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**pro hac vice application pending*

MONTANA 18TH JUDICIAL DISTRICT COURT,

GALLATIN COUNTY

LEAGUE OF WOMEN VOTERS OF MONTANA,

Plaintiff,

v.

AUSTIN KNUDSEN, in his official capacity as the Attorney General of the State of Montana; CHRISTI JACOBSEN, in her official capacity as Secretary of State of the State of Montana; and CHRIS GALLUS, in his official capacity as the Commissioner of Political Practices of the State of Montana

Defendant.

Civil Action No. DV-16-2023-0001073D

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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No.	Description
1	Declaration of Nancy Leifer, dated November 13, 2023
2	Declaration of Julia Maxon, dated November 15, 2023
3	Declaration of Kiersten Iwai, dated November 14, 2023
4	Declaration of Joye Kohl, dated November 13, 2023
5	Declaration of Marga Lincoln, dated November 13, 2023
6	Expert Report of Dr. Alexander Street, dated November 14, 2023
7	Montana Voter Registration Application
8	Enrolled Bill Text of HB 892
9	Missoula County records
10	Montana county records
11	"Election Facts," Montana Secretary of State webpage
12	"Montana's Election Administration FAQs – Checking Election IQ," Montana Secretary of State webpage
13	"Guide to Agency-Based Voter Registration: National Voter Registration Act (NVRA)," Montana Secretary of State
14	"Frequently Asked Questions," Montana Secretary of State webpage
15	"Detailed Bill Information: HB 892," Montana Legislature webpage
16	"Automatic Voter Registration," National Conference of State Legislatures webpage
17	"Voter Registration Cancellations," U.S. Election Assistance Commission webpage
18	"Election Fraud Cases," Heritage Foundation webpage
19	League of Women Voters of Montana and Montana Women Vote National Voter Registration Act Letter
20	League of Women Voters of Montana National Voter Registration Act email correspondence
21	"Late Registration Procedures – Directive #01-06," Montana Secretary of State
22	"Election Directive #03-07: Topic: Handling Mail Ballot Inactive Electors and Late Registrants," Montana Secretary of State
23	Lewis and Clark County records

[*] The exhibits are attached to the declaration of Alice C.C. Huling, filed concurrently with Plaintiff's motion.

INTRODUCTION

House Bill 892 ("HB 892") makes it illegal for a voter to do what almost all voters do when they move: apply to register in their new jurisdiction without worrying about how election administrators are handling their prior registration. After all, the government, not individual voters, has the resources and responsibility to maintain states' voter registration lists. Given the realities of a mobile voter population and decentralized elections administration in the United States, it is essential that deregistration remain the province of the government, not the voter.

Two of HB 892's provisions ignore these realities by criminalizing (1) a voter having multiple registrations and (2) a voter omitting any previous registration on a state voter registration form. The provisions do not serve any anti-fraud or election administration purpose, as existing state and federal prohibitions effectively target double voting. Instead, the provisions make routine voter registration conduct a crime and interfere with the work of civic organizations such as Plaintiff League of Women Voters of Montana ("LWVMT"). LWVMT seeks to vindicate and safeguard its constitutional rights through a preliminary injunction against HB 892's enforcement.

BACKGROUND

I. HB 892's Legal Framework

During the 2023 session, the Montana Legislature passed HB 892 ("Prohibit Double Voting"), which the Governor signed into effect on May 22. Ex. 8 (Enrolled Bill Text); Ex. 15 (Bill Information). HB 892 re-articulates Montana's preexisting prohibition on double voting, which also mirrors a longstanding federal ban. § 13-35-210(2), (4), MCA; 52 U.S.C. § 10307(e). But HB 892 goes much further; it creates two additional criminal felony laws that encumber voters with vague and unnecessary registration requirements. § 13-35-210(5)-(6), MCA.

A. HB 892's Deregistration Requirement

HB 892 prohibits any voter from "purposefully remain[ing] registered to vote in more than one place in this state or another state any time, unless related to involvement in special district elections." § 13-35-210(5), MCA ("Deregistration Requirement"). This Requirement creates a new felony offense prohibiting a voter from registering in a Montana jurisdiction before ensuring any previous registration in another jurisdiction is cancelled. The one-sentence mandate is ambiguous, failing to define key terms including "remain registered," or "in more than one place." As one legislator noted during the debate on HB 892, the Deregistration Requirement could be enforced to penalize a range of innocent voter conduct: someone "could interpret this any way you want" to impede voter registration, and "what hangs in the balance is jail time." Mont. Leg., Senate State Admin. Hearing Video at 07:52 (Apr. 17, 2023), available at https://tinyurl.com/3y5hua8r ("Sen. Comm. Hearing"). The bill was not amended to address these concerns.

Additionally, HB 892 neither explains how voters may comply with the Deregistration Requirement nor accounts for how registration systems function. The processes for voters to deregister in prior jurisdictions are unclear and inconsistent, and in many cases a voter cannot be guaranteed that deregistration has been successful. *See* Ex. 17 (EAC List). The Secretary's website merely states that voters "must notify the county election office" and provides contact information. Ex. 11 (Election Facts); *see also* Ex. 14 (SOS FAQs). And as the Secretary's witness testified during HB 892 hearings, there is no centralized system or established or consistent process for voters to cancel a registration in a prior state, and Montana has declined to subscribe to the national Electronic Registration Information Center ("ERIC") system for cross-state registration information sharing. Sen. Comm. Hearing at 18:48 (describing system); Mont. Leg., House State Admin. Hearing Video at 07:32 (Mar. 29, 2023), available at https://tinyurl.com/yc3rarh8 ("House Comm. Hearing") (same).

Even if a voter can request cancellation of a prior registration, the success of the request depends on independent acts of third parties. Ex. 23 (Lewis and Clark County Records). And in some jurisdictions, it is difficult for a voter to confirm whether their request has been completed. Ex. 1, Decl. of LWVMT President Nancy Leifer ¶ 71 ("Leifer Decl."); Ex. 6, Expert Report of Dr. Alexander Street ¶¶ 16, 22 ("Street Rep."). Some voters may not know that they remain registered elsewhere, including in automatic voter registration states, and, if they do, may be unaware of how to deregister. Leifer Decl.¶¶ 67, 73-74, 80; Street Rep. ¶ 16; Ex. 16 (AVR List). Voters understandably expect the government to use its substantial resources to handle previous registrations. Leifer Decl. ¶ 67; Street Rep. ¶¶ 16, 19.

B. HB 892's Omission Provision

HB 892 also requires voter registration applicants using the Montana state registration form ("State Form") to "provide the[ir] previous registration information." § 13-35-210(5), MCA ("Omission Provision"). The Omission Provision creates a new felony offense for omitting prior registration information on a voter registration application, and may also criminalize providing inaccurate previous registration information. The provision does not specify the requisite mental state for a violation, nor does it explain how a voter may satisfy the requirement of providing "previous registration information." *Id.* For example, it is unclear whether the information required is (1) the voter's last-in-time registration or all previous registrations and (2) the voter's previous jurisdiction(s) or the exact previous registration address(es).

During debate, one legislator noted the lack of a requisite mental state for a violation of the Omission Provision, but it went unaddressed during the legislative process. House Comm. Hearing at 06:20. When a legislator asked whether the Omission Provision would "increase the burden to vote on the voter" or "increase the burden on the clerk's office, or both," a county election official representing the Montana Association of Clerks and Recorders stated that she shared the concerns

and was "not sure what the intent here is." *Id.* at 08:56. HB 892's supporters did not clarify.

C. Montana State Voter Registration Form

Ambiguities on the current State Form—which election officials are instructed to use, Mont. Admin. R. 44.3.2004, and which was last revised in April 2021, Ex. 7 (State Form)—exacerbate the problems of the Deregistration Requirement and Omission Provision. For example, the form includes a field for an applicant's previous registration information, *id.*, Box 9, but it is unclear whether the information is required and, if so, what must be provided. The form instructs that previous registration information is "REQUIRED IF NAME CHANGED OR IF PREVIOUSLY REGISTERED TO VOTE IN ANOTHER MT COUNTY OR IN ANOTHER STATE." *Id.* But the prompt is not marked by the asterisk that indicates required fields. *Id.* And it is unclear what qualifies as a "New Registration" on the State Form, or how new registrations implicate HB 892's requirements. *Id.*, Box 1. The Secretary's guidance about the State Form and these inputs—updated in July— is silent on how to complete a registration form in compliance with HB 892. *See, e.g.*, Ex. 13 (NVRA Guide) at 4, 6.[1]

D. HB 892's Severe Felony Criminal Penalties and Unclear Requirements

HB 892 enforces the Deregistration Requirement and Omission Provision through severe means. Each violation is punishable as a felony, carrying up to $5,000 in fines, 18 months imprisonment, or both, which exceeds the background misdemeanor applicable to most election law violations. § 13-35-210(6), MCA (HB 892 penalty provision); *see also* §§ 13-35-103 (misdemeanor provision), 45-2-101(23) (defining felony), MCA. Both county and state officials could enforce the provision against voters. *See* §§ 13-37-111 (Commissioner of Political

[1] Plaintiff submitted multiple records requests to Secretary Jacobsen concerning the State Form and the enforcement of HB 892. Leifer Decl. ¶¶ 114-115; Ex. 19 (Records Request); 20 (Email Requests). The Secretary has not provided HB 892 guidance to county elections officials, despite requests to do so. *See* Ex. 9 (Missoula County Records); Ex. 10 (Montana County Records).

Practices); 2-15-501 (Attorney General), MCA. Additionally, enforcement actions may be taken against third party groups that assist a voter found to violate HB 892. *See* §§ 13-35-105, 13-35-205(6), 45-2-302(3), MCA. The risk of HB 892's enforcement is not idle. HB 892's sponsor, for example, indicated that "in discussing [HB 892] with the Secretary of State's office, this will allow them to prosecute; they wanted this bill." Mont. Leg., House Floor Session Video at 05:02 (Mar. 31, 2023), available at https://tinyurl.com/2476xmhy ("House Fl. Session"); *see* House Comm. Hearing at 02:01; Sen. Comm. Hearing at 01:05, 16:52.

Moreover, it is unclear what happens to a registration application that does not comply with HB 892. Neither HB 892 nor any other state provision makes deregistering from a previous jurisdiction or providing prior registration information a requirement for voter registration. *See, e.g.*, Mont. Const., art. IV, § 2; §§ 13-1-111 (voter qualifications), 13-1-112 (residency rules), 13-2-110 (registration application requirements), 13-2-402 (registration cancellations), MCA. And the Secretary's binding guidance provides that "[u]pon satisfying the voter registration qualifications in 13-1-111, MCA"—which includes nothing about previous registration—"a registered elector may obtain and cast a ballot." Mont. Admin. R. 44.3.2010(4). Yet HB 892's ambiguities could lead to arbitrary implementation, including as a reason to reject or hold up a valid voter registration. *See, e.g.*, Mont. Admin. R. 44.3.2010(5). County election officials have expressed concerns about HB 892's uncertainties, which have not been resolved. Ex. 9 (Missoula County Records); Ex. 10 (Montana County Records); House Comm. Hearing at 08:56. HB 892's provisions and punishments are extreme outliers, with no true analogue across the country.

E. Stated Purpose of HB 892

HB 892's ostensible purpose is to prevent double voting by imposing additional felony penalties. Plaintiff does not challenge the portion of HB 892 that makes double voting—already a criminal act under state and federal law—a felony offense. § 13-35-210(2), (4), MCA; 52 U.S.C.

§ 10307(e). But it is unclear how the Deregistration Requirement and Omission Provision may prevent double voting. For example, HB 892's lead sponsor, Representative Hellegaard, said that the bill is meant to "send[] a strong message" that voting twice "will not be tolerated." Sen. Comm. Hearing at 02:20. But when pressed about the purpose of the Deregistration Requirement and Omission Provision, legislators and the Secretary's witness could not provide any rationale; the sponsor demurred that "leadership gave [her] this bill and said we want this done." *See, e.g.*, Sen. Comm. Hearing at 23:22; House Comm. Hearing at 15:20.

Other legislators emphasized that the challenged provisions merely supplement the existing safeguards that effectively prevent double voting and voter fraud, which is extremely rare in Montana. House Comm. Hearing at 03:28, 13:34; House Fl. Session at 03:06; Sen. Comm. Hearing at 13:30; Mont. Leg. Senate Floor Session Video at 03:35, 12:00 (Apr. 25, 2023), available at https://tinyurl.com/43dm7rat ("Sen. Fl. Session"); *see also* Ex. 18 (Heritage Foundation) (recording only two election fraud instances since 2011). HB 892's sponsor and the Secretary's witness agreed that preexisting practices and systems—including criminal provisions and cross-jurisdiction collaboration—already prevent double registration and double voting. House Comm. Hearing at 07:06, 07:32; Sen. Comm. Hearing at 11:20, 21:51. The HB 892 provisions were, in the sponsor's words, merely "another tool in the toolbox." Sen. Comm. Hearing at 15:04.

II. Plaintiff's Lawsuit

Plaintiff LWVMT filed suit to enjoin the Deregistration Requirement and Omission Provision and to relieve HB 892's unconstitutional burdens on civic organizations and voters. *See* Compl., Doc. 1 (Oct. 31, 2023). LWVMT is a nonpartisan membership, service, and advocacy organization that encourages informed and active participation in government for all voters. Leifer Decl. ¶¶ 4-8, 22-23, 31. LWVMT's approximately 330 active voter-members span its four "local

League" chapters in Montana, with members moving across jurisdictions since the enactment of HB 892. *Id*. ¶¶ 9-15; Ex. 4, Decl. of Joye Kohl ¶¶ 2-3; Ex. 5, Decl. of Marga Lincoln ¶¶ 2-3.

LWVMT believes that increased civic engagement is key to a more representative government, and LWVMT expresses its view by assisting and encouraging members and eligible Montanans to register to vote. Leifer Decl. ¶¶ 5-8, 19-20, 26, 31, 54. LWVMT's voter registration activities, like the similar work of its partners, is effective. Street Rep. ¶¶ 13, 15. LWVMT assisted over 1,200 eligible Montanans in registering to vote in 2022 and over 470 so far in 2023, including voters who had to register following a cross-jurisdiction move. Leifer Decl. ¶ 22. LWVMT regularly works with Montanans who have moved recently and need to re-register in a new jurisdiction. *Id*. ¶¶ 64-65. LWVMT specifically assists and encourages registration within underserved populations—including low-income, housing insecure, formerly incarcerated, Native, and elderly individuals; students; those with disabilities; and veterans—who are often more transient than other groups. *Id*. ¶¶ 49-50, 64, 108. LWVMT's successful voter registration programs attract more members, volunteers, partnerships, and resources. *Id*. ¶¶ 29, 32-41. Other nonpartisan civic organizations are similarly impaired by HB 892. Ex. 2, Decl. of Julia Maxon ¶¶ 25-33, 81-85 ("Maxon Decl."); Ex. 3, Decl. of Kiersten Iwai ¶¶ 15-20, 54-56 ("Iwai Decl.").

