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.

BRIEF OF APPELLEES MONTANA DEMOCRATIC PARTY AND MITCH BOHN

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STATEMENT OF ISSUE

Did the District Court manifestly abuse its discretion by preliminarily enjoining HB 176 and SB 169 after finding that Appellees were likely to succeed on the merits of their constitutional claims and would suffer irreparable injury absent preliminary relief?

STATEMENT OF THE CASE

For the last fifteen years, Montanans have been able to register to vote on election day and use a variety of identification documents, including student IDs, at the polls. There is no evidence of any fraud or misconduct associated with election day registration or with using student IDs for voting. And there is no evidence that either practice negatively affected voter confidence in any way. To the contrary: voter turnout steadily increased, elections were secure, and Montanans were very confident in their elections.

Yet, in the wake of the 2020 elections—during which Montana saw the highest voter turnout in nearly fifty years—the newly-elected Secretary of State made it her top priority to roll back voting rights under the guise of "election security" and "voter confidence." The Secretary worked with the legislative majority to impede voter access by stripping

longstanding, widely used, and popular means of voting, despite no evidence that any such reforms were needed to safeguard elections.

First, House Bill 176 ("HB 176") eliminated Montanans' ability to register to vote on election day ("EDR"). EDR was widely used and very popular among voters. Indeed, Montana voters firmly rejected an attempt to eliminate EDR only seven years ago. Nevertheless, and despite hearing extensive testimony detailing how students, the elderly, disabled, and indigent voters rely on EDR to vote, HB 176 was enacted on a strict party-line vote.

Second, Senate Bill 169 ("SB 169") curtailed the use of student IDs and out-of-state drivers' licenses as primary proof of identity sufficient for voting. Again, the legislature enacted these restrictions despite no evidence of any problems associated with the use of student IDs for voting.

Because those laws unconstitutionally burden fundamental rights guaranteed by the Montana Constitution, three sets of Plaintiffs in this consolidated case sought a preliminary injunction before the June 2022 primary election to prevent Montanans from suffering irreparable harm to their constitutional rights. After determining that each law imposed

significant burdens on the right to vote without advancing any compelling state interests, the District Court issued the injunction. Order, ¶ 57.

The Secretary noticed an appeal, and this Court granted the Secretary's motion to stay the District Court's injunction. This matter is set for trial on August 15, 2022, and the District Court has indicated that it will issue its ruling on the merits shortly thereafter.

FACTUAL BACKGROUND

I. SB 169 burdens student voters despite no evidence of any fraud related to the use of student IDs for voting.

A. SB 169 changed Montana's longstanding voter ID scheme.

For nearly two decades, Montana's voter ID laws have required voters to show an election judge a photo ID, including "a valid driver's license, a school district or postsecondary education photo identification, or a tribal photo identification" to vote. § 13-13-114(1)(a), MCA (2005). If voters did not have a photo ID, they could instead provide "a current utility bill, bank statement, paycheck, notice of confirmation of voter registration . . . . government check, or other government document that show[ed] the elector's name and current address." *Id.* And, as a failsafe, if voters had no such documents, they could fill out a Polling Place Elector

Identification Form that, upon verification, met the identification requirements for voting. ARM 44.3.2110(2)(b); 44.3.2102(9) (2021).

There is no evidence of any voter fraud or irregularities associated with the use of student IDs for voting. Nonetheless, at the Secretary's urging, the Legislature passed SB 169 to make the identification requirements more onerous by relegating student IDs and out-of-state drivers' licenses to secondary status. As a result of SB 169, voters can no longer use a student ID as voter identification without additional documentation, including "a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address[.]" § 13-13-114(1)(i-ii), MCA (2021).[1] To make matters worse, after the bill passed, the Secretary promulgated regulations purportedly required by SB 169 that limited the utility of Polling Place Elector Identification Forms such that they no longer could be utilized as primary identification. MAR Notice No. 44-2-250, Mont. Sec'y of State (Oct. 8, 2021), https://sosmt.gov/wp-content/uploads/44-2-250pro-arm.pdf ("MAR Notice No. 44-2-250").

[1] SB 169 also expressly deleted voter registration confirmation cards from this list.

B. SB 169 burdens student voters.

SB 169 imposes significant burdens on Montana's young voters—especially college and university students, many of whom do not possess qualifying forms of primary identification.[2] SA 23, 59 (14:11-14), 91; Order, ¶ 5.[3] Students are, however, very likely to have a college-issued ID. SA 59 (14:16-15:5); Order, ¶ 5. At Montana State University ("MSU"), for example, student ID cards serve as meal cards, debit cards, library cards, laundry cards; keys to residence halls, academic buildings, recreational and fitness centers, computer and math labs; and as tickets to MSU football games. SA 146-47.

Students are generally less likely to have a drivers' license than older voters. SA 23; Order, ¶ 4. And out-of-state students in particular are unlikely to have a Montana drivers' license. SA 23, 59 (15:1-5), 63 (19:6-13); Order, ¶ 5. Under SB 169, these out-of-state students can also

[2] Under SB 169, Montana concealed carry permits can be used as primary forms of ID. But this does not help student voters, who are less likely to have concealed carry permits. SA 59 (15:1-15).

[3] "SA" citations reference MDP's Supplemental Index, filed concurrently with this brief.

no longer use their out-of-state drivers' licenses as primary identification. SA 129-30.

Transgender students are also less likely to have a qualifying drivers' license or state ID card because the process for obtaining a gender-affirming ID is lengthy, difficult, and intrusive. SA 149-50 (¶¶ 6-10); Order, ¶ 6. A court order is required to change a person's name on a Montana license or state ID. SA 150 (¶ 7); Order, ¶ 6. Individuals can change the gender marker only with a birth certificate or social security card showing the affirming gender marker, which requires a physician letter affirming that the individual has undergone sex confirmation surgery and completed the transition process. SA 150 (¶¶ 8-10); SA 163-64; Order, ¶ 6. In contrast, transgender students typically do not need a court order or physician's letter to change their name and gender marker on their student identification. SA 150 (¶ 8); Order, ¶ 6.

Students are also less likely to have the additional documents SB 169 requires they present along with their student IDs. Students living on campus or in shared living situations often do not receive utility bills or have bank statements addressed to their school addresses or have any reason to have a government-issued check, or a job for which they receive

paychecks. SA 59 (14:20-15:15), 91. And while these students may still have their voter registration confirmations, SB 169 expressly struck those from the list of documents voters can provide with a non-primary form of ID. *Compare* § 13-13-114(1)(a), MCA (2005), *with* § 13-13-114(1)(a)(ii)(A), MCA (2021).

