Ct. at 2347 (citing the Carter-Baker Commission's finding that regulating who can collect ballots serves to prevent abuse of voters who may be susceptible to "pressure, . . . or [] intimidation"). In addition, the lower court ignored voter fraud that exists in Montana and other jurisdictions that clearly support Montana's proactive efforts to ensure election integrity. *See, e.g.*, Appellant's Opening Br. at 30.

Here, the Secretary presented sufficient evidence—testimony that the law helps eliminate ambiguity and voter confusion regarding which IDs are acceptable—demonstrating that the law serves important state interests. *See* Order at 7 ¶ 9. The lower court's implication that somehow more justification is required is unsupported by the record or practical application of election administration laws.

B. Plaintiffs did not meet their burden in showing HB 176 burdens the right to vote.

In finding that HB 176 placed an undue burden on the right to vote, the lower court vaguely cited to evidence "presented . . . concerning Montanan's use

of EDR and reliance on it" as enough to establish a burden on the right to vote. Order at 38 ¶ 45; *see also id.* at 9-10 ¶ 13 (discussing testimony from a handful of voters that attempted to use same day registration in November 2021). The lower court also cites to Mayer, who generally concluded that this new law places a higher burden on Native American voters because they are "less likely to have a working vehicle, money for gasoline, or car insurance." *Id.* at 10 ¶ 14. The lower court order does not point to *any* evidence of a specific, or quantifiable burden on a Plaintiffs' voting right.

That is because any perceived inconveniences created by HB 176 are negligible to non-existent. As discussed above, most states do not allow EDR and the Supreme Court has expressly rejected any entitlement to it. *Marston*, 410 U.S. at 680; *see also supra* Section I.B. And under Montana law, voters can still register and vote on the same day at any time during the 30-day period before Election Day. Appellant's Opening Br. at 7.

The lower court also inexplicably discounted Trende's expert testimony that underscores why specific and quantifiable proof is so important in election procedure cases: while there may be some "relationship between election-day registration and turnout" there is not a "causal link between the two." SecretaryApp. 0757. Importantly, "courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a

challenged provision." *Brnovich*, 141 S.Ct. at 2339. Trende notes that Montana retains "one of the longest registration windows in the nation," which further supports the State's decision to move up the deadline one day to help it execute smoother election-day operations. SecretaryApp. 0764.

Once again, the lower court inappropriately flipped the burden of proof to the Secretary to definitively prove that Plaintiffs preferred method of election administration is not viable. Specifically, the lower court elevates Plaintiffs' speculative testimony regarding the State's interests over the Secretary's real-world testimony. This ignores the Secretary's presentation of credible testimony that HB 176 was designed to address the office's concerns with delays and burden on staff on election day. Order at 11 ¶ 15. Despite this testimony from the State's duly elected chief election officer, the lower court agreed with Plaintiffs' self-serving assertions that election staff could eliminate Montana's burden by taking steps "to handle the extra work imposed by having registration in addition to voting on election day." Order at 37-38 ¶ 44.

In sum, it was clear error and a departure from national standards for the lower court to conclude Plaintiffs somehow established that HB 176 actually places a burden on the right to vote versus just a mere inconvenience. *See Crawford*, 533 U.S. at 200-01; *Feldman*, 840 F.3d at 1080-81; *see also Brnovich*, 141 S.Ct. at 2338.

CONCLUSION

For these reasons, RITE respectfully urges this Court to reverse the lower court's order and reaffirm Montana's dedication to secure and fair elections.

Dated: June 9, 2022.

Jackson, Murdo & Grant, P.C.

By: /s/ Rob Cameron
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with proportionally spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 4906 words, excluding certificate of service and certificate of compliance.

DATED: June 9, 2022.

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CERTIFICATE OF SERVICE

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