In response to HB 892, LWVMT has altered its programs and diverted resources, and it is developing guidance for members, volunteers, and voters about HB 892's impact and the risk of criminal penalties. Leifer Decl. ¶¶ 51, 123, 135-51. HB 892 chills LWVMT's expressive activities because LWVMT fears the threat of criminal liability under HB 892 to itself, its members and volunteers, and the voters it assists. *Id*. ¶¶ 55-57, 61, 68, 87-91, 125, 127, 142-43. LWVMT is also reasonably concerned that HB 892 will be applied as a requirement for registration eligibility that could result in the rejection or delay of valid applications of its members and the voters it assists,

which undermines LWVMT's activities. *Id*. ¶¶ 58, 79-83. If a voter or a registration volunteer were prosecuted under HB 892, LWVMT and its partners would be severely harmed. *Id*. ¶¶ 56, 135-39, 142-43; *see also* Maxon Decl. ¶¶ 68-80; Iwai Decl. ¶¶ 42-53. LWVMT has several registration programs upcoming in early 2024, and it will continue to conduct others through the 2024 election cycle. Leifer Decl. ¶¶ 42-51. But LWVMT is reluctant in its planning given how HB 892 affects these programs and Plaintiff's interactions with voters. *Id*. ¶¶ 53-55, 123.

LEGAL STANDARD

District courts have "broad discretion" to grant a preliminary injunction where doing so will "preserve the status quo and minimize the harm to all parties pending final resolution on the merits." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 14, 401 Mont. 405, 473 P.3d 386 (internal quotation marks and citation omitted). Such relief is warranted where the applicant shows: (1) it "is likely to succeed on the merits"; (2) it "is likely to suffer irreparable harm"; (3) "the balance of equities tips in the applicant's favor"; and (4) relief "is in the public interest." § 27-19-201(1), MCA.[2]

ARGUMENT

HB 892's Deregistration Requirement and Omission Provision impair LWVMT's fundamental rights to free speech, association, suffrage, and due process. Both provisions are subject to, and fail, strict scrutiny. The provisions have and imminently will cause LWVMT and others irreparable harm. And the equities and public interest tilt sharply in Plaintiff's favor.

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[2] The amended statute provides that the standard should "mirror the federal preliminary injunction standard," and its "interpretation and application" should "closely follow United States supreme court case law." § 27-19-201(4), MCA. The Court has since reiterated that a party need only establish a "prima facie case . . . to be entitled to a preliminary injunction." *Benesh v. Hebert*, 2023 MT 123N, ¶ 12, 530 P.3d 1293, 2023 Mont. LEXIS 647, at *11 (Mont. June 20, 2023).

I. Plaintiff LWVMT is likely to succeed on the merits of their constitutional claims.

A. HB 892 violates Plaintiff's fundamental right of freedom of speech.

The challenged provisions violate Article II, Section 7, which prohibits laws "impairing the freedom of speech or expression" and protects the right to "be free to speak or publish whatever he will on any subject[.]" Mont. Const., art. II, § 7. These rights are "fundamental." *State v. Dugan*, 2013 MT 38, ¶ 18, 369 Mont. 39, 303 P.3d 755 (citations omitted).[3]

First, LWVMT's voter registration activities represent core political speech. Montana's free speech rights extend to organizations to protect their "opportunity to persuade to action." *Mont. Auto Ass'n v. Greely*, 193 Mont. 378, 387-88, 632 P.2d 300, 305 (1981). Article II, Section 7 safeguards the right of organizations to the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Dorn v. Bd. of Trs. of Billings Sch. Dist. No. 2*, 203 Mont. 136, 145, 661 P.2d 426, 431(1983) (internal quotation marks and citation omitted). Such expression "is appropriately described as 'core political speech,'" which includes voter engagement activity involving "the expression of a desire for political change," "communication of information," and "the dissemination and propagation of views and ideas" about the electoral process. *Meyer v. Grant*, 486 U.S. 414, 421-22 & n.5 (1988) (citation omitted).

LWVMT subscribes to the view that "a healthy, participatory democracy depends on ensuring that as many people as possible vote for the people who represent them." *Mont.*

[3] Montana's state constitutional free speech and associational guarantees are at least as protective as the federal First Amendment. *See City of Billings v. Laedeke*, 247 Mont. 151, 157-58, 805 P.2d 1348, 1351-52 (1991). Indeed, the text of Article II, Sections 6 and 7 exceeds the First Amendment to, for example, broadly bar any "impairing" of free expression, and the Montana Constitution must be interpreted independent of any federal constitutional floor. Mont. Const., art. II, § 7; *see also*, *Dorwart v. Caraway*, 2002 MT 240, ¶¶ 94-96, 312 Mont. 1, 58 P.3d 128 (Nelson, J., concurring). This brief cites federal cases as persuasive only, not to suggest federal law dictates the outcome here. The Court should "indicate[] clearly and expressly that [its decision is] based on bona fide separate, adequate, and independent grounds" under the Montana Constitution. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

Democratic Party v. Jacobsen, 2022 MT 184, ¶ 36, 410 Mont. 114, 518 P.3d 58. LWVMT believes that more Montanans should participate in elections and become civically engaged to achieve a more representative democracy. Leifer Decl. ¶¶ 5-6, 8, 19-20, 31, 40. In the ongoing national debate about whether to engage and trust in the electoral process, LWVMT takes a strong stance in favor of doing so by encouraging and assisting eligible Montanans to become registered. Leifer Decl. ¶ 21. Other groups express similar messages in their registration programs with particular focus on engaging underserved populations. Maxon Decl. ¶¶ 7-10, 45-55; Iwai Decl. ¶¶ 6-14.

Such "advocacy of a politically controversial viewpoint" encouraging engagement in the electoral process "is the essence" of core political speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995). LWVMT's speech promotes the "interchange of ideas for the bringing about of political and social changes"—greater participation in elections, particularly by underserved groups, because getting registered is beneficial, easy, and safe. *See Dorn*, 203 Mont. at 145, 661 P.3d at 431. Montana courts have concluded that analogous voter engagement efforts are core political speech. Appendix A, *Mont. Democratic Party v. Jacobsen*, DV 21-0451, at 48-50 (13th Jud. Dist. Ct. Apr. 6, 2022); *W. Native Voice v. Stapleton*, DV 20-0377, 2020 Mont. Dist. LEXIS 3, at *60-63 (13th Jud. Dist. Ct. Sept. 25, 2020). As have numerous federal courts specifically considering voter registration. *See, e.g.*, *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019); *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1217 (D.N.M. 2010).

Second, the Deregistration Requirement and the Omission Provision impair LWVMT's core political speech in its voter registration activities. Free speech rights are broad, protecting "not just speech itself but the entire process of communication, including the exchange of ideas and information between speaker and listener." *State ex rel. Missoulian v. Mont. Twenty-First*

Judicial Dist. Court, Ravalli Cnty., 281 Mont. 285, 301-02, 933 P.2d 829, 839 (1997). Likewise, regulations infringe on core political speech when they "reduc[e] the total quantum of speech on a public issue" and impair the speaker's "right not only to advocate their cause but also to select what they believe to be the most effective means" of doing so. *Meyer*, 486 U.S. at 423-24.

LWVMT's expression is undermined because HB 892 requires it to speak cautiously in its voter registration encouragement and assistance programs. Leifer Decl. ¶¶ 57, 143-44. Key to LWVMT's message—and its most effective means of encouraging registration—is its unequivocal expression that prospective voters should engage and that getting registered is easy, convenient, and hassle- and risk-free. *Id.* ¶¶ 27-28, 57. This message is effective at encouraging and assisting voters to overcome the costs of voting. Street Rep. ¶¶ 13, 15.

HB 892 impairs LWVMT's message and will reduce the quantum of speech advocating for registration because LWVMT is concerned that the voters it assists and its own members and volunteers could be subject to criminal prosecution. Leifer Decl. ¶¶ 56-57, 68, 90-91, 125, 127, 142-43. As HB 892 is implemented, LWVMT will need to inform voters, members, and volunteers about HB 892's new hurdles and warn them of the criminal risks of a violation. *Id.* ¶¶ 51, 57, 137-39, 142-43. LWVMT will need to dedicate more resources to each voter it assists to encourage them to overcome HB 892's added hurdles and risks. *Id.* ¶¶ 63, 149-51. This, in turn, chills Plaintiff's pro-democracy, pro-voting message, forcing LWVMT to alter its expression due to the threat that LWVMT's voter registration work could create criminal liability. *Id.* ¶¶ 121-22, 144-45. Other civic organizations' speech rights are similarly encumbered by HB 892. Maxon Decl. ¶¶ 81-85; Iwai Decl. ¶¶ 54-56. HB 892's impairment of LWVMT's core political speech "must be strictly scrutinized." *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236.

B. HB 892 violates Plaintiff's fundamental right of freedom of association.

HB 892 violates LWVMT's "[f]undamental" free association rights. Mont. Const., art. II, §§ 6-7; *In re C.H.*, 210 Mont. 184, 199, 683 P.2d 931, 939 (1984). The Constitution "protects the right of associations to engage in advocacy on behalf of their members" and the organization, including to "provide[] for the opportunity [of associations] to persuade to action." *Greely*, 193 Mont. at 387-88, 632 P.2d at 305; *accord NAACP v. Button*, 371 U.S. 415, 429-31 (1963). HB 892 impairs these associational rights, both directly and indirectly.

LWVMT's programs are protected associational activity, and its expressive association is key to its voter registration programs. Leifer Decl. ¶¶ 32-41. When LWVMT conducts a registration drive, it associates with members, volunteers, voters, and partner organizations to increase engagement. *Id.* LWVMT relies on its ability to effectively and freely share its pro-voter message to continue to deepen and expand its associations. *Id.* ¶¶ 26, 31, 33-34, 40. Other Montana organizations engage in similar activity, and all undertake these expressive associations for the same core reason: encouraging and assisting eligible Montanans to engage by registering to vote. *Id*. ¶¶ 38-41; Maxon Decl. ¶¶ 12-13, 25-33; Iwai Decl. ¶¶ 6, 15-20.

Montana recognizes constitutional protection for this type of expressive association. In *Dorn*, for example, the Court held that analogous activities in the initiative petition context are protected under Article II, Sections 6 and 7. 203 Mont. at 144-45, 661 P.2d at 430-31. Like the right to free speech, the right to free association guarantees "the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Dorn*, 203 Mont. at 145, 661 P.2d at 431 (internal quotation marks and citation omitted). Similarly, restrictions on ballot collection assistance implicate the "[f]reedom of association," which "protects the ability of organizations . . . to associate with members, organizers, volunteers, and [voter] communities in furtherance of a political belief." *W. Native Voice*, 2020 Mont. Dist. LEXIS 3, at *62-63; *accord*

Appendix B, *W. Native Voice v. Stapleton*, No. DV-2020-377, at 9-11 (13th Jud. Dist. Ct. July 7, 2020) (enjoining provisions based on "right to freedom of association"). Federal courts likewise protect the associational rights involved in voter engagement work. *See, e.g.*, *Hargett*, 400 F. Supp. 3d at 720; *Herrera*, 690 F. Supp. 2d at 1202, 1215-16; *accord VoteAmerica v. Schwab*, No. 21-2253-KHV, 2023 U.S. Dist. LEXIS 78316, at *30 (D. Kan. May 4, 2023).

The Constitution prohibits "*impairing* the freedom of" association, not just fully denying it. Mont. Const., art. II, § 7 (emphasis added). Thus, associational rights guard against laws that "constitute an effective restraint on freedom of association." *Greely*, 193 Mont. at 397, 632 P.2d at 310 (cleaned up). They are "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference[]" with the group's "means of communicating" to further their associations. *Healy v. James*, 408 U.S. 169, 181-83 (1972). The "abridgement of such rights" in incidental or "unintended" ways nonetheless "ha[s] a chilling effect on, and therefore infringe[s], the exercise of fundamental rights." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2009) (citation omitted).

HB 892 impairs Plaintiff's free association. Rather than freely encouraging members, volunteers, and partnership organizations to work with LWVMT to perform voter registration programs, LWVMT will need to warn that doing so could, in some circumstances, expose individuals and organizations to criminal sanction. Leifer Decl. ¶¶ 57, 143. Likewise, HB 892's hurdles will impede the registration process and diminish the effectiveness of LWVMT's programs, impairing LWVMT's ability to deepen and expand its associations through its successful programs. *Id.* ¶¶ 3, 57, 59-61, 127, 145-46, 151. Civic organizations are reasonably concerned that HB 892 will scare off current and potential voters, members, and volunteers, and undermine the effective programs that further their associations. *Id.* ¶¶ 52, 56-61, 76-77, 83, 87,

143; Maxon Decl. ¶¶ 58, 66-80; Iwai Decl. ¶¶ 40-53. These risks undermine each aspect of Plaintiff's associations because "the threat of penalties is likely to have a chilling effect on the entirety of the [registration] drive." *Hargett*, 400 F. Supp. 3d at 720.

Core political speech rights require utmost constitutional protection for both "political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam). Whether direct or incidental, HB's impairment of Plaintiff's expressive associations "must survive exacting scrutiny." *Perry*, 591 F.3d at 1139 (quoting *Buckley*, 424 U.S. at 64).

C. HB 892 encumbers the fundamental right of suffrage.

In addition to protecting core political speech and association, the Montana Constitution safeguards the "free exercise of the right of suffrage." Mont. Const., art. II § 13. Together and individually, the Deregistration Requirement and Omission Provision needlessly encumber voting rights and must satisfy strict scrutiny. *Mont. Democratic Party* at ¶ 19.

Requiring Montanans to go through additional unclear and inconsistent steps to deregister will turn people off from the voting process by burdening their ability to register. *See* Leifer Decl. ¶¶ 59-60, 62-91; Street Rep. ¶¶ 22-23; Ex. 17 (EAC List). Some voters do not know whether or where they have a prior registration or if it has already been cancelled. Leifer Decl. ¶¶ 67, 71, 73-74; Maxon Decl. ¶¶ 59-60, 79; Iwai Decl. ¶¶ 35-37, 52. Compliance with the Deregistration Requirement is further conditioned on the actions of third parties beyond the voter's control to cancel a prior registration. Leifer Decl. ¶¶ 67-71, 79; Ex. 23 (Lewis and Clark County Records). The Omission Provision similarly abridges suffrage rights. Voters often will not remember or may misremember previous registration information. Leifer Decl. ¶¶ 72-74. In a best-case scenario, these voters will be delayed in registering as they research their prior registration. *Id.* ¶¶ 75, 81-82. Others will inadvertently submit incomplete or inaccurate applications. *Id.* ¶¶ 81-82. And many

voters simply will not go through HB 892's added requirements, opting instead not to vote. *Id.* ¶¶ 60, 76-77, 83, 87.