SB 169's burdens do not fall on a small population. There are sixteen colleges and universities in the Montana University System, enrolling more than 40,000 students, over 10,000 of whom are from out of state. SA 24. Montana is among the states with the highest proportion of out-of-state students who vote in their campus state. SA 175-77. And while the youth vote in Montana has not been especially high historically, young people turned out at significant rates in the 2020 general election: "Montana youth were among the most electorally significant in the country, with voting rates consistently above national averages and considerably on the rise." SA 86.

SB 169's relegation of student IDs is no coincidence. Speaker Galt was explicit during a hearing on SB 169: "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."

SA 23. Answering his own question, he concluded that young voters have "little stake in the game." *Id.*

C. SB 169 advances no state interest.

SB 169's treatment of student IDs serves no state interest. The Secretary's own Elections Director admitted during legislative hearings that Montana has had no student ID-related election fraud whatsoever. SA 14-16, 181 (¶ 11), 188 (¶ 10). Neither Gallatin County, home to MSU and its more than 17,000 students, nor Missoula County, home to the University of Montana ("UM"), have had any problems with voters using student IDs at the polls. SA 181 (¶ 11), 188 (¶ 10). And voter fraud in general is vanishingly rare in Montana. SA 14-16; Order, ¶ 27.

Moreover, Montana University System schools issue ID cards securely. Students at MSU and UM must present a valid, government-issued photo ID before they can receive their student ID. SA 146.

SB 169 does nothing to ensure that voters are eligible to vote because the purpose of showing voter ID at the polls is to prove that the voter is who they say they are, not that they qualify to vote. SA 24; MAR Notice No. 44-2-250. Eligibility is addressed during the registration process. § 13-2-110(3)(a)-(c), (4)(a). And other than a U.S. passport or

Tribal ID, none of the primary forms of identification affirm voting eligibility—noncitizens can obtain a Montana driver's license or state ID card, concealed carry permit, and a military ID. SA 25. Nor do any of these forms of ID prove a voter's residence; voters need not present a primary ID listing an address that matches the voter's registered address. *Id.*

II. HB 176 burdens voters by eliminating EDR.

A. Montana voters rely heavily on EDR to vote.

Montana has two registration periods. During regular registration, which lasts until 30 days before an election, voters may register in person or by mail. § 13-2-301, MCA; ARM 44.3.2003. After that, during late registration, voters may register in-person at their election official's office. § 13-2-301, MCA; ARM 44.3.2015. Between 2005, when EDR first became available, and the enactment of HB 176, the late registration period included election day. And during that time, 70,277 Montanans relied on EDR to register and vote. SA 18-19; Order, ¶ 11.

Election day has become—by far—the most utilized day for registration, with nearly 45 percent of all late registrants registering and voting on election day. *Id.* In total, more than 52,000 unique Montanans

have utilized EDR since its inception, more than 7 percent of all currently registered Montana voters. SA 21. This is consistent with research showing that EDR boosts turnout, both nationally and in Montana, where it has been associated with a 1.5 percentage point increase. SA 18.

EDR is particularly popular with young voters and in areas with high student and military populations. The ten precincts with the highest number of voters who have used EDR are in Great Falls, home to Malstrom Air Force base; Missoula, home to UM; and Bozeman, home to MSU. SA 21. And since 2008, voters aged 18-24, 10.4 percent of all registrants, made up more than 31 percent of all election day registrants. *Id*.

EDR has also been a "godsend" for disabled voters because it helps mitigate barriers to voting by allowing them to register and vote in a single trip, and because it enables organizations that help elderly and disabled voters to aggregate resources on election day. SA 200 (20:16-18), 202 (31:1-7), 219 (¶ 16), 220-21 (¶¶ 22-23); Order, ¶ 21. For similar reasons, EDR is crucial in enfranchising Montana's low income, rural, and working voters, allowing them to avoid multiple trips to register and vote, to rely on transportation to the polls provided as part of get-out-the-

vote efforts on election day, and to take advantage of the ability to register and vote outside of working hours, only available on election day. SA 227 (¶ 7), 237 (¶¶ 7-10); Order, ¶ 21. Native voters, too, rely on EDR for similar reasons. SA 203 (42:9-19); Order, ¶ 20.

EDR also serves as an important failsafe for voters who discover problems with their registration only after they arrive at the polls. SA 201 (21:5-23), 212 (14:12-17, 15:6-22), 213 (19:13-21), 243 (¶¶ 4-5), 248 (¶¶ 3-4); Order, ¶ 21. As Vice Chairman Bryce Bennet noted, "story after story" described instances of Montanans believing they registered to vote at the DMV and have "done everything right," only to learn that their registration failed to transfer to elections officials on time. SA 214 (41:15-25).

Given how many voters have relied on EDR, it is no surprise that EDR has remained popular in Montana. In 2013, Montana voters rejected the Legislature's effort to end EDR. Legislative Referendum 126 (2013). And when the Legislature held hearings on HB 176, numerous individuals and organizations appeared to testify in opposition and spoke about how Montana voters—and particularly Native American, disabled, low income, rural, and young voters—relied on EDR to overcome

obstacles to voting. SA 200 (20:6-15), 201 (21:5-15), 202 (32:2-12); Order, ¶ 14. Nevertheless, the Legislature passed HB 176 over substantial public opposition.

HB 176 has already disenfranchised dozens of Montana voters. SA 255 (¶ 6). Even during the low-turnout, non-statewide 2021 municipal elections, at least 58 voters attempted—but were unable—to register and vote after noon the day prior to the election. SA 256 (¶ 13). Of these, 37 were new registrants and 21 were unable to update their existing registration. SA 257 (¶ 14).

Plaintiffs submitted testimony from several voters who were disenfranchised by HB 176, including one voter who had recently moved to Montana from another state and submitted his voter registration form at the DMV, only to be turned away when he arrived to vote on election day because of an apparent error by the DMV. SA 237-38 (¶¶ 8-9), 243 (¶ 4), 248-49 (¶¶ 7-8); Order, ¶ 13.

B. HB 176 does not advance any compelling state interest.

There is no evidence of any fraud or irregularities associated with EDR. SA 14-16, 181 (¶¶ 9-11), 188 (¶ 9); Order, ¶¶ 27-29. Nor is there evidence that EDR decreased voter confidence, or that ending it will

increase confidence. SA 14-16, 211 (11:11-21). If anything, the EDR process is *more* secure than registration outside the late period. SA 181 (¶ 8). Voters using EDR must affirm under penalty of perjury that the information on their application is true in person before an election official, a face-to-face interaction that is itself a barrier to fraud. SA 181 (¶ 8), 204 (46:22-47:1), 205 (51:21-52:3). And only during the late registration period, including on election day, will the statewide registration system flag whether an in-person applicant is registered elsewhere or if they already received an absentee ballot. SA 181 (¶ 8), 206 (61:21-62:14), 207 (87:19-25).