For the voters that do apply, county election officials who receive otherwise acceptable registrations may reject or delay processing them because of perceived noncompliance with HB 892. *Id.* ¶ 81. Voters could then be required to spend additional time and effort resubmitting or correcting their registration form. *Id.* ¶ 82. This is so even though county election officials often already have the necessary information to process the application (at least for inter-county moves). *Id.* ¶¶ 85; Street Rep. ¶¶ 17-18. HB 892's burdens will fall hardest on the underserved populations that civic organizations encourage to register, Street Rep. ¶¶ 21-23; Leifer Decl. ¶ 64; Maxon Decl. ¶¶ 45-65; Iwai Decl. ¶¶ 31-39, by requiring voters to go through "additional hoops" that "will raise the cost of voting." *Mont. Democratic Party* at ¶ 28 (quotation marks omitted).

HB 892 encumbers voting rights even though a voter's failure to cancel a prior registration or provide previous information is irrelevant to voter eligibility under Montana law. *See supra* Background I.D. Moreover, underpinning these burdens is HB 892's threat of criminal prosecution, which impedes eligible Montanans from registering in the first place. Ex. 23 (Lewis and Clark County Records). If someone is convicted because of HB 892, the result would be the complete loss of the franchise for a time. §§ 13-35-210(6), 45-2-101(23), 13-1-111(2), MCA. Civic organizations will bear the burden of spending more time assisting fewer voters, and will have their own messaging chilled because of HB 892. Leifer Decl. ¶¶ 56, 143-44, 148-51; Maxon Decl. ¶¶ 73-85; Iwai Decl. ¶¶ 46-56.

Thus, the challenged restrictions curtail the fundamental right of suffrage, both for Plaintiff's members and the individuals they assist. As such, HB 892 must survive strict scrutiny. *See Mont. Democratic Party* at ¶ 18 (describing fundamental nature of the right).

D. HB 892 is impermissibly vague, in violation of due process.

HB 892 is impermissibly vague and violates Plaintiff's due process rights. Mont. Const., art. II, § 17. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Dugan* at ¶ 66 (citations omitted). A statute is facially void "if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Id.* at ¶ 67 (citation omitted). Where, as here, "a vague statute abuts upon sensitive areas of" free speech and association, any "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *City of Whitefish v. O'Shaughnessy*, 216 Mont. 433, 440, 704 P.2d 1021, 1025-26 (1985) (citation omitted). Vagueness standards "are strict in the area of free expression." *Button*, 371 U.S. at 432; *accord Butcher v. Knudsen*, 38 F.4th 1163, 1169 (9th Cir. 2022).

The Deregistration Requirement criminalizes "purposefully remain[ing] registered to vote in more than one place," but does not define key terms in critical respects. § 13-35-210(5), MCA. Voters and the civic organizations assisting them, not to mention election administrators, are left to guess what conduct is required to avoid liability, who is covered by the prohibition, and when it will apply. Leifer Decl. ¶¶ 92-115, 122-24; Maxon Decl. ¶¶ 34-44; Iwai Decl. ¶¶ 21-30; Ex. 9 (Missoula County Records); Ex. 10 (Montana County Records). For example, "remain" is defined as "to continue unchanged." *Remain*, MERRIAM-WEBSTER DICTIONARY (2023), https://www.merriam-webster.com/dictionary/remain. So, to avoid "continu[ing] unchanged," must an applicant take affirmative steps to deregister elsewhere and confirm election officials cancelled the registration? Must voters do so before applying to register at their current residence? Are current Montana registrants included in the requirement? HB 892 provides no answers.

The inclusion of "purposefully" does little to clarify because "[a] scienter requirement cannot eliminate vagueness . . . if it is satisfied by an 'intent' to do something that is in itself

ambiguous." *Nova Records, Inc. v. Sendak*, 706 F.2d 782, 789 (7th Cir. 1983); *accord United States v. Loy*, 237 F.3d 251, 265 (3d Cir. 2001). For example, does a person act "purposefully" if they know that they have a registration elsewhere but choose not to cancel that registration? Or is it satisfied only if the person plans to vote in both places, but not if they just remain registered? What if a voter only suspects that they are registered elsewhere—potentially because they moved from one of the many states with automatic voter registration, *see* Ex. 16 (AVR list)—but did not check? Is it enough for a voter to simply be willfully uncertain of the status of preexisting registrations? Again, HB 892 is not instructive.

The Omission Provision, for its part, has no scienter element at all, requiring "previous registration information" on threat of felony prosecution for apparently even inadvertent omissions. HB 892 further fails to describe the extent of the previous registration information applicants must include. This leaves Montanans to guess what conduct is considered a felony. *See* §§ 13-35-210(6), 45-2-101(23), MCA. And it is uncertain how HB 892's requirements may be imputed to others, like LWVMT, for assisting voters, which may be considered "aiding and abetting" a violation, §§ 13-35-105, 45-2-302(3), MCA, or unintentionally "caus[ing] a name to be placed on the registry lists other than in the manner provided by this title," § 13-35-205(6), MCA. In short, HB 892 unconstitutionally requires Montanans "to speculate as to whether [their] contemplated course of action may be subject to criminal penalties." *State v. Brogan*, 272 Mont. 156, 168, 900 P.2d 284, 291 (1995) (internal quotation marks and citation omitted).

E. HB 892 fails strict or any lesser level of scrutiny.

When a statute "implicates . . . a fundamental right," the "most stringent level of scrutiny" applies. *Mont. Democratic Party* at ¶ 18. The government must prove that the challenged laws are "narrowly tailored to serve a compelling government interest," *id.*, by establishing "competent evidence" that the laws are "the least onerous path that can be taken to achieve the state objective,"

Wadsworth v. State, 275 Mont. 287, 302, 303, 911 P.2d 1165, 1174 (1996). This high burden "is seldom satisfied." *State ex rel. Bartmess v. Bd. of Trs. of Sch. Dist. No. 1*, 223 Mont. 269, 275, 726 P.2d 801, 804 (1986). Indeed, the challenged provisions cannot survive constitutional scrutiny because they are not sufficiently related to a legitimate state interest.

First, it is not clear what interest the challenged provisions serve. Even the bill's sponsor equivocated when questioned, stating only that "leadership gave [her] this bill and said we want this done." *See supra* Background I.E. But a political desire to move legislation is not a compelling reason to curtail fundamental rights. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203 (2008) (plurality op.) (partisan objectives for voting restrictions are not legitimate interests).

While HB 892's ostensible goal was to "clarify what double voting means in Montana law and that voting in Montana and another state" for the same election is prohibited, House Comm. Hearing at 2:23, the challenged provisions do not "clarify" anything; they add ambiguities and focus on multiple *registrations*. But there is nothing inherently unlawful about having two registrations. *See Common Cause Ind. v. Lawson*, 937 F.3d 944, 960 (7th Cir. 2019); Street Rep. ¶¶ 11, 16, 19. And the state has no evidence that addressing "double voting" motivates the challenged provisions, especially as "voter fraud of any sort is vanishingly rare in Montana." *Mont. Democratic Party* at ¶ 29 (internal quotation marks omitted); Street Rep. ¶¶ 4, 25.

Second, even if the state has a compelling interest in issues related to double voting, the challenged provisions do not improve upon existing prohibitions on double voting; in the sponsor's words, the provisions are merely "another tool in the toolbox." Sen. Comm. Hearing at 15:04. Existing federal and state law prohibits it, as do HB 892's unchallenged parts. § 13-35-210(2), (4), MCA; 52 U.S.C. § 10307(e). And Montana already prevents a voter with two registrations from voting twice through, for example, provisional ballots. Ex. 21 (Directive 1-06); Ex. 22 (Directive

03-07); Ex. 12 (Election Admin. FAQs). A supplemental tool is not the "least onerous path" to achieve the state's interest. *Wadsworth*, 275 Mont. at 303, 911 P.2d at 1174. And the provisions serve little purpose anyway. Street Rep. ¶¶ 5, 25-27. Montana's system already prevents duplicative inter-county registrations, whether or not an applicant complies with HB 892. *Id.* ¶ 18. Montana election officials do not check for duplicative interstate registrations because Montana does not subscribe to ERIC, the cross-state registration data sharing platform—which would be a far less intrusive solution to address double registrations. *Id*. ¶ 17.

HB 892's provisions are both under- and over-inclusive. They provide no means for election officials to check out-of-state information. And they extend risks of criminal sanction to people who have no intention to unlawfully vote twice. Broadly and vaguely criminalizing common voter behavior is far from the narrow tailoring required "[w]hen the government intrudes upon a fundamental right." *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174.

II. Plaintiff faces imminent, irreparable injury in the absence of preliminary relief.

HB 892 should be enjoined because LWVMT "is likely to suffer irreparable harm in the absence of preliminary relief." § 27-19-201(1)(b), MCA. "[T]he loss of a constitutional right constitutes an irreparable injury," *Driscoll* at ¶ 15, particularly when it involves interference with free speech or the right to vote. *See, e.g.*, *Weems v. State ex rel. Fox*, 2019 MT 98, ¶ 25, 395 Mont. 350, 440 P.3d 4; *Mont. Democratic Party* at ¶¶ 32, 34; *accord Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

More specifically, LWVMT and others are planning and implementing voter engagement programs now ahead of events scheduled in early 2024. Leifer Decl. ¶¶ 42-51; Maxon Decl. ¶ 68; Iwai Decl. ¶ 42. Given the law's recent passage, broad enforcement mandate, and legislators' representations that HB 892 was enacted to be enforced, LWVMT and others are concerned that their activities could expose themselves and the voters they assist to criminal liability. *See supra*

Background I.D-E. Absent an injunction to maintain the status quo, Plaintiff will be irreparably harmed; they will suffer chilled speech, altered programs, and encumbered right to vote.

III. The balance of equities and public interest weigh in favor of Plaintiff.

The balance of equities and public interest favors Plaintiff. The Court's task is to "minimize potential damage." *Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342. The threats and burdens on Plaintiff are high. *See supra* Argument II.A-D. But Defendants' interests in enforcing HB 892's provisions are minimal, given that voter fraud is rare in Montana and the challenged provisions have at best a tenuous connection to such an interest. *See supra* Argument II.E; Background I.E. Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023) (internal quotation marks and citation omitted).

CONCLUSION

For the above reasons, the challenged HB 892 provisions should be preliminarily enjoined.

Respectfully submitted this 16th day of November, 2023.

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APPENDIX A

FILED
04/06/2022
Terry Halpin
CLERK
Yellowstone County District Court
STATE OF MONTANA
By: Pamela Owens
DV-56-2021-0000451-DK
Moses, Michael G.
124.00

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

Montana Democratic Party, Mitch Bohn, Plaintiffs, WESTERN NATIVE VOICE, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe, Plaintiffs, Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group, Plaintiffs, v. Christi Jacobsen, in her official capacity as Montana Secretary of State, Defendant.	Consolidated Case No.: DV 21-0451 Judge Michael G. Moses **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTIONS**

Consolidated Plaintiffs Montana Democratic Party and Mitch Bohn ("MDP"); Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe ("WNV"); and Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group ("MYA") (collectively, "Plaintiffs") submitted motions requesting the Court preliminarily enjoin laws passed during the 2021 Legislative sessions throughout the pendency of this litigation. Specifically, all Plaintiffs seek to enjoin House Bill 176 ("HB 176"), MDP and WNV seek to enjoin House Bill 530 ("HB 530"), MDP and MYA seek to enjoin Senate Bill 169 ("SB 169"), and MYA seeks to enjoin House Bill 506 ("HB 506"). These motions have been fully briefed by all the parties and a hearing on the motions was held on March 10, 2022. These matters are ripe for adjudication.

The Court has considered the briefs, evidence presented, and oral arguments made by counsel. For the reasons discussed below, the Court grants Plaintiffs' motions and preliminarily enjoins the challenged laws.

FINDINGS OF FACT

I. SB 169

1. Prior to the enactment of SB 169, voters could prove their identity to vote in-person by showing an election judge "a current photo identification showing the elector's name." (Decl. of Matthew Gordon ("Gordon Decl."), Ex. 19, Jan. 13, 2022, No.

DV 21-451)); § 13-13-114(1)(a), MCA (2003). This photo identification was acceptable in forms "including but not limited to a valid driver's license, a school district or postsecondary education photo identification, or a tribal photo identification." *Id*. If the voter did not have photo identification, then the voter could "present a current utility bill, bank statement, paycheck, notice of confirmation of voter registration issued pursuant to 13-2-207, government check, or other government document that shows the elector's name and current address." *Id*. This had been the law in Montana since 2004. § 13-13-114(1)(a), MCA (2003).

2. After the enactment of SB 169 in April 2021, to vote in-person a voter must show an election judge:

> (i) a Montana driver's license, Montana state identification card issued pursuant to 61-12-501, military identification card, tribal photo identification card, United States passport, or Montana concealed carry permit; or
> (ii)
>> (A) a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address; and
>> (B) photo identification that shows the elector's name, including but not limited to a school district or postsecondary education photo identification.

§ 13-13-114(1)(i-ii), MCA (2021).

3. Under the new version of the statute, voters who relied on a student ID as their sole form of identification to vote in previous elections will no longer be able to without a secondary form of identification such as: "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)(ii)(A), MCA.

4. While SB 169 was being debated, Montana Speaker of the House, Wylie Galt, stated, as rationale for making student ID only acceptable as a secondary form of identification, that: "[b]asically, it makes that 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…So this just clears it up that they have a little stake in the game." (Gordon Decl., Ex. 35 at 15).

5. Regarding the secondary forms of identification voters using their student ID will have to possess, an expert for MDP, Dr. Kenneth Mayer, testified that "[c]ollege-age students, in general, are less likely than the general population to possess a driver's license or ID…In Montana, 71.5% of the population aged 18-24 has a Montana driver's license, well behind the total license possession rate of 94.7% among the 18 or older population in Montana…" (Gordon Decl., Ex. 35 at 15). Additionally, Dr. Mayer opined that out of state students "who do not possess a Montana driver's license or state ID will be at a particular disadvantage if their student ID no longer qualifies as a primary voter ID." *Id*. Dr. Mayer considered that it would cost students, who may already possess an out of state driver's license, $62.32 to obtain a REAL ID Montana Driver's license. *Id*. Ultimately, Dr. Mayer concluded that "[r]elegating student IDs to secondary status imposes a burden on college students, who fall into an age group less likely to

possess a driver's license than older voters, and on out-of-state students attending a Montana university who likely will not have a Montana license or ID." (Gordon Decl., Ex. 35 at 18). Further that most of the primary forms of ID acceptable under the new statute "do not actually confirm a voter's eligibility or address, as noncitizens can obtain every form of ID other than a Passport or Tribal ID, and primary IDs are not required to have the voter's current registered address." (Gordon Decl., Ex. 35 at 18-19).

6. MDP provided testimony from the Director of Equality and Economic Justice at the Montana Human Rights Network, Shawn Reagor, who described that transgender students often rely on student ID to vote because "[a]cquiring gender confirming student identification is often a much easier process" than attempting to change their gender marker on Montana identification. (Decl. of Shawn Reagor ("Reagor Decl."), ¶¶ 8-13, Jan. 12, 2022). Under present Montana law, a transgender person desiring to change their gender on their Montana identification would have to get "a court order changing the individual's name, an updated birth certificate, an updated social security card, and finally a Montana license." (Reagor Decl. ¶ 6). To take the first step of updating their birth certificate, a transgender person would have to get a court order indicating they have undergone surgery. *Id*. at ¶ 8.