And while the Legislature suggested that HB 176 eases burdens on election administrators, numerous election officials dispute this. According to the Gallatin County Clerk and Recorder, EDR is "an important failsafe" that does not "caus[e] additional burdens on the regular polling locations" because EDR occurs at the Gallatin County Courthouse. SA 180 (¶¶ 4-5). And the Lewis and Clark County Clerk and Recorder said that ending EDR is "not . . . helpful administratively." SA 211 (10:23-11:02). The Missoula County Elections Administrator testified

that while EDR "required planning," he and his staff could accommodate EDR so long as "the appropriate measures [were] in place." SA 187 (¶ 7).

Election officials register voters almost every business day of the year, and the process is virtually the same on election day. SA 204 (45:24-48:8). It is not particularly time-consuming, SA 204 (47:20-48:3), and it does not increase lines at polling locations; voters registering on election day do so at their election official's office, not their polling place. § 44.3.2015, MCA; SA 180 (¶ 5).

But even if EDR does require additional work from election administrators, that is because it increases voter turnout. As the Lewis and Clark County Clerk and Recorder put it: "any time someone registers and vote[s], it's more work for us. [But t]hat's the job." SA 211 (11:2-6).

STANDARD OF REVIEW

District courts are vested with a "high degree of discretion" to grant injunctive relief. *Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912. Accordingly, this Court "refuse[s] to disturb" a preliminary injunction "unless a manifest abuse of discretion has been shown." *Cole v. St. James Healthcare*, 2008 MT 453, ¶ 9, 348 Mont. 68, 199 P.3d 810 (cleaned up). A manifest abuse of discretion is "one that is

obvious, evident or unmistakable." *Shammel*, 2003 MT 372, ¶ 12. This deferential standard of review applies to both mandatory and prohibitive injunctions. *See City of Whitefish v. Troy Town Pump, Inc.*, 2001 MT 58, ¶ 21, 304 Mont. 346, 21 P.3d 1026.

A district court's factual findings are entitled to "great deference." *Cole*, 2008 MT 453, ¶ 22. To the extent the ruling is based on legal conclusions, the Court reviews "to determine whether the interpretation of the law is correct." *City of Whitefish v. Bd. of Cnty. Comm'rs of Flathead Cnty.*, 2008 MT 436, ¶ 7, 347 Mont. 490, 493, 199 P.3d 201, 204.

SUMMARY OF THE ARGUMENT

Instead of celebrating the record turnout and absence of problems with the 2020 election, Montana's newly-elected Secretary of State immediately moved to roll back voting access and limit voting rights. Despite the absence of any evidence that EDR or student IDs posed any risk to Montana's elections or undermined voter confidence, and defying her predecessor's own expert report about the high level of voter confidence in Montana, the Secretary worked with the legislative majority to pass laws designed to ensure that fewer lawful voters would be able to successfully cast their ballots. Because those laws

unconstitutionally burden fundamental rights guaranteed by the Montana Constitution, the District Court entered a preliminary injunction to prevent voters across Montana from suffering, through disenfranchisement in the June 2022 primary elections, irreparable harm to their constitutional rights. The District Court's order was based on findings that were well supported by the evidentiary record and application of well-settled Montana law, and the Secretary's contrary arguments fail for three reasons.

First, the Secretary ignores applicable Montana precedent in favor of inapt authority from other contexts and other jurisdictions. The Secretary argues that the District Court failed to require enough of Plaintiffs, ignoring that the District Court found that Plaintiffs satisfied Montana's preliminary injunction standard in more ways than one.

Second, the Secretary effectively concedes that neither HB 176 nor SB 169 can survive strict scrutiny and instead criticizes the District Court for failing to apply a different standard of review never before adopted by any Montana court and which would defy this Court's precedent. The Secretary advocates for a standard that she claims is derived from the federal *Anderson-Burdick* test but is actually an unduly

deferential form of rational basis review that no court, in any jurisdiction, has applied to right-to-vote claims. Even if the Court were to adopt the *Anderson-Burdick* test, a faithful application would result in affirming the District Court because the Secretary cannot show that HB 176 or SB 169 is actually necessary to advance any weighty state interest.

Third, the Secretary largely ignores the District Court's detailed and well-supported factual findings and does not attempt to explain how any of those findings are erroneous at all, much less so erroneous that deference to the District Court on them is unwarranted. The Secretary does not seriously dispute the District Court's finding regarding the burdens on voters. Nor does the Secretary contest its finding that other, far less suppressive means could solve the problems the Secretary supposes exist without imposing the same burdens on voters. Instead, the Secretary misrepresents the nature of the challenged laws and the burdens they impose and appeals to arguments that have no application to the claims in this case.

The District Court's issuance of a preliminary injunction should be affirmed.

ARGUMENT

I. The District Court correctly applied Montana's preliminary injunction standard.

A preliminary injunction is warranted when an applicant satisfies any one or more of the five grounds enumerated in § 27-19-201, MCA. *See Sweet Grass Farms, Ltd. v. Bd. of Cnty. Comm'rs of Sweet Grass Cnty.*, 2000 MT 147, ¶ 27, 300 Mont. 66, 72, 2 P.3d 825, 829. Two grounds are relevant here: First, when a movant is "entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually." § 27-19-201(1), MCA. Second, when "the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant," *id.* § 27-19-201(2), including "the loss of a constitutional right." *Driscoll v. Stapleton* (*Driscoll II*), 2020 MT 247, 115,401 Mont. 405, 414, 473 P.3d 386, 392. Because those grounds "are disjunctive," a district court "is not required to make a finding that each circumstance exists." *Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 13, 303 Mont. 342, 16 P.3d 342.

This standard applies to both prohibitory and mandatory injunctions. *See Newman v. Wittmer*, 277 Mont. 1, 11, 917 P.2d 926

(1996). While mandatory injunctions are generally not favored "absent a showing of irreparable injury," *Troy Town Pump*, 2001 MT 58, ¶ 21, "[t]he principles upon which mandatory and prohibitory injunctions are granted do not materially differ." *Id.* (quoting *Grosfield v. Johnson* (1935), 98 Mont. 412, 421, 39 P.2d 660, 664).

The District Court correctly issued the preliminary injunction after finding that Plaintiffs satisfied both grounds: they demonstrated a prima facie case of entitlement to relief and the threat of an irreparable injury without it. Order, ¶ 84. Because the District Court did not make any obvious, evident, or unmistakable errors in reaching those findings, it did not manifestly abuse its discretion. This remains true even if the Court were to find the District Court erred in concluding that Plaintiffs sought a prohibitory injunction, rather than a mandatory injunction, because the District Court held in the alternative that the evidence presented met either standard. Order, ¶ 6 n.2 The District Court's Order should be affirmed.

A. The District Court did not manifestly abuse its discretion by finding that Plaintiffs satisfied two independent enumerated grounds for issuing a preliminary injunction.

Contrary to the Secretary's argument, Appellant's Opening Br. ("Br.") 13-15 (May 16, 2022), Montana law requires that only one of the five enumerated grounds for preliminary injunctive relief be met for an injunction to issue. *Four Rivers Seed Co.*, 2000 MT 360, ¶ 13. But in any event, by finding that the Plaintiffs satisfied two enumerated grounds, the District Court went *beyond* what Montana law requires. Order, ¶¶ 84-85. The Court's order may be affirmed on either independent ground.

The District Court's finding that the Plaintiffs demonstrated a threat of irreparable harm, Order, ¶ 87, was alone sufficient for a preliminary injunction to issue under Montana law. To be sure, "all requests for preliminary injunctive relief require some demonstration of threatened harm or injury." Order, ¶ 3 (quoting *BAM Ventures, Ltd. Liab. Co. v. Schifferman*, 2019 MT 67, ¶ 16, 395 Mont. 160, ¶ 16, 437 P.3d 142, ¶ 16). Thus, when a party relies on the grounds for preliminary injunction enumerated in subsections (1), (3), (4), or (5) of § 27-19-201, MCA, they must also establish "a prima facie case that they will suffer some degree of harm." *Driscoll II*, 2020 MT 247, ¶ 17. However, when a party

requesting preliminary injunctive or declaratory relief demonstrates great or irreparable injury satisfying subsection (2), they necessarily satisfy both the statutorily required enumerated ground *and* the baseline harm or injury requirement. *See BAM Ventures*, 2019 MT 67, ¶ 16; *Driscoll II*, 2020 MT 247, ¶ 14. Accordingly, the District Court's conclusion that Plaintiffs met the ground enumerated in § 27-19-201(2), MCA was by itself a sufficient basis for granting the preliminary injunction. Nonetheless, the District Court did not end its analysis there—the District Court also found that Plaintiffs met their burden of showing a prima facie entitlement to relief. Order, ¶ 37.

The Secretary's attempt to attack the District Court for failing to consider additional factors, *see* Br. 13-14 (likelihood of success on the merits), 16-17 (public interest), has no basis in Montana law. This Court requires such showings only when preliminary injunctive relief is sought in a matter that ultimately seeks monetary damages. *Van Loan v. Van Loan* (1995), 271 Mont. 176, 895 P.2d 614, 617. The cases cited by the Secretary only further support that principle. *See, e.g.*, *Four Rivers Seed Co.*, 2000 MT 360 (considering whether money damages were an appropriate remedy); *Cole*, 2008 MT 453, ¶¶ 15, 31 (analyzing whether

the movant had satisfied the ground enumerated in § 27-19-201(1)). In any event, the District Court considered and rejected the Secretary's argument that the preliminary injunction does not serve the public interest. Among other things, the District Court did "not find it persuasive that the Secretary has been taking steps to enact [the challenged] laws given that is a duty of her job and she has had notice that these laws were contested since before they were signed into law as evidenced in the testimony that occurred in hearings at the Legislature and notice soon after they were enacted as evidenced by the Plaintiffs' filing of their complaints." Order, ¶ 92. And the Secretary's position that "any reasonable balancing of the equities should tilt sharply in the State's favor," Br. 17, is merely her opinion of the evidence and does not establish that the District Court manifestly abused its discretion in granting injunctive relief.

The Secretary's attacks on the District Court's irreparable harm analysis, *id.* at 14-15, fare no better. First, the Secretary defies the record to suggest that the District Court erred by finding only that Plaintiffs "could" be harmed, instead of requiring proof that they "would" be harmed. *Id.* at 14. The District Court expressly concluded that Plaintiffs

established that "they *will* suffer a great or irreparable injury." Order, ¶ 87 (emphasis added). The Secretary is also wrong on the law. Plaintiffs need only establish a prima facie case of harm or injury. *See Driscoll II*, 2020 MT 247, ¶ 18. Prima facie means "literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Id.* ¶ 16 (quoting *Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350, 359, 440 P.3d 4, 10).

Second, the Secretary's claim that the District Court erred by not requiring Plaintiffs to prove they would be "irreparably harmed" also misreads both the Order and the law. Br. 14. The District Court expressly held that the Plaintiffs established that they would suffer "great or irreparable injury." Order, ¶ 87. But in any event, because the Plaintiffs demonstrated a prima facie case of entitlement to relief, *id.* ¶¶ 33-85, the District Court need only have found that Plaintiffs satisfied "*the lesser degree of harm* implied within the other subsections of § 12-19-201, MCA." *Driscoll II*, 2020 MT 247, ¶ 14 (quoting *BAM Ventures*, 2019 MT 67, ¶ 16) (emphasis added). Under that lesser requirement, the District Court need only have concluded that Plaintiffs demonstrated "a prima

facie case that they will suffer *some degree of harm*." *Id.* ¶ 17 (emphasis added).

The Secretary compounds her error by misrepresenting the record evidence. Her claim that the 2021 elections occurred "without issue," Br. 14, ignores the undisputed evidence that, even in the low-turnout, non-statewide municipal elections in November 2021, numerous Montana citizens were unable to vote because EDR was no longer an option. *See supra* II.B. The Secretary repeats this misstatement throughout her brief, repeatedly defying the undisputed record to falsely claim that Plaintiffs identified nobody who was disenfranchised by HB 176.

Third, the Secretary's criticism of the District Court's decision as "circular reasoning," *id.* at 14-15, is undermined by her own authority. Because the loss of a constitutional right amounts to an injury or harm sufficient to satisfy the ground enumerated in § 27-19-201(2), MCA, *Driscoll*, 2020 MT at 115, and Plaintiffs' claims are themselves rooted in the loss of constitutional rights, there is undoubtedly overlap between Plaintiffs' prima facie case and their irreparable injury. The cases the Secretary cites recognize as much. *See, e.g.*, *M.H. v. Mont. High Sch. Ass'n* (1996), 280 Mont. 123, 135, 929 P.2d 239, 247 (noting that "the

irreparable injury basis for granting preliminary injunctions is based on an implicit determination that the applicant is likely to succeed on his or her underlying claim").[4]

Finally, the Court should reject the argument that the timing of Plaintiffs' preliminary injunction motions negates their showing of irreparable injury. *See* Br. 15. Courts—including in Montana—have rejected this argument. *See Native Ecosystems Council v. Marten*, 334 F. Supp. 3d 1124, 1133 (D. Mont. 2018) (rejecting argument that 10-month delay in filing for preliminary injunction "undermines [the moving party's] claim of irreparable harm"). The Secretary cites cases from other contexts, like trademark infringement, where a delay in filing a preliminary injunction undermines the moving party's claim of harm because the delay itself increases the harm to the moving party. *See* Br. 15 (citing *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87 (D.D.C. 2014)). But in election-related litigation, courts routinely reject arguments that purported months- or even years-long delays in

[4] To the extent the Secretary criticizes the District Court's holding that Plaintiffs established irreparable injury because the District Court's holding that Plaintiffs established a prima facie case amounts to a manifest abuse of discretion, that argument is addressed below. *See Infra* II.

seeking preliminary injunctions barred relief. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016) (30-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).