7. MYA's expert, Yael Bromberg, a law professor at Rutgers School of Law, testified that in 2018, the youth vote in Montana more than doubled (42%) when compared to the youth voting turnout in 2014 (18%). (Decl. of Yael Bromberg, ESQ. ("Bromberg

Decl."), 19, Jan. 14, 2022, No. DV. 21-451). Ms. Bromberg cited to statistics showing that the Montana youth voting rate has been increasing every year and rose to 56% in 2020, whereas the national youth voting rate in 2020 was only 50%. (Bromberg Decl. at 19). Ultimately, Ms. Bromberg concluded that going into 2021, "Montana youth were among the most electorally significant in the country, with voting rates consistently above national averages and considerably on the rise." (Bromberg Decl. at 20).

8. Ms. Bromberg additionally opined that the Montana Legislature, when it enacted SB 169, "implemented a measure known to disproportionately impact youth voters." *Id.* at 24. She further described that youth voters are a class that "is uniquely vulnerable due to its predominance of first-time voters and highly mobile voters." *Id*. Ms. Bromberg cited to statistics showing that "[i]n the 2016 election, 21% of registered young voters (ages 18-29) did not vote due to problems with voter ID." *Id*. at 24-25. Ms. Bromberg also described that, in North Carolina, "the elimination of the availability of student ID and out-of-state government-issued identification at the pools was found to impact 14% of young voters who could not meet the new requirements." *Id*. at 25. Further regarding SB 169, Ms. Bromberg opined that "young people and students are disproportionately less likely to have a driver's license" and are "also unlikely to have and/or carry with them many of the other standalone forms of identification prescribed by SB 169, such as Montana state ID, military ID, tribal photo ID, U.S. passport, or concealed carry permit." (Bromberg Decl. at 25). Moreover, student voters, "[b]ecause

they live in dormitories and/or are highly mobile…often do not own the secondary proof of identification with current residence listed therein which SB 169 requires to accompany a Student Photo ID – i.e., a current utility bill, bank statement, paycheck, government check, or other government document." (Bromberg Decl. at 25).

9. Defendant, Secretary of State Christi Jacobsen ("the Secretary"), provided testimony from the Chief Legal Counsel for the Montana Secretary of State, who described that the changes to the voter identification were to eliminate ambiguity and confusion. (Decl. of Austin Markus James ("James Decl."), ¶¶ 17-21, Feb. 17, 2022, No. DV 21-451). Additionally, Mr. James testified that since the adoption of SB 169 "[a]t least 337,581 total votes have been cast and recorded in Montana elections…" *Id*. at ¶ 36. Further that "[a]ll newly registered voters since the implementation of SB 169 have received a confirmation of voter registration in the form of a government document containing their name and address[]" and that a voter registration "card paired with a photo ID containing [the voter's] name may be used as identification when you vote." *Id*. at ¶¶ 33-39.

10. The Secretary also provided expert testimony from a Senior Elections Analyst at RealClearPolitics, Sean Trende, who described that "the linkage between photographic identification laws and [voter] turnout is fairly weak." (Def.'s Expert Rpt. of Sean P. Trende ("Trende Rpt."), 12, Feb. 17, 2022, No. DV 21-451).

II. HB 176

11. Election Day Registration ("EDR") was implemented in Montana in 2005. (*See* Gordon Decl., Ex. 3). EDR enabled Montana voters to register to vote and submit their ballot both on election day. *Id.* EDR was used in general elections by 7,547 voters in 2008; 12,055 voters in 2016; and over 8,000 voters in 2018 and 2020. (Gordon Decl., Ex. 35 at 10-11). MDP's expert, Dr. Mayer, testified that EDR has "an effect greater than any other change to voting procedures." (Gordon Decl., Ex. 35 at 9). Specifically, because "it reduces the cost of voting by combining both registration and voting into a single administrative step" and "it allows voters who are not activated early in the election period the opportunity to register and vote when attention to the election has peaked on election day." *Id.*

12. In 2021, the Montana Legislature passed HB 176, which eliminates EDR by moving the deadline to register to vote during late registration to noon the day before the election. (*See* Gordon Decl., Ex. 6). When speaking in support of HB 176, Representative Shannon Greef "claimed that HB 176 would 'mitigate [sic] against voter fraud,' 'ensure voter integrity,' and 'reduce the opportunity for mistakes.'" (Aff. of Daniel Craig McCool, Ph.D., in Supp. of Pls.' Mot. for a Prelim. Injunction ("McCool Aff."), Ex. 1, ¶ 118, Jan. 12, 2022, No. DV 21-451 (quoting HB 176. 2021. Senate Hearings, Feb. 15, at 16:49)). Additionally, Representative Greef described that when she was talking about voter fraud as a reason for supporting HB 176, that she "wasn't talking

about Montana specifically." (Aff. of Alex Rate in Supp. of Pls.' Mot. for Prelim. Inj. ("Rate Aff."), Ex. J, 40:4-13, Jan 12, 2022, No. DV 21-451; McCool Aff., Ex. 1, ¶ 118 (quoting Senate Hearing, Feb. 15, at 17:35)).

13. Plaintiffs WNV and MDP provided testimony from Montanans affected by the passage of HB 176. MDP presented a declaration by Malia Bertelsen describing how moving the voting registration deadline to the afternoon before election day prevented her from voting in the November 2021 local Bozeman election. (Decl. of Malia Bertelsen, ¶¶ 6-10, Jan. 12, 2022, No. DV 21-541). MDP presented testimony from the Missoula County Elections Administrator, Bradley Seaman, who testified that due to the law change made by HB 176 and that "[d]espite extensive public outreach about the lack of Election Day Registration, Missoula County had to turn away eight otherwise eligible voters who arrived on November 2nd." (Decl. of Bradley Seaman ("Seaman Decl."), ¶ 8, Jan. 12, 2021, No. DV 21-451). Mr. Seaman further confirmed that, under the previous version of the law, "[t]hese voters would have been able to vote…" *Id*. Additionally, MDP presented testimony from the Gallatin County Clerk and Recorder, Eric Semerad, who testified that HB 176 "led to 17 qualified voters being unable to cast ballots in Gallatin County because they arrived after noon on November 1, the day before election day. While these individuals were able to update their registration at that time, they were not permitted to cast a ballot for the 2021 contests." (Decl. of Eric Semerad ("Semerad Decl."), ¶ 7, Jan. 12, 2022, No. DV 21-451). Additionally, Mr. Semerad

testified that during the thirty years he has worked in the Gallatin County Clerk's office, he is "not aware of any instance of voter fraud associated with election day registration. Election day registration is, if anything, more secure than other forms of registration…" (Semerad Decl. ¶ 8).

14. WNV presented expert testimony describing that "the percentage of voters using election day registration ("EDR") is consistently higher for people living on-reservation in Montana." (Aff. of Alexander Street, Ph.D., in Supp. of Pls.' Mot. for a Prelim. Inj. ("Street Aff.") ¶ 4, Jan. 12, 2022, No. DV 21-451). WNV's expert further described that tribal members are "more reliant on EDR" and "by removing the option of EDR, HB 176 is likely to have a disparate, negative impact on registration and voting for Native Americans living on reservations in Montana." (Street Aff. ¶¶ 21-23). WNV presented evidence that voting on Indian Reservations in Montana is difficult due to the locations of election offices, the distance Native Americans must travel to vote in person or even by mail, and the socioeconomic factors including that Native Americans are less likely to have a working vehicle, money for gasoline, or car insurance. (*See* Aff. of Councilman Lane Spotted Elk in Supp. of Pls.' Mot. for Prelim. Inj. ("Spotted Elk Aff."), ¶¶ 5-16, Jan. 12, 2022, No. DV 21-451; Aff. of Robert McDonald in Supp. of Pls.' Mot. for Prelim. Inj. ("McDonald Aff."), ¶¶ 4-9, Jan. 12, 2022, No. DV 21-451; Aff. of Dawn Gray in Supp. of Pls.' Mot. for Prelim. Inj. ("Gray Aff."), ¶ 16, Jan. 12, 2022, No. DV 21-451).

15. On the other hand, the Secretary provided testimony from Montana legislators describing they voted in support of HB 176 due to statements from election administrators describing the challenges that EDR adds to running elections and their belief that moving the deadline back one day will reduce lines at the polls and stop delays in reporting results. (Decl. of Steve Fitzpatrick ("Fitzpatrick Decl."), ¶¶ 6-7, Feb. 17, 2022, No. DV 21-451; Decl. of Greg Hertz ("Hertz Decl."), ¶¶ 6-7, Feb. 17, 2022, No. DV. 21-451). The Secretary also provided testimony from the Clerk, Recorder, and Election Administrator for Fergus County who described that "[h]aving to register individuals to vote on election day takes away time from all of the other work, both election-related and non-election related…" (Decl. of Janel Tucek ("Tucek Decl."), ¶ 11, Feb. 17, 2022, No. DV 21-451; *see also* Decl. of Doug Ellis ("Ellis Decl."), ¶¶ 15-23, Feb. 17, 2022, No. DV 21-451).

16. The Secretary further provided expert testimony describing that "Montana's close of voter register at 12:00 noon on the day preceding election day provides substantial benefits, particularly for rural counties. By contrast it imposes a minimal burden on those seeking to register to vote." (Expert Decl. of Scott Gessler ("Gessler Decl."), ¶¶ 2, 15-29, Feb. 17, 2022, No. DV 21-451). Additionally, the Secretary's expert opined that "political science literature finds a relationship between election-day registration and turnout, yet struggles to find a causal linkage between the two" and that "Montana retains same-day registration during voting, which should soften

whatever impact there is to the elimination of election-day registration[.]" (Trende Rpt. at 7).

III. HB 530

17. In 2021, House Bill 406 ("HB 406") was introduced and was effectually a new attempt at passing a restriction on ballot collection in Montana similar to the Montana Ballot Interference Prevention Act ("BIPA"), which has already been litigated and determined to be unconstitutional in Montana District Courts. *See* Courts Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Stapleton*, Sept. 25, 2020, No. DV 20-0377; Findings of Fact, Conclusions of Law, and Order, *Driscoll v. Stapleton*, Sept. 25, 2020, No. DV 20-0408. HB 406 ultimately failed to pass the Montana Senate; however, HB 530 was amended to include language from HB 406. (Gordon Decl., Ex. 34).

18. HB 530 specifically provides:

> (1) On or before July 1, 2022, the secretary of state shall adopt an administrative rule in substantially the following form:
>
> > (a) For the purposes of enhancing election security, a person may not provide or offer to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots.
> >
> > (b) "Person" does not include a government entity, a state agency as defined in 1-2-116, a local government as defined in 2-6-1002, an election administrator, an election judge, a person authorized by an election administrator to prepare or distribute ballots, or a public or private mail service or its employees acting in the course and scope of the mail service's duties to carry and deliver mail.
>
> (2) A person violating the rule adopted by the secretary of state pursuant to subsection (1) is subject to a civil penalty. The civil penalty is a fine of $100 for

> each ballot distributed, ordered, requested, collected, or delivered in violation of the rule.

(Gordon Decl., Ex. 11).

19. WNV and MDP presented testimony from experts describing the effects HB 530 will have on young people, Native Americans, disabled voters, and elderly voters. WNV and MDP also presented testimony from eligible voters who will be negatively affected by HB 530.

20. WNV presented testimony, as described above, concerning the difficulties faced by Native Americans voting on reservations. Specifically, the mail system on reservations poses significant problems for absentee voting because most Native Americans do not have home mail delivery and some have non-traditional mailing addresses. (McCool Aff., Ex. 1, ¶¶ 74-96; Aff. of Ronnie Jo Horse ("Jo Horse Aff.") ¶ 16, Jan. 12, 2022, No. DV 21-451). WNV also presented testimony that there is a higher poverty and unemployment rate on reservations than for the State and that Native Americans "have less money in their pocket—less money to spend on a vehicle, gas, car insurance, and maintenance—all of which are necessary to travel to a post office or a ballot box." (McCool Aff., Ex. 1, ¶ 19). WNV's expert further testified that "tribal voters are dispersed over a large area, requiring significant driving distances to get to a post office, tribal offices, and election offices." (McCool Aff., Ex. 1, ¶ 65). Given these difficulties—among others presented through testimony by WNV—WNV's expert described HB 530 (and HB 176) will have a "disproportionately negative impact and

impose significant voter costs on Native voters, making it more difficult for them to vote, with no discernable public benefit." (McCool Aff. ¶ 6; *see also* McCool Aff., Ex. 1, ¶¶ 22-52).

21. MDP presented evidence showing that absentee voting in Montana has increased each year. (Gordon Decl., Ex. 27). Plaintiff Mitch Bohn described he prefers voting by absentee ballot given the busyness of Metra Arena on election day, which makes it difficult for a person in a wheelchair to navigate, the November weather in Montana, which can make it more difficult to get to a polling location, and the extra time he gets to have with his ballot. (Decl. of Mitch Bohn ("Bohn Decl."), ¶ 4, Jan. 12, 2022, No. DV 21-451). Mr. Bohn further described that he has relied on third parties, specifically, his parents, to return his ballot for him. *Id*. at ¶ 5. MDP presented testimony describing how ballot assistance programs have helped Montanans who cannot take time off to cast their ballot due to a variety of issues to include: work commitments, school schedules, family care responsibilities, mobility impairments, lack of access to postal mail service, or lack of access to transportation. (Bohn Decl. ¶ 6; Bolger Decl. ¶ 20; Decl. of Bernadette Franks-Ongoy, ¶ 19, Jan. 12, 2022, No. DV 21-451). Additionally, MDP's expert estimated, in his 2020 expert report for a case involving BIPA, that between 2016 and 2018 at least 2,500 ballots were collected and conveyed by third parties and concluded "that eliminating third party ballot collection will increase the number of

rejected absentee ballots that arrive late and will do nothing to enhance election security." (Gordon Decl., Ex. 35 at 17).

22. The Secretary provided testimony from an expert who opined that "[b]y prohibiting individuals from receiving compensation for collecting voted ballots, Montana's law imposes little burden on voters, reduces opportunity for fraud, and fosters confidence in elections." (Gessler Decl. ¶ 4). The Secretary also provided testimony from legislators who voted in support of HB 530 describing their motivation for their support was the events in North Carolina during the 2018 congressional race "when a paid political operative was alleged to have illegally gathered up and fraudulently voted absentee ballots." (Decl. Fitzpatrick at ¶ 17; Decl. of Greg Hertz ("Hertz Decl."), ¶ 20, Feb. 17, 2022). Additionally, legislators who voted in support of HB 530 testified they had "no intent to harm any particular class or group of voters" when they voted in support of HB 530. (Fitzpatrick Decl. ¶ 21; Hertz Decl. ¶ 24)

IV. HB 506

23. HB 506 amends § 13-2-205(2), MCA, to provide that "[u]ntil the individual meets residence and age requirements, a ballot may not be issued to the individual and the individual may not cast a ballot." (Expert Report of Dr. Michael Herron, Ph.D. ("Herron Rpt.") ¶ 33, Jan. 12, 2022, No. DV 21-451).

24. MYA presented testimony from experts describing the impact HB 506 will have on young eligible voters and young people who are about to become eligible to vote.

Additionally, MYA presented testimony from young voters. Specifically, Ali Caudle testified that she turned eighteen on October 3, 2021, and upon turning eighteen, filled out a voter registration form online but realized that she would not meet the deadline to mail her form in at least thirty days prior to the election. (Youth Pls.' Br. in Supp. of Appl. for Prelim. Inj.[1] ("MYA Br."), Ex. B ¶¶ 3-5, Jan. 13, 2022, No. DV 21-451). Ms. Caudle testified that she had difficulties registering in person due to the hours she is in school and commitments she has occupying her until after regular business hours on weekdays and had to "miss an event for the National Honor Society" to register in person and submit her vote. (MYA Br., Ex. B ¶ 12); (*see also* MYA Br., Ex. C ¶¶ 5-14 (describing the difficulties registering to vote and casting a ballot during business hours alongside school commitments and extracurricular activities)).

25. MYA's expert testified that the restriction on when absentee ballots can be mailed to voters in HB 506 burdens four classes of Montana voters and specifically, "[i]n decreasing order of burdens, these classes are as follows: (I) residents who turn 18 on election day itself; (II) residents who turn 18 between one and seven days of election day; (III) residents who turn 18 between eight and 14 days of election day; and (IV) residents who turn 18 between 15 and 25 days of election day." (Herron Rpt. ¶ 2). MYA's expert describes that each of these groups will have differing access to absentee

[1] MYA Plaintiffs also submitted, on January 14, 2022, a corrected brief in support of their application for a preliminary injunction (Dkt. 73), however, their exhibits were not attached to that filing, so the Court referenced the January 13, 2022, filing (Dkt. 70) to see the attached exhibits.

voting. *See id*. Specifically, residents turning eighteen on election day will be unable to vote absentee due to HB 506. (Herron Rpt. ¶ 3). Similarly, residents turning eighteen between one and seven days before election day will effectually be unable to vote absentee due to the estimated mailing travel time. *Id*. Residents turning eighteen between eight and fourteen days prior to election day will also be unlikely to be able to absentee vote given the time it takes for an absentee ballot to be mailed and for them to return it. *Id*. at ¶ 3. The last class of effected voters, residents turning eighteen between fifteen and twenty-five days of election day, "will receive their absentee ballots later than those who turn 18 more than 25 days before an election." *Id*.

26. The Secretary presented testimony from Melissa McLarnon, an employee in the Election and Government Services division of the Montana Secretary of State's Office, who primarily works on the State's election management systems. (Decl. of Melissa McLarnon ("McLarnon Decl."), ¶ 3, Feb. 17, 2022, No. DV 21-451). Ms. McLarnon testified that there was "a lack of uniformity in how various Election Administrators" across Montana issued ballots to individuals turning eighteen before election day which raised issues for the development of election and use of election software. (McLarnon Decl. ¶¶ 6-7). The Secretary presented testimony from legislators describing they supported HB 506 because of the "inconsistent practices with respect to mailing absentee ballots to voters before they met age and residency requirements" and HB 506

"ensure[s] that only qualified electors are voting in Montana elections." (Fitzpatrick Decl. at ¶¶ 23-24; Hertz Decl. at ¶¶ 26-28).

V. Voter Fraud

27. MDP's expert testified that "voter fraud of any sort is vanishingly rare in Montana, with only a handful of cases over the last 20 years." (Gordon Decl., Ex. 35 at 6). Further MDP's expert described there was a case in 2011 where a man submitted his ex-wife's absentee ballot and in 2021 there was a case where a man pled "guilty to registering to vote" under a false name. (*Id*. at 6-7; *see also* Decl. of Dale Schowengerdt, Ex. 1-16, Feb. 17, 2021, No. DV 21-451). MDP's expert ultimately concluded that "8,472,202 votes have been case in Montana elections since 2002, either in person or by a mail or absentee ballot that was accepted. Voter fraud…does not remotely present a problem for or threat to election security in Montana." *Id*. at 7.

28. In *Driscoll v. Stapleton*, the Secretary at that time "did not present evidence in the preliminary injunction proceedings of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana." 2020 MT 247, ¶ 22, 401 Mont. 405, ¶ 22, 473 P.3d 386, ¶ 22. For the purposes of this preliminary injunction, the Court finds the same is true in this matter.

29. Election administrators in Montana are not aware of voter fraud relating to the use of student IDs. (Semerad Decl. ¶ 11; Seaman Decl. ¶ 10).

30. One of the Secretary's experts testified "…although I am not convinced that voter fraud is a substantial problem in Montana, there is some evidence the photographic identification laws bolster confidence in elections." (Trende Rpt. at 12).

31. Another expert for the Secretary opined in regard to HB 530 that "[b]y prohibiting individuals from receiving compensation for collecting voted ballots, Montana's law imposes little burden on voters, reduces opportunity for fraud, and fosters confidence in elections." (Gessler Decl. ¶ 4). However, no instances of fraud relating to ballot collection in Montana were cited to by this expert.

Based on the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact are more properly considered Conclusions of Law, they are incorporated by reference herein as such. To the extent that these Conclusions of Law are more appropriately considered Findings of Fact they are incorporated as such.

I. LEGAL STANDARD

2. Under the Montana Code Annotated (MCA), a preliminary injunction may be granted on five enumerated grounds. § 27-19-201 (1-5). Only two are relevant for the purposes of this matter. Specifically, an injunction may be granted:

> (1) when it appears that the applicant 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;

(2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;

§ 27-19-201(1-2), MCA. Only one of the enumerated grounds needs to be met for an injunction to issue because the subsections are disjunctive. *Four Rivers Seed Co. v. Circle K Farms*, 2000 MT 360, ¶ 13, 303 Mont. 342, ¶ 13, 16 P.3d 342, ¶ 13; *Weems v. State*, 2019 MT 98, ¶ 17, 395 Mont. 350, ¶ 17, 440 P.3d 4, ¶ 17. Importantly, "[t]he purpose of a preliminary injunction is to prevent 'further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits.'" *City of Billings v. Cty. Water Dist*. (1997), 281 Mont. 219, 226, 935 P.2d 246, 250 (quoting *Knudson v. McDunn* (1995), 271 Mont. 61, 894 P.2d 295, 298). The Supreme Court has defined the "status quo" as "'… the last actual, peaceable, noncontested condition which preceded the pending controversy…'" *Porter v. K & S P'ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839 (quoting *State v. Sutton* (1946), 2 Wash.2d 523, 98 P.2d 680, 684); *see also Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, ¶ 24, 405 P.3d 73, ¶ 24 (quoting *Porter v. K & S P'ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839).

3. While "[a] statute enjoys a presumption of constitutionality… a party need establish only a prima facie violation of its rights to be entitled to a preliminary injunction—even if such evidence ultimately may not be sufficient to prevail at trial." *Driscoll*, 2020 MT 247, ¶ 16, 401 Mont. 405, ¶ 16, 473 P.3d 386, ¶ 16; *see also Weems*, ¶ 18. "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Id*. (quoting *Prima facie, Black's Law Dictionary* (10th ed.

2014)). Additionally, "all requests for preliminary injunctive relief require some demonstration of threatened harm or injury, whether under the 'great or irreparable injury' standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA." *BAM Ventures, Ltd. Liab. Co. v. Schifferman*, 2019 MT 67, ¶ 16, 395 Mont. 160, ¶ 16, 437 P.3d 142, ¶ 16; *see also Weems* ¶ 17. Lastly, "[f]or the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Driscoll*, ¶ 15; *Mont. Cannabis Indus. Ass'n v. State,* 2012 MT 201, ¶ 15, 366 Mont. 224, 229, 296 P.3d 1161, 1165.

4. The Secretary, in her response brief, discussed that "Montana law also imposes a higher burden of proof" when a party seeks a "mandatory injunction" rather than a prohibitory injunction. (Def.'s Br. in Resp. to Pls.' Prelim. Inj. Motions and in Supp. of Def.'s Mot. for Summ. J. ("Def.'s Resp.") at 4 (citing *Paradise Rainbows v. Fish & Game Comm'n* (1966), 148 Mont. 412, 420, 421 P.2d 717, 721)). A mandatory injunction would "require the undoing of injurious acts" whereas a prohibitory injunction "is a remedy to restrain the doing of injurious acts." *Newman v. Wittmer* (1996), 277 Mont. 1, 11, 917 P.2d 926, 932 (quoting *In re the "A" Family* (1979), 184 Mont. 145, 153, 602 P.2d 157, 162 (internal quotations omitted)). The Secretary asserts that her actions of taking steps to implement these challenged laws in the months since their passage means that she would have to undo that work such that the enjoining of these laws would effectually be a mandatory injunction.

5. However, Plaintiffs have been clear that the remedy they seek is a return to the status quo that existed prior to the Montana legislature passing HB 176, HB 530, SB 169, and HB 506. Plaintiffs are not requesting that the local elections that occurred in between the passage of these laws and the issuing of this order be re-done or overturned. Plaintiffs are not requesting that the Secretary un-adopt new administrative rules, un-broadcast public service announcements across various media describing the changes, un-train Montana election administrators, un-create and un-implement new components of Montana's voting infrastructure, un-ensure compliance with Montana law during elections that took place on May 4, 2021, September 14, 2021, and November 2, 2021, and un-prepare for upcoming elections scheduled to begin in May 2022. Rather the Plaintiffs are requesting that the Secretary be restrained from enforcing HB 176, HB 530, SB 169, and HB 506 before they have governed a state-wide election.

6. In sum, given that Plaintiffs are requesting the Secretary be restrained from enforcing these contested laws in upcoming elections, rather than undo the local elections that have already occurred, the Court finds a preliminary injunction and the applicable standard is appropriate.[2]

[2] In any event, even if a mandatory injunction is proper, the Court finds that based on the evidence presented, Plaintiffs would meet the "higher standard" necessary for a mandatory injunction to issue. Especially considering "the principles upon which mandatory and prohibitory injunctions are granted do not materially differ." *City of Whitefish v. Troy Town Pump*, 2001 MT 58, ¶ 21, 304 Mont. 346, ¶ 21, 21 P.3d 1026, ¶ 21 (quoting *Grosfield v. Johnson* (1935), 98 Mont. 412, 421, 39 P.2d 660, 664 (internal quotations omitted)).

II. DISCUSSION

a. Standing

7. The Secretary argues all Plaintiffs lack standing. The Secretary incorporates her arguments made in her motion to dismiss MDP's Complaint, which the Court has previously ruled on.

8. The law of the case doctrine "expresses generally the courts' reluctance to reopen issues that have been settled during the course of litigation." *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 29, 351 Mont. 464, ¶ 29, 215 P.3d 649, ¶ 29. Under this doctrine, parties are precluded "from re-litigating issues that this Court has already resolved." *Wittich Law Firm, P.C. v. O'Connell*, 2014 MT 23N, ¶ 8, 374 Mont. 540, ¶ 8; *see also State v. Carden* (1976), 170 Mont. 437, 439, 555 P.2d 738, 740 (holding the law of the case doctrine applies to prior rulings of a trial court in the same case).

9. Thus, based on the law of the case doctrine and the fact that the Secretary has raised no new genuine arguments that were not previously addressed by the Court in its order on her motion to dismiss MDP's Complaint, the Court easily dispenses with the Secretary's standing arguments as to MDP. (*See* Dkt. 32). For the second time and incorporating by reference its analysis and holding in its previous Order Re Defendant's Motion to Dismiss, the Court finds MDP has standing to challenge HB 176, HB 530, and SB 169 under organizational and associational standing. *See id*.

10. As to the remaining Plaintiffs, the Secretary has raised the issue of standing for the first time. The Secretary argues Plaintiffs are organizations, not voters, and therefore they cannot challenge "laws that only apply to voters." (Def.'s Resp. at 6). Rather the Secretary contends Plaintiffs must identify an individual who has suffered or will suffer concrete harm. (Def.'s Resp. at 7). Additionally, the Secretary argues, by incorporating her brief in support of her motion to dismiss MDP's Complaint and her reply, that WNV and MYA do not have organizational and associational standing. The Court will engage in a similar analysis as to that in its Order RE Defendant's Motion to Dismiss. (*See* Dkt. 32 at 3-10).

i. *Organizational Standing*

11. Under organizational standing, an organization "may file suit on its own behalf to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy…" *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 42, 360 Mont. 207, ¶ 42, 255 P.3d 80, ¶ 42. Thus, an organization has standing if injury has been clearly alleged, the injury is distinguishable from the public generally, and the injury would be alleviated by successfully maintaining the action. *Heffernan,* ¶ 33.

WNV Plaintiffs – Western Native Voice & Montana Native Vote

12. WNV Plaintiffs, Western Native Voice and Montana Native Vote ("Nonprofit Plaintiffs") are "Native American-led organizations that organize and advocate in order

to build up Native leadership with Montana." (Compl. for Declaratory and Injunctive Relief ("WNV Compl."), ¶ 19, May 17, 2021, No. DV 21-560). Nonprofit Plaintiffs point to the fact that HB 176 will require them to "spend additional resources to hire organizers earlier in the election cycle to mobilize turnout." (WNV Compl. ¶ 30). They further describe that their operations have already been impacted by HB 176. *Id*. Additionally, like MDP, Nonprofit Plaintiffs also engage in Get Out the Vote ("GOTV") efforts that are (or will be) essentially outlawed by HB 530 due to its ban on gaining pecuniary benefits for ballot collecting. (WNV Compl. ¶ 33).

13. As evidenced by the effect HB 176 and HB 530 will have on their operations, Nonprofit plaintiffs have clearly alleged injury that is distinguishable from the public generally that would be alleviated if they were successful in this matter. The Secretary's argument that WNV must identify individual voters who will suffer harm because of the challenged laws to have standing is unavailing and disregards Montana law concerning organizational standing. Organizational standing clearly confers standing to an organization that can show it will suffer injury to the organization itself. *Heffernan*, ¶¶ 42-45. Thus, the Court finds that Western Native Voice and Montana Native Vote have standing under organizational standing to challenge HB 530 and HB 176.

MYA Plaintiffs – Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Group

14. The MYA Plaintiffs consist of Montana Youth Action, Forward Montana Foundation, and the Montana Public Interest Group. All three groups are organizations in Montana. (Compl. ("MYA Compl."), ¶10; ¶ 15; ¶ 18, Sept. 9, 2021, No. DV 21-1097).

15. In MYA's Complaint, it describes Forward Montana Foundation and Montana Public Interest Research Group "have made it their mission to bring young people's political values and concerns to the fore and to facilitate greater and greater youth voter turnout." (MYA Compl. ¶ 2).

16. Additionally, MYA describes in its Complaint that Montana Youth Action is run by students and has the mission to "empower youth in Big Sky Country to make a difference through politics, civics, and service to communities in Montana." (MYA Compl. ¶ 10). The members of Montana Youth Action "are middle and high school students…preparing to become active voters when they become eligible." *Id*.