B. The District Court's conclusion that Plaintiffs sought a prohibitory injunction is not cause for reversal.

The Secretary's claim that the District Court "erred by imposing a mandatory injunction on election officials," Br. 16, amounts to a distinction without a difference. The District Court expressly found that, "based on the evidence presented, Plaintiffs would meet the 'higher standard' necessary for a mandatory injunction to issue." Order, ¶ 6 n.2. And in Montana, "[t]he principles upon which mandatory and prohibitory injunctions are granted do not materially differ." *Troy Town Pump*, 2001 MT 58, ¶ 21 (quoting *Grosfield v. Johnson* (1935), 98 Mont. 412, 421, 39 P.2d 660, 664). At most, mandatory injunctions are not favored "absent a

showing of irreparable injury." *Id*. Here, the District Court held that Plaintiffs made that showing. Order, ¶ 87.[5]

II. The District Court did not manifestly abuse its discretion in finding that Plaintiffs established a prima facie entitlement to relief.

The Secretary's merits arguments suffer from a fatal foundational flaw: She applies the wrong legal standard. Because the right to vote is fundamental under Montana law, strict scrutiny applies. But even if this Court applies a balancing test to Plaintiffs' claims, neither SB 169 nor HB 176 satisfies that standard of review. Accordingly, the District Court's conclusions should not be disturbed.

A. The Montana Constitution requires that restrictions on the right to vote satisfy strict scrutiny.

The District Court faithfully applied this Court's precedents by subjecting the challenged restrictions on the fundamental right to vote to strict scrutiny. The Secretary does not even contend that either HB 176 or SB 169 can survive strict scrutiny; instead, she asks this Court to

[5] In any event, because the District Court's holding that Plaintiffs sought a prohibitory injunction does not affect "the propriety of the injunction itself," the preliminary injunction should not be reserved on that basis. *Cole*, 2008 MT 44, ¶ 52.

depart from its longstanding precedent and apply what the Secretary believes should be a highly deferential standard of review. Br. 17-21. The Court should decline the Secretary's invitation to weaken the protections the Montana Constitution has long afforded fundamental rights, including the right to vote—a right that is preservative of all other rights. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

As the District Court correctly observed, under Montana law, statutes that interfere with fundamental rights, including the right to vote, are subject to strict scrutiny. Order, ¶ 35; *see, e.g.*, *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 23, 314 Mont. 314, 65 P.3d 576 (applying strict scrutiny to claims alleging violation of right to vote); *Driscoll v. Stapleton* (*Driscoll I*), No. DV 20 408, 2020 WL 5441604, at *6 (Mont. Dist. Ct. May 22, 2020) (same), *aff'd in part, vacated in part on other grounds*, *Driscoll II,* 2020 MT 247, 401 Mont. 405, 473 P.3d 386. *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236; *see also, e.g.*, *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 17, 302 Mont. 518, 523, 15 P.3d 877, 882 ("[W]here the legislation at issue infringes upon a fundamental right or discriminates

against a suspect class, such as race or national origin, we apply strict scrutiny, the most stringent standard of review.").

This clear precedent notwithstanding, the Secretary again argues for the application of the federal *Anderson-Burdick* standard. Br. 18. But *Anderson-Burdick* is a *federal* standard applied by *federal* courts—as illustrated by each case relied on by the Secretary. *See id.* at 17-19. It has not previously been applied by Montana courts, and for good reason: the federalism concerns that animate *Anderson-Burdick* are simply not present, *cf. Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018) (noting the "confluence of interests" inherent in the *Anderson-Burdick* test, which includes accommodating states' interests in regulating their elections), and the Montana Constitution provides more expansive protections of its citizens' right to vote than the federal Constitution.

Unlike its federal counterpart, the Montana Constitution contains an explicit and affirmative grant of the right to vote. Mont. Const. art. II, § 13; art. IV, § 2*; see also* Mont. Const art. II, § 4 (prohibiting denial of equal protection of the law). Montana is one of only seven states whose constitution contains two different affirmative grants of the right to vote,

as well as a negative prohibition on infringements of that right. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 104 & n.91 (2014). As this Court has recognized, these provisions in the Montana Constitution provide broader protections than the federal Constitution with respect to certain fundamental rights. *See, e.g.*, *State v. Tackitt*, 2003 MT 81, ¶ 20, 315 Mont. 59, 65, 67 P.3d 295, 300 (right to privacy); *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 153–54, 104 P.3d 445, 449 (equal protection); *Woirhaye v. Mont. Fourth Jud. Dist. Ct.*, 1998 MT 320, ¶ 14, 292 Mont. 185, 189, 972 P.2d 800, 802 (trial by jury). The Secretary concedes, as she must, that the right to vote is a fundamental right. Br. 18. And that fundamental right deserves no lesser protection.

None of the cases that the Secretary cites holds that anything less than strict scrutiny applies to claims that infringe on a fundamental right under the Montana Constitution. *See id.* at 19. The Secretary selectively quotes from *Wadsworth v. State*, *id.,* but there this Court made clear that, "[t]he most stringent standard, strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right." *Wadsworth* (1996), 275 Mont. 287, 302, 911 P.2d 1165, 1173–74. In

Willems v. State, 2014 MT 82, 374 Mont. 343, 325 P.3d 1204, this Court simply concluded that "the purported violation of the right of suffrage would not be cured at all" by the requested remedy, such that the "suffrage argument [wa]s without merit." *Id.* ¶¶ 32-34. And *Montana Cannabis Industry Association v. State*, 2012 MT 201, ¶ 22, 366 Mont. 224, 286 P.3d 1161, concerned fundamental rights to which the Constitution explicitly attached limiting language. *See Mont. Cannabis Indus. Ass'n*, 2012 MT 201, ¶¶ 19, 22 (noting that the Montana Constitution's express limitation on the right to pursue employment to "all lawful ways" "circumscribed that right by subjecting it to the State's police power to protect the public health and welfare").[6] Montana's right of suffrage contains no such limitation; to the contrary, the Constitution provides that "no power, civil or military, shall at any time interfere to

[6] Moreover, *Montana Cannabis Industry Association* premised its application of rational-basis review on the conclusion that *no* fundamental right was implicated by the challenged law. *See* 2012 MT 201, ¶¶ 21, 23, 32. *See also Nelson v. City of Billings*,. 2018 MT 36, ¶¶ 13, 30, 390 Mont. 290, 412 P.3d 1058. Ultimately, the only Montana authority cited by the Secretary in support of anything less than the application of strict scrutiny is a partial concurrence and dissent from this Court's opinion in *Driscoll*, 2020 MT 247. *See* Br. 20–21.

prevent the free exercise of the right of suffrage." Mont. Const. art. II, § 13.