17. Forward Montana Foundation "dedicates itself…to voter registration and 'get out the vote' efforts" and will be harmed by SB 169, HB 506, and HB 176 because it will have to "expend significant resources in developing new voter education materials, engaging in campaigns to reeducate youth voters….and conducting expanded get out the vote efforts." (MYA Compl. ¶ 15).

18. The Montana Public Interest Research Group ("MontPIRG"), "is a student directed and funded nonpartisan organization" that "has been registering young voters,

giving them the tools to have their voices heard, and working to eliminate the barriers between young people and their constitutional right to vote." (MYA Compl. ¶ 18). MontPIRG alleges that it will be harmed by SB 169, HB 506, and HB 176 "because all three laws will require MontPIRG to expend significant resources in developing new voter education materials, engaging in campaigns to reeducate young voters with whom they've engaged previously, and conducting expanded get out the vote efforts." (MYA Compl. ¶ 19).

19. Montana Youth Action has alleged in MYA's Complaint that its members will be harmed by these laws. The Court finds that Montana Youth Action did not sufficiently allege injury to the organization but rather, in its Complaint, alleged injuries to its members, which is more appropriately considered under the doctrine of associational standing. Thus, the Court finds that Montana Youth Action does not have organizational standing.

20. As to Forward Montana Foundation and MontPIRG the Court finds that, as evidenced by the effects of SB 169, HB 506, and HB 176 to their operations that injury to the organizations has sufficiently been alleged and these Plaintiffs have clearly alleged injury that is distinguishable from the public generally that would be alleviated if they were successful in this matter. As described above, the Court disagrees with the Secretary's argument that MYA must identify individual voters who will suffer harm because of the challenged laws to have standing given that organizational standing

clearly confers standing to an organization that can show it will suffer injury to the organization itself. *Heffernan*, ¶¶ 42-45. Thus, the Court finds that Forward Montana Foundation and MontPIRG have standing under organizational standing to challenge HB 530 and HB 176.

ii. *Associational Standing*

21. Under associational standing, an organization "may assert the rights of its members." *Heffernan*, ¶ 42. "The doctrine of associational standing 'recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.'" *Heffernan,* ¶ 44 (quoting *United Automobile Workers v. Brock*, 477 U.S. 274, 290, 106 S. Ct. 2523, 2533 (1986)). An organization has standing to "bring suit on behalf of its members, even without a showing of injury to the association itself, when (a) at least one of its members would have standing to sue in his or her own right, (b) the interests the association seeks to protect are germane to its purpose, and (c) neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit." *Heffernan*, ¶ 43.

22. Preliminarily, WNV did not argue that it has associational standing. Given that the Court has found it has organizational standing, as discussed above, and standing under *parents patriae*, as discussed below, it is immaterial as to whether WNV also has

associational standing. Thus, the Court does not address associational standing as it relates to WNV.

23. Forward Montana Foundation is not a membership organization and thus, does not have standing under associational standing. The remaining MYA Plaintiffs, Montana Youth Action and MontPIRG have demonstrated that their members would have standing to sue in their own right, the interests sought to be protected are germane to the purposes of Montana Youth Action and MontPIRG, and individual participation of these organization's members is not required based on the claims asserted and the relief requested.

24. Specifically, Montana Youth Action and MontPIRG, as described above, have missions germane to protecting the youth voting and youth civic engagement. (MYA Compl. ¶¶ 2, 10, 18). Members of these organizations would have standing to sue in their own right as evidenced in MYA's Complaint and the declarations submitted by MYA. (MYA Br., Ex. B, ¶¶ 14-15; ¶¶ 5, 8; MYA Br., Ex. D, ¶¶ 3-12; MYA Br., Ex. I, ¶¶ 4-25). Lastly, given that the relief sought is declaratory, the individual participation of these members is not required.

25. In sum, the Court finds Montana Youth Action and MontPIRG have associational standing to challenge HB 176, SB 169, and HB 506.

iii. *Parens Patriae*

26. WNV asserts that WNV Plaintiffs including Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe ("Tribal Plaintiffs"), as sovereign nations, can bring actions as parens patriae. (Pl. Western Native Voice et al.'s Reply in Supp. of Mot. for Prelim. Inj. ("WNV Reply"), p. 6-7, Mar. 2, 2022, No DV. 21-451).

27. To have standing under *parens patriae*, the sovereign, first, "must assert an injury to what has been characterized as a 'quasi-sovereign' interest…" *Alfred L. Snapp & Son v. Puerto Rico* (1982), 458 U.S. 592, 601, 102 S. Ct. 3260, 3265. Quasi-sovereign interests include "the health and well-being—both physical and economic—of its residents…" and there is "a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id.*, 458 U.S. at 607, 102 S. Ct. at 3269.

28. The second requirement for *parens patriae* standing is that, while there has been no definitive limit imposed "more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the [sovereign] has alleged injury to a sufficiently substantial segment of its population." *Alfred L. Snapp & Son*, 458 U.S. at 607, 102 S. Ct. at 3269.[3]

[3] *See* NOTE: PROTECTING NATIVE AMERICANS: THE TRIBE AS PARENS PATRIAE, 5 MICH. J. RACE & L. 665.

29. Here, WNV asserts that Tribal Plaintiffs quasi-sovereign interest is in protecting "their members' constitutional right to vote from HB 530 and HB 176's disenfranchising effects…" (WNV Reply at 7). Tribal Council Member Lane Spotted Elk describes that "HB 530 and HB 176 make participation in elections by Northern Cheyenne members substantially more difficult." (Spotted Elk Aff. ¶ 18; *see also* Gray Aff. ¶ 22 (stating "HB 530 and HB 176 makes participation in elections by Blackfeet Nation members substantially more difficult."); McDonald Aff., Ex. A). Additionally, WNV describes these laws may diminish tribal members' political power "through the disenfranchisement of their members through the laws' discriminating effects." (WNV Reply at 7).

30. The Secretary did not provide any argument as to why *parens patriae* would not confer standing upon WNV's Tribal Plaintiffs.

31. The Court finds that WNV's Tribal Plaintiffs have alleged injury to a sufficient quasi-sovereign interest, specifically that of protecting the constitutional rights of their members which relates to their health and well-being, to substantial segments of their populations such that they have standing under *parens patriae* to challenge HB 176 and HB 530.

32. In conclusion, the Court finds that MYA Plaintiffs have standing to challenge HB 176, SB 169, and HB 506 under the concepts of organizational or associational standing.

WNV Plaintiffs have standing to challenge HB 176 and HB 530 under the concepts of organizational standing or *parens patriae*.

b. Preliminary Injunctions

33. MDP and MYA request that SB 169 be preliminarily enjoined under § 27-19-201(1-2), MCA because they allege SB 169 is unconstitutional under the Montana Constitution's Equal Protection Clause and the right to vote enshrined in the Montana Constitution's Declaration of Rights. MDP, WNV, and MYA request that HB 176 be preliminarily enjoined because they allege it infringes Plaintiffs and their members' fundamental right to vote and Plaintiffs and their members' rights under Montana's equal protection clause. MDP and WNV request that HB 530 be preliminarily enjoined because they allege it infringes the right to vote, equal protection, free speech, and due process. Lastly, MYA requests that HB 506 be preliminarily enjoined because MYA alleges HB 506 infringes MYA Plaintiffs and their members' right to suffrage (right to vote), right to equal protection, and the rights of persons not adults.

A. Right to Vote

34. The right to vote (also called the right of suffrage) is enshrined under the Montana Constitution's Declaration of Rights and provides that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const., Art. II § 13. Since the right to vote is found within the Declaration of

Rights, it is a fundamental right. *State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, ¶ 47, 113 P.3d 281, ¶ 47; *see also Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, ¶ 32, 325 P.3d 1204, ¶ 32.

35. When the exercise of a fundamental right is interfered with, "[t]he most stringent standard, strict scrutiny, is imposed..." *Wadsworth v. State* (1996), 275 Mont. 287, 911 P.2d 1165, 1174. Strict scrutiny review of a statute "requires the government to show a compelling state interest for its action." *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 61, 296 Mont. 207, ¶ 61, 988 P.2d 1236, ¶ 61 (quoting *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 (internal quotations omitted)). "In addition to the necessity that the State show a compelling state interest for invasion of a fundamental right, the State, to sustain the validity of such invasion, must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Mont. Envtl. Info. Ctr.*, at ¶ 61 (quoting *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 (internal quotations omitted)).

36. Similar to the arguments made in *Driscoll v. Stapleton*, the Secretary again asks the Court to apply a "flexible standard" adopted by federal courts referred to as the "*Anderson-Burdick* standard" from *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059 (1992). (Def.'s Resp. at 15). Under this standard, "severe" restrictions on voting rights are subject to strict scrutiny whereas "reasonable, nondiscriminatory restrictions" on voting rights need only be

justified by the "State's important regulatory interests." *Burdick*, 504 U.S. 428, 434, 112 S. Ct. 2059, 2063 (quoting *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1569 (internal quotations omitted)).

37. The Court finds that Plaintiffs have made a prima facie case that SB 169, HB 530, HB 176, and HB 506 unconstitutionally burden the right to vote as discussed below.

i. SB 169

38. In making their prima facie case of a constitutional violation, MDP and MYA allege SB 169 unconstitutionally burdens the right to vote of young voters because it denies them the right to vote in the manner that other similarly situated voters enjoy. In support of this, both MDP and MYA's experts testified that young voters are less likely to have the standalone primary forms of ID acceptable under SB 169. Additionally, both experts testified that students are less likely to have the secondary form of ID now required to be used in conjunction with a student ID. MDP also presented evidence that no voter fraud in Montana has occurred from the use of student IDs to vote. (Gordon Decl., Ex. 35 at 6-8; Semerad Decl. ¶ 11; Seaman Decl. ¶ 10).

39. The Secretary argues that the minor changes SB 169 makes to voter identification requirements do not violate or overly burden the right to vote. The Secretary describes that requiring some other form of identification in conjunction with a student ID is a modest change that the Legislature has authority to implement through the explicit delegation of authority to the Legislature to regulate elections in the Montana

Constitution. Further, the Secretary offers that even if the right to vote is implicated, that the Court should apply the flexible *Anderson-Burdick* standard and that SB 169 would easily pass because SB 169 imposes a minimal burden.

40. The Court finds the expert testimony submitted by MDP and MYA concerning SB 169 to be reliable and informative. In particular, the testimony concerning how the cost of voting determines whether a voter will exercise their right to vote. Here, the cost of voting for students has become more expensive with the passage of SB 169. MDP provided testimony from an expert and from others describing 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. These additional costs to voting are unique to young voters given their mobility and the fact that they are less likely to possess the primary forms of ID and the forms that must be presented in addition to the student ID. Based on the additional difficulties young voters who rely on using their student ID as a primary form of ID will face, the Court finds that MDP and MYA have established that SB 169 implicates the fundamental right to vote and would thereby be subject to strict scrutiny review.

41. The Secretary essentially describes that SB 169 was passed to clear up confusion among election workers, to increase voter confidence in elections, to ensure compliance with residency requirements, and to prevent voter fraud.

42. Regarding voter fraud, there have been no instances of student ID-related election fraud since the allowance of student IDs as voter identification. (Gordon Decl., Ex. 35 at 6-8; Semerad Decl. ¶ 11; Seaman Decl. ¶ 10; MDP Ex. 20 at 22:5-21). Voter fraud in general is rare in Montana. (Gordon Decl., Ex. 35 at 6-8). Regarding ensuring compliance with residency requirements, there are already laws in place that address this. There are likely less burdensome means than removing student IDs as a primary form of ID to clear up confusion amongst election staff. Lastly, as testified to by experts on both sides, requiring voter identification itself increases voter confidence in elections.

43. Thus, given that MDP and MYA have shown the burden that SB 169 has on the right to vote of young voters, the Court finds that Plaintiffs have made a prima facie showing that SB 169 is unconstitutional and should be preliminarily enjoined to preserve the status quo until a trial on the merits can be had.

44. As discussed above, the status quo is that which existed prior to the passage of these laws, given that was "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Porter*, 192 Mont. At 181, 627 P.2d at 839.

ii. HB 176

45. Plaintiffs have established a prima facie case that HB 176 unconstitutionally burdens the right to vote because HB 176 eliminates an important voting option for Native Americans and will make it harder, if not impossible, for some Montanans to vote as discussed below.

46. The Secretary argues, for the second time during this litigation, that the Legislature is granted explicit discretion to enact EDR in Article IV, § 3 of the Montana Constitution and therefore the Legislature has the sole discretion to decide whether to allow or disallow EDR. The Court stands by its previous decision in its Order RE Defendant's Motion to Dismiss which is the law of the case. (*See* Dkt. 32 at 16-17). Thus, as stated previously, while the Court recognizes that 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 and:

> Since *Marbury*, it has been accepted that determining the constitutionality of a statute is the exclusive province of the judicial branch. **It is circular logic to suggest that a court cannot consider whether a statute complies with a particular constitutional provision because the same constitutional provision forecloses such consideration.**

Brown v. Gianforte, 2021 MT 149, ¶ 24, 404 Mont. 269, ¶ 24, 488 P.3d 548, ¶ 24 (emphasis added).

44. Having again determined that laws passed by the Legislature are subject to judicial review, the Secretary next argues the right to vote is not burdened by HB 176 because of the concerns with delays, burdens on staff, and long lines stemming from EDR. The Secretary did provide testimony from some election staff describing the extra work that is required on election day when registration is also permitted. However, Plaintiffs submitted testimony from election staff in support of permitting EDR and

describing the steps they take to handle the extra work imposed by having registration in addition to voting on election day.

45. Based on the evidence the Court was presented with concerning Montanan's use of EDR and reliance on it, the Court finds that Plaintiffs have made a prima facie case that HB 176 unconstitutionally burdens the right to vote by eliminating EDR.

iii. HB 530

46. WNV and MDP have established a prima facie case that HB 530 unconstitutionally burdens the right to vote because it burdens the voters who rely on organized absentee ballot assistance as discussed below.

47. The Secretary argues that HB 530 is not ripe given that the Secretary has not adopted the administrative rule as directed in HB 530 § 2(1). Specifically, "[o]n or before July 1, 2022, the secretary of state shall adopt an administrative rule in substantially" the form provided in HB 530 § 2(1)(a-b). However, "[t]he basic purpose of the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Reichert v. State*, 2012 MT 111, ¶ 54, 365 Mont. 92, ¶ 54, 278 P.3d 455, ¶ 54. A case is considered "unripe" when "the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Id*. Moreover, "[r]ipeness asks whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication…." *Id*. at ¶ 55.

48. Here, MDP and WNV point to HB 530 § 2(2), which is not subject to administrative rule making by the Secretary and provides that "[a] person violating the rule adopted by the secretary of state pursuant to subsection (1) is subject to a civil penalty. The civil penalty is a fine of $100 for each ballot distributed, ordered, requested, collected, or delivered in violation of the rule." Moreover, the portion of HB 530 left to the Secretary to adopt an administrative rule requires that it be in "substantially the same form" as that drafted by the legislature. Thus, at issue in HB 530 is not an abstract disagreement, especially given that it is clear from the statute there will be a civil penalty when engaging in many types of ballot assisting activities. Significantly, Plaintiffs have provided evidence as to how they have already been injured by HB 530 given they have already been attempting to determine whether the activities their organizations have previously engaged in will be subject to civil penalties under HB 530 and spending resources to educate voters about the change in the law.