B. SB 169 violates the fundamental right to vote.

The District Court did not manifestly abuse its discretion by finding that SB 169 imposes significant burdens on the right to vote, and that no compelling justifies those burdens.

1. SB 169 imposes a significant burden on the right to vote.

The District Court did not obviously, evidently, or unmistakably abuse its discretion in finding—after reviewing extensive expert, documentary, and testimonial evidence—that SB 169 burdens the right to vote. Plaintiffs and the Secretary offered conflicting expert testimony regarding whether, and the extent to which, SB 169 burdens the right to vote. The District Court carefully weighed the evidence and ultimately credited Plaintiffs' evidence that SB 169 raises the cost of voting for out-of-state students, transgender students, and young people, and that these costs are particularly difficult for young voters to overcome given their mobility and the fact that they are less likely to possess both a primary form of ID and the documentation that must be presented in addition to student IDs. Order, ¶ 40.

In response, the Secretary minimizes the significance of Plaintiffs' evidence and misstates the law both before and after SB 169. The Secretary's argument that Plaintiffs cannot demonstrate a burden on the right to vote without identifying specific voters who are disenfranchised as a result of SB 169, Br. 23, 24 n.7, is unsupported as a matter of law: she cites no case that requires this, in Montana or elsewhere. And she ignores the raft of cases in which courts have—and regularly do—credit expert testimony quantifying the burdens imposed by voting restrictions to find that a challenged law burdens the right to vote. *See Fish v. Schwab*, 957 F.3d 1105, 1127-1133 (10th Cir. 2020); *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1217 (N.D. Fla. 2018). In fact, such evidence is often more useful to courts than examples of discrete voters. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 201-02 (2008).

Rather than grappling with the evidence actually presented to and credited by the District Court, the Secretary resorts to trying to persuade this Court by citing evidence outside the record. The Secretary emphasizes the deposition testimony of Hailey Sinoff, but her deposition occurred *after* the District Court entered the preliminary injunction and

is thus not part of the record before this Court. *See Havre Daily News, LLC v. City of Havre*, 2006 MT 215 ¶ 25, 333 Mont. 331, 343, 142 P.3d 864, 873 ("[T]his Court may not rely on facts outside of the record in resolving an issue before it."); *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982) (review of district court's findings on a motion for preliminary judgment "is, of course, restricted to the limited record available to the district court when it granted or denied the motion"). Nor can the views and experiences of a *single voter* negate the extensive evidence that was considered and credited by the District Court to prove "how the additional hoops out-of-state students, transgender students, and young people will have to go through in order to meet the requirements for a secondary form of ID will raise the cost of voting." Order, ¶ 40.[7]

[7] The Secretary makes the argument that this "academic testimony cannot withstand even cursory scrutiny because it uses college students as a proxy for 'young voters.'" Br. 24. But courts have regularly and properly equated the groups. *See, e.g.*, *League of Women Voters of Fla.*, 314 F. Supp. 3d at 1206, 1216, 1221, 1223 (prohibition on early voting on college campuses "lopsidedly impacts Florida's youngest voters," and failed *Anderson-Burdick* because it restricted access to franchise on "account of age". And, while not all young voters are college students, the burden on this specific subset of Montanans still renders SB 169 unconstitutional. "Disparate impact matters" even under the more

The Secretary also looks, without success, for support from Montana's driver's license regime. The Secretary theorizes that SB 169 cannot possibly burden voters with out-of-state driver's licenses because Montana residents "are required to obtain a Montana driver's license." Br. 25-26. But Montana law requires only that a resident obtain a Montana driver's license "before operating a motor vehicle." § 61-5-103(1), MCA. College students and other young voters who possess out-of-state driver's licenses or other ID and do *not* operate motor vehicles in Montana are *not* required to obtain a Montana driver's license.

Lacking an evidentiary basis for claiming that the District Court erred, the Secretary attempts to minimize SB 169's impacts by mischaracterizing the law. The Secretary repeatedly contends that SB 169 makes voting "easier." Br. 4-5, 17. But that's inaccurate. For example, the Secretary claims that the pre-SB 169 voter ID law required that primary IDs be both "current and valid." *Id.* at 4. This is incorrect. Before SB 169, the statute required only that photo IDs be "current," *see*

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flexible *Anderson-Burdick* framework. *League of Women Voters of Fla.*, 314 F. Supp. 3d at 1216. Even the U.S. Supreme Court has recognized that courts should consider not only a law's impact on the general electorate, but also particularly burdensome impacts on identifiable subgroups. *See Crawford*, 553 U.S. at 199–203 (plurality opinion).

§ 13-13-114(1)(a), MCA (2005), and the pre-SB 169 regulations specified that all photo IDs were "presumed to be current and valid[.]" ARM 44.3.2102(6)(c) (2021).

The Secretary's discussion of the new "failsafe," Br. 22-23, elides the fact that, before SB 169 and the Secretary's amended regulations, Montana voters had a better option. The Secretary's new Declaration of Impediment for Elector form permits an elector who lacks sufficient identification to cast a provisional ballot, which will be counted *only if* (1) the voter physically returns by 5 p.m. the day after the election, (2) provides a valid form of ID or other documentation, *and* (3) demonstrates a "reasonable impediment" to obtaining a photo ID. 13-15-107(3)-(4), MCA. In stark contrast, the pre-SB 169 Polling Place Elector Identification Form was a true failsafe that did not require voting a provisional ballot. *See* ARM §§ 44.3.2110(2)(b), 44.3.2102(9). That form alone sufficed for identification at the polls: Once verified by election officials, the voter could use it as primary identification and cast a regular ballot. *Id.*

The notion that SB 169 made voting easier by creating a new failsafe is simply false. SB 169 and the Secretary's new regulation impose

substantial burdens on the right to vote. The record evidence demonstrates this, and the District Court's findings were not erroneous.

2. SB 169 is not justified by any compelling state interest.

Because SB 169 infringes on the right to vote, it "can only survive scrutiny if the State establishes a compelling state interest and . . . its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *Mont. Env't Info. Ctr.*, 1999 MT 248, ¶ 63. The Secretary made no such showing.

Although the Secretary attempts to justify the burdens by referring to election integrity and voter confidence, she presented no supporting evidence. In particularly, there was no evidence presented of any fraud or other problems associated with student IDs, no evidence that student IDs decreased voter confidence, and no evidence that SB 169 will increase voter confidence. Moreover, by the Secretary's own admission, SB 169 "do[es] not address proof of citizenship." MAR Issue No. 2 at 170, Mont. Sec'y of State, (Jan. 28, 2022), https://sosmt.gov/wp-admin/admin-ajax.php?juwpfisadmin=false&action=wpfd&task=file.download&wpfd_category_id=735&wpfd_file_id=46687&token=&preview=1. Instead of attempting to make the required showing, the Secretary erroneously

accuses the District Court of "ignor[ing]" the State's proffered interests altogether. Br. 27. But the District Court did not *ignore* them—it rightfully *discounted* them. The District Court considered the Secretary's arguments, *see* Order, ¶¶ 30-31, 41-42, but credited the record evidence that voter fraud is rare in Montana and that there has been no student ID-related election fraud in concluding that the state's purported interests are insufficient to justify SB 169's burdens on the right to vote, *id.* ¶ 36. Given the Secretary's failure to establish a connection between those interests and SB 169, the District Court did not err.

C. HB 176 violates the fundamental right to vote.

The District Court did not manifestly abuse its discretion by finding that HB 176 imposes significant burdens on the right to vote and that no compelling interest justifies those burdens.

1. HB 176 imposes significant burdens on the right to vote.

The District Court's finding that eliminating EDR burdens Montana voters was based on substantial and largely unrefuted evidence, including from affected individuals and expert reports, demonstrating that tens of thousands of Montanans have used EDR, that EDR boosts turnout, and that Native and young voters

disproportionately rely on EDR. Order, ¶¶ 14, 59. Based on that evidence, the District Court found that HB 176 "eliminates an important voting option" and "will make it harder, if not impossible, for some Montanans to vote." *Id.* ¶ 45. The Secretary largely ignores these significant burdens.

2. HB 176 is not justified by any compelling state interest.

The District Court did not manifestly abuse its discretion when it found that the Secretary failed to establish that elimination of EDR is justified by a compelling state interest. Order, ¶¶ 44-45.

The Secretary's evidence of a state interest—that some election administrators would prefer to end EDR because it would make election day easier for them—is contradicted by evidence from other administrators who testified that they would prefer to keep EDR, and that ending it could be more burdensome. *See supra* II.C. But even if the mixed administrative burden evidence was sufficient to establish a state interest, the Secretary did not—and cannot—demonstrate that elimination of EDR is narrowly tailored to address that issue without unnecessarily burdening the right to vote. The District Court considered the Secretary's evidence that HB 176 advances state interests but credited evidence describing steps elections officials can take—short of

eliminating an important tool for voters to cast their ballots—to mitigate any issues from EDR. *Id.* ¶¶ 44-45; *see also Dorn v. Bd. of Trs. of Billings Sch. Dist. # 2* (1983), 203 Mont. 136, 150, 661 P.2d 426, 433 (noting less restrictive means "were not tried").

3. The Montana Constitution does not give the Legislature carte blanche to eliminate EDR.

Rather than engage with the District Court's factual findings or demonstrate how HB 176 is closely tailored to the State's proffered interests, the Secretary suggests that the Legislature is free to end EDR by virtue of the language of Article IV, Section 3 of the Montana Constitution. Br. 33-38. But this argument fundamentally misunderstands Plaintiffs' claims. Plaintiffs are *not* suggesting that "the Constitution requires EDR." *Id.* at 34. Their claim is that Montana voters have come to rely on EDR to exercise their right to vote, and its abolition unduly burdens the ability of Montanans to exercise the franchise. The burden upon the fundamental right to vote (which Plaintiffs amply proved), requires HB 176 to satisfy strict scrutiny to survive. Because it cannot, it violates the Montana Constitution, regardless of which constitutional provision allowed the Legislature to enact EDR in the first place.

As the District Court recognized, "while . . . the Legislature has authority to provide for a system of poll booth registration, the laws passed by the Legislature in order to provide that system are still subject to judicial review." Order, ¶ 46. Indeed, "[o]nce the legislative branch has exercised its authority to enact a statute, whether through legislative referendum or a bill signed by the Governor, it is within the courts' inherent power to interpret the constitutionality of that statute when called upon to do so." *Driscoll II*, 2020 MT 247, ¶ 11 n.3. To put it another way: the Legislature can legislate laws related to voter registration, but not unconstitutionally.[8]

III. Even if the Court applied *Anderson-Burdick*, HB 176 and SB 169 would not survive scrutiny.

Even if the Court were to accept the Secretary's invitation to import the *Anderson-Burdick* standard, the result would not change. Under *Anderson-Burdick*, courts first consider whether and to what extent the

[8] Nor, for that matter, does the fact that "EDR did not exist in Montana until 2005" change the constitutional calculus. Br. 35. Laws that exist at the time of constitutional ratification do not permanently ossify the minimum rights that are afforded by them. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (Fourteenth Amendment to U.S. Constitution does not permit separate-but-equal segregation in schools even though ratifiers of amendment indisputably understood racial segregation to be constitutionally permitted).

challenged law burdens the right to vote. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Laws that impose severe burdens are subject to strict scrutiny. *See Norman v. Reed*, 502 U.S. 279, 280 (1992); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019). But even regulations that impose less than "severe" burdens on the right to vote are subject to more exacting forms of scrutiny than rational basis review—even a "minimal" burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Ohio State Conf. of NAACP v. Husted* (*Ohio NAACP*), 768 F.3d 524, 538 (6th Cir. 2014) (citing *Crawford*, 553 U.S. at 191). Regardless of the extent of the burden, the state must "articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth." *Ohio NAACP*, 768 F.3d at 545-46; *see also Anderson*, 460 U.S. at 789.

The Secretary attempts to evade *any* scrutiny of HB 176 and SB 169 by downplaying the burdens imposed upon voters. But the Secretary does not allege that the District Court's factual findings about the impacts of the challenged laws on voters was manifestly erroneous. *See,*

e.g., *Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) (noting that the defendant "introduced no specific evidence to refute" the evidence of the burden the challenged law imposed on Ohio voters).