49. Next, the Secretary argues HB 530 does not unconstitutionally burden the right to vote because, the Secretary alleges, there is no right to vote by absentee ballot or to have that ballot collected in a particular manner. Additionally, the Secretary argues that ballot collection is not banned under HB 530, but rather organizations and people collecting ballots cannot accept "a pecuniary benefit" from, *inter alia*, collecting ballots.

50. While there is no explicit fundamental right to vote by absentee ballot or to have a ballot collected, it is still possible that the fundamental right to vote can be infringed by legislation affecting that right through limiting the voting options available to Montanans. WNV provided expert testimony as described above illustrating the reliance many Native voters have on organizations that engage in paid ballot collection due to many factors discussed above but to restate a few: the distance Native voters have to travel in order to vote in person and the difficulties with the mailing system on reservations. MDP provided testimony describing how paid ballot collection reduces the burdens on voters who many not have the means, ability, or time to get to the polls in-person.

51. In sum, given that banning paid ballot collection will reduce the avenues to vote of many Montanans that rely on ballot collection due to a multitude of reasons as described above and as evidenced by testimony submitted by MDP and WNV, the Court finds that MDP and WNV have made a prima facie showing that HB 530 unconstitutionally burdens the right to vote.

iv. HB 506

52. MYA contends that HB 506 unconstitutionally burdens the right to vote for several reasons. First, MYA alleges that newly eligible voters turning eighteen in the two weeks prior to an election will be unable to absentee vote and thus if they have to rely on that form of voting due to travel, going to school out-of-state, illness, disability,

or for other reasons, they will not be able to vote at all. Second, MYA alleges that requiring newly eligible voters (specifically voters turning eighteen during the late registration period) to vote in person whereas all other eligible voters have other voting options available violates newly eligible voters' right to vote. Lastly, MYA contends that HB 506 needlessly complicates the voting process for voters becoming eligible during the late registration period.

53. The Secretary counters that absentee voting is not included in the constitutional right to vote. The Secretary also argues that the Legislature is specifically authorized to set requirements for absentee voting pursuant to Article IV § 3 of the Montana Constitution. The Secretary provided evidence from Melissa McLarnon describing lack of uniformity regarding election administrators' distribution and counting of ballots from voters turning eighteen during the late registration period. Further the Secretary argues that HB 506 is constitutional due to it providing uniformity and clarity among election administrators as well as ensuring only qualified voters are casting their ballots.

54. The Court finds that MYA has made a prima facie case that HB 506 unconstitutionally burdens the right to vote. While the Secretary claims "only absentee voting options of a small sliver of potential voters" will be affected, these voters previously had a voting avenue open to them that has now been closed by HB 506 and

the Court finds it is proper to enjoin this law until its constitutionality can be determined after a full review on the merits. (*See* Def.'s Resp. at 40).

B. Equal Protection

55. The Equal Protection Clause of the Montana Constitution aims to "ensure that Montana's citizens are not subject to arbitrary and discriminatory state action." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 15, 382 Mont. 256, ¶ 15, 368 P.3d 1131, ¶ 15. The clause specifically declares: "[n]either the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." Mont. Const., Art. II § 4. Additionally, while the Legislature must be given deference when it enacts a law, "it is the express function and duty of this Court to ensure that all Montanans are afforded equal protection under the law." *Davis v. Union Pac. R.R.* (1997), 282 Mont. 233, 240, 937 P.2d 27, 31.

56. "When presented with an equal protection challenge, we first identity the classes involved and determine whether they are similarly situated." *Mont. Cannabis Indus. Ass'n*, ¶ 15 (quoting *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 23, 354 Mont. 133, ¶ 23, 227 P.3d 42, ¶ 23)(internal quotations omitted). Similarly situated classes are identified by "isolating the factor allegedly subject to impermissible discrimination; if two groups are identical in all other respects, they are similarly situated." *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 19, 402 Mont. 277, ¶ 19, 477 P.3d 1065, ¶ 19. If it is determined that

"the challenged statute creates classes of similarly situated persons, we next decide whether the law treats the classes in an unequal manner." *Mont. Cannabis Indus. Ass'n,* ¶ 15.

57. First, regarding defining the classes, MDP and MYA allege that under HB 176, HB 530, and SB 169 that young voters are treated differently from similarly situated voters. WNV alleges that under HB 176 and HB 530 Native American voters are treated differently than similarly situated voters. The Secretary contends that "young voters" is not an adequately defined class. However, the Court finds that MDP and MYA, for the purposes of making a prima facie case, have defined the class "in a way which will effectively test the statute without truncating the analysis." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 34, 374 Mont. 453, ¶ 34, 325 P.3d 1211, ¶ 34.

58. Having determined the classes for the purposes of a preliminary injunction, the Court next considers "if the two classes are similarly situated by isolating the factor subject to the allegedly impermissible discrimination []. If the two groups are equivalent in all respects other than the isolated factor, then they are similarly situated." *Hensley,* at ¶ 21. Additionally, "[a] law or policy that contains an apparently neutral classification may violate equal protection if 'in reality [it] constitutes a device designed to impose different burdens on different classes of persons.'" *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, ¶ 16, 104 P.3d 445, ¶ 16 (quoting *State v. Spina,* 1999 MT 113, ¶ 85, 294 Mont. 367, ¶ 85, 982 P.2d 421, ¶ 85).

59. WNV contends that HB 176 disproportionately burdens the right to vote of Native Americans living on rural reservations in Montana and that HB 530 disproportionately affects Native Americans on the basis of race. Specifically, regarding HB 176, WNV cites to testimony and expert reports showing that Native Americans have to travel further to register to vote, have less access to vehicles, have less access to money for gas and car insurance, and use EDR at higher rates than non-Native voters.

60. The Secretary argues that claims such as those described by WNV were rejected in *Brnovich v. Democratic Nat'l Committee* however, that case is irrelevant given it held that two laws passed in Arizona did not violate a federal statute under a federal legal standard that has not been applied in Montana. *See Brnovich v. Democratic Nat'l Comm.* (2021), 141 S. Ct. 2321, 2338.

61. Regarding HB 530, WNV describes that Native American voters rely on ballot collection more than non-Native voters due to the structural barriers to casting a ballot through mail that they disproportionately face. WNV presented significant evidence describing these barriers, which, to name a few, include lack of residential mail, longer distances to Post Offices, less access to vehicles, and less access to internet.

62. MDP and MYA contend that under HB 176, HB 530, and SB 169 young voters are treated differently because identification and voting methods disproportionately used by them are constrained by these laws. MDP presented evidence, as discussed above, concerning young voters' reliance on EDR—specifically young voters account for 31.2%

of voters who have registered on election day. (Gordon Decl., Ex. 35 at 13). MDP presented evidence concerning the significance of having the option to use a student ID as a primary form of voter identification for young voters due to the likelihood that young voters will not have access to the other forms of primary or secondary identification as now required by SB 169. Moreover, MDP presented evidence that young voters, Native voters, seniors, and voters with disabilities are disproportionately burdened by HB 530 because they already face greater hurdles to participation than other voters.

63. Once the relevant classifications have been defined, "we next determine the appropriate level of scrutiny." *Snetsinger,* at ¶ 17. As previously described, "[s]trict scrutiny applies if a suspect class or fundamental right is affected." *Id*. To survive strict scrutiny review, "the State has the burden of showing that the law, or in this case the policy, is narrowly tailored to serve a compelling government interest." *Id.*

64. The Secretary maintains that Plaintiffs have not stated viable equal protection claims because HB 176 and SB 169 are facially neutral and discriminatory intent has not been established towards any of the classes. Additionally, the Secretary contends that Plaintiffs have not satisfied their prima facie burden to establish a disparate impact claim as to HB 530. The Secretary further asserts that the State's interest in these three laws which include raising voter confidence in the security and administration of Montana's elections, reducing the amount of work for election workers on election day,

reducing lines at polling places, reducing delays in reporting election results, and preventing election fraud in Montana would be enough to pass constitutional scrutiny under the *Anderson-Burdick* standard.

65. The Court disagrees with the Secretary that Plaintiffs must establish a disparate impact theory as to the challenged laws. *See Snetsinger,* at ¶ 16. Plaintiffs have rebutted the State's interests in testimony from experts and election staff describing there has been no voter fraud in Montana pertaining to EDR, ballot assistance, or the use of student IDs as voter identification. Additionally, Plaintiffs provided testimony from election staff describing that EDR is not a significant burden and that even if the deadline is moved back, it just moves the burden to that day. Plaintiffs provided evidence showing the significant reliance on ballot assistance and the confusion surrounding the implementation of HB 530.

66. In sum, the Court finds that Plaintiffs have made a prima facie showing that HB 176, HB 530, and SB 169 unconstitutionally burden Plaintiffs' right to equal protection of the laws by treating similarly situated groups unequally.

i. HB 506

67. MYA argues HB 506 violates Montanans' right to equal protection because it disproportionately and disparately abridges the right to vote of young Montana voters. Specifically, MYA describes HB 506 treats those who will be eligible to vote on election day in a different manner based only on the point at which they turn eighteen during

the election cycle. Thus, as described by MYA, the class of voters is those who turn eighteen the month prior to election day.

68. MYA also argues that HB 506 in conjunction with HB 176 and SB 169 creates an interactive effect making the impact of these laws on young voters exponentially worse. MYA provided testimony, as described above, from young voters and the difficulties they face by the implementation of these laws. MYA provided expert testimony describing that "[c]ombined with their lack of justification, the independent and cumulative effects of the burdens placed on youth and student voters as a result of these laws, along with the timing of their passage on the heels of unprecedented youth electoral engagement nationally and statewide, can only be understood as a collective effort to deny or abridge the right to vote of youth voters." (Bromberg Decl. at 1). Further MYA described that "a common thread" among HB 506, HB 176, and SB 169 is that they all "target youth and student voters directly and/or single out characteristics that are unique to or disproportionately held by youth and student voters." (Bromberg Decl. at 21).

69. The Secretary's primary argument for HB 506 is simply that minors do not have the right to vote and that there is no equal protection claim because the distinguishing factor between the two classes—age—plainly relates to the underlying justification of the statute.

70. MYA counters that these voters turning eighteen in the month prior to election day will have one of the avenues of voting—absentee voting—closed to them simply because of when they turn eighteen during the election cycle and that it treats them differently from everyone else who is eighteen prior to the month before election day. Further MYA describes that in addition to infringing the right to vote of these newly eligible voters, the Rights of Persons Not Adults provision in Montana's Constitution is similarly infringed by HB 506.

71. In sum, the Court finds that MYA has established a prima facie case that HB 506 violates the right to equal protection because it treats voter turning age eighteen in the thirty days before an election in an unequal manner than other eligible voters.

C. Right to Free Speech

72. The right to freedom of speech is a fundamental right given its enshrining in the Montana Constitution's Declaration of Rights. *Riggs*, ¶ 47; *see also State v. Dugan*, 2013 MT 38, ¶ 18, 369 Mont. 39, ¶ 18, 303 P.3d 755, ¶ 18 ("The right to free speech is a fundamental personal right…"). Freedom of speech "applies to associations, as well as individuals, and protects the right of associations to engage in advocacy on behalf of their members." *Mont. Auto. Ass'n v. Greely* (1981), 193 Mont. 378, 388, 632 P.2d 300, 305. Political speech is afforded "the broadest protection." *See McIntyre v. Ohio Elections Comm'n* (1995), 514 U.S. 334, 346, 115 S. Ct. 1511, 1518. In DV 20-0377, Judge Fehr described that "ballot collection activity" falls within "the type of interactive

communication concerning political change that is appropriately described as 'core political speech.'" Courts Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Corey Stapleton*, ¶ 27, Sept. 25, 2020, No. DV 20-0377 (quoting *Meyer v. Grant* (1988), 486 U.S. 414, 421-22, 108 S. Ct. 1886, 1892 (internal quotations omitted)).

i. HB 530

73. WNV and MDP have established a prima facie case that HB 530 unconstitutionally burdens the right to free speech because it restricts the Montana Democratic Party's, Western Native Voice's, Montana Native Vote's, Blackfeet Nation's, and the Confederated Salish and Kootenai Tribe's ("CSKT") ability to engage with voters to encourage and assist them to vote as discussed below.

74. The Secretary contends that no message is communicated by ballot collecting and thereby the right to free speech is not implicated by HB 530. The Secretary cites to a string of federal authorities supporting this proposition.

75. MDP and WNV contend that HB 530 restricts their speech because through ballot collecting activities, they are expressing their belief in civic engagement and voter participation.

76. This Court finds, for the purposes of a preliminary injunction, that Montana Democratic Party, Western Native Voice and Montana Native Vote, "[b]y collecting and conveying ballots, … are engaged in the 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' which is at the

heart of freedom of expression protections." Courts Findings of Fact, Conclusions of Law, and Order, *Western Native Voice*, ¶ 30, No. DV 20-0377 (quoting *Dorn v. Bd. Of Trustees of Billings Sch. Dist. No. 2* (1983), 203 Mont. 136, 145, 661 P.2d 426, 431). Additionally, as described by WNV, Plaintiffs Blackfeet Nation and CSKT engage in political speech by promoting and facilitating the work of Western Native Voice and Montana Native Vote's paid organizers or by hiring their own ballot collectors.

77. Thus, WNV and MDP have established a prima facie case that HB 530 unconstitutionally burdens the right to free speech.

D. Right to Due Process of Law

78. The due process clause is contained in Montana's Declaration of Rights and therefore is a fundamental right. *Riggs*, at ¶ 47. A statute can be challenged for vagueness under two theories: "(1) because the statute is so vague that it is rendered void on its face; or (2) because it is vague as applied in a particular situation." *State v. Dugan*, 2013 MT 38, ¶ 66, 369 Mont. 39, ¶ 66, 303 P.3d 755, ¶ 66 (citing *State v. Watters*, 2009 MT 163, ¶ 24, 350 Mont. 465, 208 P.3d 408). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Whitefish v. O'Shaughnessy* (1985), 216 Mont. 433, 440, 704 P.2d 1021, 1025.

i. HB 530

79. WNV has established a prima facie case that HB 530 is unconstitutionally vague because it is unclear as to when and to whom it applies. Apart from the Secretary's

ripeness argument addressed above, the Secretary only offers that a lack of definitions in HB 530 does not render it vague on its face as long as the meaning of the statute is clear, and the defendant has adequate notice of what is proscribed. Further the Secretary argues that she will have the opportunity to define terms during the administrative rule making process.

80. The Court has previously addressed the Secretary's ripeness argument regarding HB 530. WNV provided evidence concerning the ambiguities concerning the governmental exception as it relates to tribal governmental entities. Additionally, WNV describes that the ambiguities concerning what type of conduct relating to ballot collection activity that will trigger the penalties in HB 530 are such that WNV has already had to change their processes in a way that steers far wider than what HB 530 may make unlawful.