Moreover, as already noted, courts must consider not only the impacts on the electorate as a whole, but also on the discrete subgroups of voters who are most impacted. *See Crawford*, 553 U.S. at 198, 201 (controlling op.) ("The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a [photo ID]"); *see also Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (noting courts should consider "not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe"). The severity of the burden is greater when it disproportionately falls upon populations who already face greater barriers to participation and are less likely to be able to overcome those increased costs. *See Ohio NAACP*, 768 F.3d at 545 (finding significant burden that fell disproportionately on African American, lower-income, and homeless voters likely to use the voting opportunities eliminated by challenged law). To be unconstitutionally burdensome, a law need not

completely prevent voters from voting. The focus of the inquiry is on how affected voters' "ability to cast a ballot is impeded by [the State's] statutory scheme." *Id.* at 541; *see also Obama for Am.*, 697 F. 3d at 433 (holding burden of challenged voting practice was not "slight" even though it did not "absolutely prohibit early voters from voting"). Finally, laws that threaten disenfranchisement may impose a severe burden on the franchise even when a relatively small number of voters are affected. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (disqualifying provisional ballots that constituted less than 0.3 percent of total votes inflicted "substantial" burden on voters); *Ga. Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1264 (N.D. Ga. 2018) (finding severe burden where 3,141 individuals ineligible to register).

At the second step of the *Anderson-Burdick* inquiry, the Secretary must show the challenged voting laws are "actually necessary" to serve specific state interests, and that they actually and effectively address the specific problem. *See Obama for Am.*, 697 F.3d at 434 (finding "vague interest" in election administration fatally undermined where there was "no evidence that local boards of elections have struggled to cope with

early voting in the past"); *Ohio NAACP*, 768 F.3d at 547 ("The district court properly identified that the specific concern Defendants expressed regarding voter fraud . . . was not logically linked to concerns with voting and registering on the same day."). This showing is required even where the state is able to identify a legitimate interest: In *Anderson* itself, the Supreme Court determined the proffered state interest was valid but still concluded that the challenged restriction was unconstitutional after asking: (1) whether there was anything in the record before it that undermined that interest (the Court found that there was); (2) whether the law actually promoted that interest (the Court found that it did not); and (3) whether the law was necessary to achieve that interest (the Court found that it was not). *See* 460 U.S. at 796–806. As a result, the restriction did not survive application of the balancing test.

A. SB 169 would not survive *Anderson-Burdick*.

Even if the Court applied *Anderson-Burdick*, SB 169 would not survive. The Secretary's invocation of electoral integrity and "safeguarding voter confidence," Br. 27, exemplify precisely the kind of vague and abstract justifications that courts have found insufficient when weighed against substantial burdens imposed by a challenged

election law, *Obama for Am.*, 697 F.3d at 434; *Ohio NAACP*, 768 F.3d at 547. Although the Secretary repeatedly raises the specter of voter fraud, *see* Br. 11, 21, 27–28, 30, 38–39, SB 169 was not only passed in the near-absence of any voter fraud in Montana, but also in the wake of an indisputably secure election. SA 295. And more to the point, the Secretary identified no evidence of any fraud associated with the use of student IDs.

The Secretary's asserted interests in voter confidence, Br. 4, 11, 21, 27–28, 30, 41, 43, fare no better. Just months before the 2020 general election, the Secretary's office relied on an expert report touting Montanans' high levels of confidence in their elections. SA 326-29. And even if Montanans' confidence has since decreased, the Secretary provides no evidence suggesting any connection to the use of student IDs. In short, the Secretary fails to demonstrate why SB 169 is actually necessary for—i.e., how it actually address—the interests she asserts. *See, e.g.*, *Ohio NAACP*, 768 F.3d at 545-46.

B. HB 176 would not survive *Anderson-Burdick*

For the same reasons, application of *Anderson-Burdick* would not save HB 176. The Secretary once again fails to explain why the

elimination of EDR is actually necessary to serve the interest she puts forth. *Id.* And the Secretary does not even acknowledge the evidence of alternative solutions to the problems she supposes and instead focuses on the rational relationship between eliminating one administrative task and creating space for others. Br. 43-44. That HB 176 might be "rationally related" to these interests, Br. 43, is insufficient, even under the federal standard. *See id.* (requiring "specific, rather than abstract state interests," that are "actually necessary, meaning it actually addresses, the interest put forth").

IV. The Challenged Restrictions violate equal protection.

The District Court did not manifestly abuse its discretion in concluding that SB 169 and HB 176 also violate the Montana Constitution's equal protection provisions. Order 46.

The Secretary relies on a single, forty-year-old case to argue that Plaintiffs must prove discriminatory intent. Br. 31. But *Fitzpatrick v. State* (1981), 194 Mont. 310, 315, 323, 638 P.2d 1002, 1010, is about the proper scope of post-conviction relief sought by a death row prisoner, and subsequent Montana equal protections cases make clear that a showing of discriminatory intent is not required. Instead, the relevant question is

whether the challenged legislation "operates to a peculiar disadvantage of a suspect class." *Arneson v. State* (1993), 262 Mont. 269, 272, 864 P.2d 1245, 1247. "Thus, to prevail on an equal protection challenge, the injured party must demonstrate that the law at issue discriminates by impermissibly classifying individuals and treating them differently on the basis of that classification." *State v. Egdorf*, 2003 MT 264, ¶ 15, 317 Mont. 436, 440, 77 P.3d 517, 520.

Ignoring caselaw to the contrary, the Secretary further argues that SB 169 and HB 176 present no equal protection issue because they do not facially classify voters by age. Br. 31. But an apparently neutral law may nonetheless violate equal protection if "in reality [it] constitute[es] a device designed to impose different burdens on different classes of persons." *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421 (quotation omitted). And Plaintiffs proved just that: young Montanans are unduly affected because the Challenged Restrictions constrict identification and voting methods disproportionately used by them. *See supra* I.B, II.A.[9]

[9] The Secretary's claim that the Court's characterization of "young voters" is similarly without merit. *See supra* n.7.

While evidence of intentional discrimination is not necessary to prove Plaintiffs' claims, it is evident that the Legislature knew these laws would have disproportionate impacts on young voters. SA 201 (21:9-15), 61 (13:6-15), 63 (19:6-8), 274 (12:14-13:13), 275 (15:7-11, 16:11-19), 276 (22:16-20). Perhaps most tellingly, Speaker of the House Wylie Galt made the intent of SB 169 plain when, during a legislative hearing, he said: "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." SA 23. He concluded that young voters have "little stake in the game." *Id.* The U.S. Supreme Court rejected a virtually indistinguishable rationale offered by Texas in *Carrington v. Rash*, 380 U.S. 89 (1965), when it attempted to justify restrictions that made it harder for "transient" members of the military to vote in that state.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court affirm the District Court's Order granting Plaintiffs' motions for preliminary injunction.

Respectfully submitted this 15th day of June, 2022.

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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 9,948 words, excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 15th day of June, 2022.

/s/ Matthew P. Gordon
Matthew P. Gordon

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