81. In sum, the Court finds that WNV has made a prima facie case that HB 530 is unconstitutionally vague.

E. Rights of Persons Not Adults

82. The Montana Constitution provides: "[t]he rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons." Mont. Const., Art. II § 15.

83. MYA alleges that because HB 506 effectively limits the ability of minors turning eighteen to participate in voting procedures that adults get to use that it burdens a minor's right to exercise the same rights as adults. MYA's expert testified that a reasonable reading of Art. II § 15 is that "17-year-olds who will be 18 on or before Election Day cannot face unequal access to the ballot compared to adults; if they do, then it must be for some enhanced protection of the 17-year-old." (Bromberg Decl. at 15).

84. The Secretary argues minors do not have the right to vote and therefore Art. II, § 15 is not applicable. The Secretary additionally argues that HB 506 was proposed because "(i) some county election administrators were providing absentee ballots to individuals who did not yet meet Montana's age or residency requirements; and (ii) county election administrators who sent ballots to voters before the voter met age or residency requirements were in some cases 'holding' returned ballots of underage voters until election day or the day the voter turned 18." (Def.'s Resp. at 35; McLarnon Decl. ¶ 6). Thus, the Secretary argues, HB 506 assists in providing uniformity throughout the state.

85. The Court finds that MYA has made a prima facie case that the right to vote is burdened unconstitutionally given that minors have previously enjoyed being able to receive their absentee ballot prior to turning eighteen and under HB 506, will no longer be able to.

F. Great or Irreparable Injury

86. Under § 27-19-201(2), MCA, an injunction may be granted "when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant…" For the purposes of issuing a preliminary injunction, "the loss of a constitutional right constitutes irreparable harm…" *Mont. Cannabis Indus. Ass'n*, ¶ 15.

87. The Court finds that Plaintiffs have established they will suffer a great or irreparable injury if these laws are not preliminarily enjoined until a case on the merits can be had as discussed below.

88. MDP and MYA have shown that their members and the organizations they represent will suffer constitutional harm if SB 169 remains in effect during the pendency of this litigation. Specifically, MDP and MYA have provided testimony from eligible voters describing they will have difficulty locating a secondary form of ID to be presented in addition to their student ID to exercise their right to vote. MDP provided testimony and evidence concerning the significant unlikeliness of out-of-state students to possess a Montana drivers' license and the similar unlikelihood of even in-state students possessing a driver's license or state ID. (Gordon Decl., Ex. 35 at 15). The Court found the testimony from Plaintiffs' experts concerning how raising the "costs" of voting will make it more difficult for voters to submit their ballots and that one of these "costs" is by having the proper identification to be able to vote to be persuasive. Thus,

the Court finds that MDP and MYA have shown that SB 169, by burdening constitutional rights, will cause irreparable harm if SB 169 remains in effect during the pendency of this litigation.

89. MDP and WNV have shown they and the members of the organizations they represent will suffer irreparable harm if HB 530 and HB 176 remain in effect. Specifically, both Plaintiffs made prima facie cases that HB 530 and HB 176 unduly burden the right to vote by making it more difficult for specific groups to exercise their right to vote. Additionally, MDP, WNV, and MYA will be harmed given their participation in ballot collecting and get out the vote activities will be curtailed by HB 176 if it were to remain in effect. Thus, Plaintiffs have shown that HB 530 and HB 176 will cause irreparable injury if these laws are not enjoined during the pendency of this litigation.

90. MYA has shown that HB 506 will cause an estimated 763 new voters to experience an increase in confusion and difficulty when voting. (Herron Rpt. ¶ 60). MYA provided testimony from a minor who will be turning eighteen four days before the 2022 primary election who will only have the option to vote in person because of HB 506. (MYA Brf., Ex. I, ¶¶ 4-8). This minor, unlike his peers who turn 18 before him, will not have the option to vote by mail nor will he have the opportunity to receive and examine his ballot until four days before the election. *Id*. at ¶ 9. Further he described that HB 506 makes it more difficult for him to exercise his right to vote. *Id*. at ¶ 25. Thus,

MYA has shown that it and the members it represents will suffer harm if HB 506 were to remain in effect during the pendency of this litigation.

G. Delay

91. The Secretary argues Plaintiffs motions should be denied because Plaintiffs have impermissibly delayed in requesting that these laws be preliminarily enjoined given that election officials have already worked to implement the changes these laws made to elections, voters would be confused, and the public's confidence in the electoral process would be "further undermine[d]." (Def.'s Brf. at 9-10). In support of her argument, the Secretary cites to a string of federal cases in which delay as short as thirty-six days after learning of alleged irreparable harm resulted in denial of a preliminary injunction. The Secretary also cites to *Boyer v. Karagacin* for the proposition that a preliminary injunction is typically "granted at the commencement of an action before there can be a determination of the rights of the parties to preserve the subject in controversy in its existing condition pending a determination." 178 Mont. 26, 34, 582 P.2d 1173, 1178.

92. This Court does not interpret § 27-19-201, MCA as requiring that a preliminary injunction be filed at the "commencement" of an action or even right after a law has come into effect. Nonetheless, at this point in time, this consolidated matter is at its commencement and Plaintiffs have not impermissibly delayed in their applications for

preliminary injunctions. Moreover, the Court does not find it persuasive that the Secretary has been taking steps to enact these 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. Additionally, Plaintiffs have made this request prior to the holding of the first state-wide election since the enactment of these laws.

93. Thus, the Court finds that Plaintiffs did not impermissibly delay in requesting these laws be preliminarily enjoined.

III. CONCLUSION

84. Plaintiffs have established a prima facie case that they will suffer some degree of harm and are entitled to preliminary relief pursuant to § 27-19-201(1), MCA. Additionally, Plaintiffs have made a prima facie case that they will suffer an "irreparable injury" through the loss of constitutional rights pursuant to § 27-19-201(2), MCA, if these laws were to remain in effect during the pendency of this litigation.

85. In sum, laws promulgated by the legislature enjoy the presumption of constitutionality. However, in the case of the four laws at issue here, HB 506, SB 169, HB 176, and HB 530, Plaintiffs have demonstrated they are entitled to have these laws temporarily enjoined to preserve the status quo—the last non-contested condition preceding this pending controversy—and prevent potential constitutional injury to the

parties and the voters they represent until the constitutionality of these laws can be thoroughly investigated and a determination of their constitutionality on the merits can be made.

The Court, being fully informed, having considered all briefs on file and in-court arguments, makes the following decision:

IT IS HEREBY ORDERED:

1. Plaintiffs' motions for a Preliminary Injunction are **GRANTED;**
2. The Secretary and her agents, officers, employees, successors, and all persons acting in concert with each or any of them are IMMEDIATELY restrained and prohibited from enforcing any aspect of HB 176, HB 530, SB 169, and HB 506 pending resolution of the Plaintiffs' request that the Secretary be permanently enjoined from enforcing the statutes cited above;
3. The Court waives the requirement that the Plaintiffs post a security bond for the payment of costs and damages as permitted by § 27-19-306(1), MCA.

DATED April 6, 2022

/s/ Michael G. Moses
District Court Judge

cc: Dale Schowengerdt
David M.S. Dewhirst
Austin James
Peter M. Meloy
Matthew Gordon
John Heenan
Alex Rate
Ryan Ward Aikin

Electronically Signed By:
Hon. Judge Michael Moses
Wed, Apr 06 2022 11:00:15 AM

Rylee Sommers-Flanagan
David Knobel
Jonathan Topaz
Kathleen Smithgall
Ian McIntosh
Clayton Gregersen
Alora Thomas-Lundborg
Akilah Lane
Jacqueline De León
Matthew Campbell
Samantha Kelty
Theresa J. Lee
Jonathan Hawley
William Morris
E. Lars Phillips
Leonard H. Smith
John M. Semmens
Henry Brewster

APPENDIX B

CLERK OF THE
DISTRICT COURT
TERRY HALPIN

2020 JUL -7 P 2:52

FILED

BY ________
DEPUTY

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

WESTERN NATIVE VOICE, Montana Native Vote, Assiniboine and Sioux Tribes of Fort Peck, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Crow Tribe, Fort Belknap Indian Community, **Plaintiffs,** **vs.** **COREY STAPLETON, in his official capacity as Montana Secretary of State, TIM FOX, in his official capacity as Montana Attorney General, JEFF MANGAN, in his official capacity as Montana Commissioner of Political Practices,** **Defendants.**	**Cause No: DV-2020-377** **Judge: Jessica T. Fehr** **ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTIVE RELIEF**

Plaintiffs Western Native Voice, Montana Native Vote, Assiniboine and Sioux Tribes of Fort Peck, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Crow Tribe and Fort Belknap Indian Community have sued Corey Stapleton, in his official capacity as Montana Secretary of State, Tim Fox, in his official capacity as Montana Attorney General, and Jeff Mangan, in his official capacity as Montana Commissioner of Political Practices, to enjoin enforcement of the Ballot Interference Prevention Act (hereinafter "BIPA"), Mont. Code Ann. § 13-35-701 *et seq.* On March 25, 2020, Plaintiffs applied,

pursuant to Mont. Code Ann. § 27-19-301 for a preliminary injunction to enjoin the enforcement of the BIPA, which Plaintiffs allege prevents the organized collection of ballots in violation of their constitutional rights. On April 13, 2020, the Defendants filed their Response in Objection to Plaintiffs' Motion for Preliminary Injunction. On April 27, 2020, Plaintiffs filed their Reply Brief in Support of Motion for a Preliminary Injunction. Before the Court conducted a hearing on the matter, Plaintiffs filed a Motion for Temporary Restraining Order on May 1, 2020. Defendants filed their Response in Objection on May 4, 2020. Plaintiffs filed their Reply Brief in Support on May 5, 2020. On May 20, 2020, the Court granted the Plaintiffs' Motion for Temporary Restraining Order.

On May 27, 2020, a Joint Stipulation to Waive Preliminary Injunction Hearing was filed by the parties. On May 27, 2020, the Court granted the parties request to waive the hearing on the Motion for Preliminary Injunction and set a Status Conference for May 29, 2020. On the same date, May 27, 2020, the Defendants filed a Motion to Dismiss Plaintiffs' Motion for Preliminary Injunction, claiming the motion was moot due to a Preliminary Injunction being issued in *Driscoll v. Stapleton*, Cause No. DV-20-408 (13th Jud. Dist. May 22, 2020). Plaintiffs filed a Brief in Opposition to the Motion to Dismiss on May 28, 2020 and Plaintiffs filed a Reply in Support of the Motion to Dismiss on May 28, 2020, as well.

On May 29, 2020, the Court held a Status Conference with the parties. The Court denied the Defendants' Motion to Dismiss, ruling that the Plaintiffs in the present matter are separate and distinct from those of the *Driscoll* case. On May 29, 2020, following the Status Conference, the Court issued a written Order Denying the Defendants' Motion to Dismiss. At the conclusion of the May 29, 2020, Status Conference, the Court took the parties' briefing on the Preliminary Injunction under advisement. This written order follows.

THEREFORE, BASED ON THE COURT'S REVIEW, IT IS HEREBY ORDERED that the Plaintiffs' Motion for Preliminary Injunction is **GRANTED**.

BACKGROUND

The Ballot Interference Protection ACT (hereinafter referred to as "BIPA") was passed by the House during the 2017 Montana legislative session. BIPA was placed on the ballot as ballot referendum LR 129 for the 2018 November general election. BIPA was approved by the voters during the 2018 general election. BIPA restricts who can collect registered voters voted or unvoted ballots and creates exceptions only for election officials and employees of the United States Postal Office. Mont. Code Ann. § 13-35-703. BIPA allows caregivers, family members, household members and acquaintances to collect ballots, but limits the same categories of individuals from collecting and conveying more than six ballots per election. Mont. Code Ann § 13-35-703 (2) and (3). BIPA compels every caregiver, family member, household member or acquittance who delivers another individuals ballot to sign a registry and provide their name, address, and phone number; the voter's name and address; and the individual's relationship to the voter. See Mont. Code. Ann. § 13-35-703(2(c)-(2)(f). BIPA authorizes a $500 fine for each ballot unlawfully collected. Mont. Code. Ann § 13-35-703.

Plaintiffs argue that BIPA infringes on their fundamental right to vote; Plaintiffs claim that BIPA places a significant burden on Native Americans living on reservations, many of whom rely ballot collection organizations to vote. Plaintiffs argue that, while many Montanans may drop their ballots in the U.S. mail postal drop boxes or drive to their local elections offices, Native Americans living on reservations lack equal access to these opportunities due to scarcity of post offices, non-traditional mailing addresses, coupled with geographical isolation and higher levels of poverty, which make it harder for Native Americans to drop off their ballots at polling places. Plaintiffs stress that Native Americans living on reservations often deliver their ballots by pooling them with family and community ballots. Plaintiffs further contend that BIPA violates Organizational Plaintiffs', Plaintiff CSKT's and Plaintiff Fort Belknap's fundamental right to freedom of speech, fundamental right to freedom of association, and

fundamental right to due process. Plaintiffs posit that BIPA does not meet strict scrutiny and that the law must be enjoined; that Plaintiffs will suffer irreparable injury absent a preliminary injunction and that the balance of equities weighs in favor of Plaintiffs and that the injunction would not be adverse to the public interest.

The State contends that the Plaintiffs' motion for a preliminary injunction should be denied because Plaintiffs have not demonstrated a *prima facie* constitutional violation and, therefore, have not made a *prima facie* showing that they will suffer irreparable injury before this case can be fully litigated. The State argues that any urgency was self-created by the Plaintiffs and that their assertions of irreparable harm are insufficient to establish a *prima facie* case that BIPA will violate their constitutional rights or the constitutional rights of their members if it remains in effect for the upcoming elections. The State posits that Plaintiffs' have no constitutional right to have their absentee ballots collected by a person other than an election official or United States Postal Service worker, and that Organizational Plaintiffs have no constitutional right to collect ballots.

DISCUSSION

Pursuant to M.C.A. §27-19-201, a preliminary injunction may be granted:

(1) when it appears that the applicant 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;
(2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
(3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgement ineffectual;
(4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition;
(5) when it appears that the applicant has applied for an order under the provision of 40-4-121 or an order of protection under Title 40, chapter 15.

The subsections outlined above are disjunctive, "meaning that findings that satisfy one subsection are sufficient." *Sweet Grass Farms, Ltd. v. Bd. Of Cty. Comm'rs of Sweet Grass County.*, 2000 MT 147, ¶ 27, NEED FULL CITE (quoting *Stark v. Borner*, 266 Mont. 256, 259, 375 P. 2d 314, 317 (1987)). Only one subsection of M.C.A. §27-19-201 needs to be met to support the issuance of a preliminary injunction. *Stark*, 266 Mont. at 259, 735 P.2d at 317. The "grant or denial of injunctive relief is a matter within the broad discretion of the district court based on applicable findings of fact and conclusions of law." *Weems v. State by & through Fox*, 2019 MT 98, ¶ 7 (quoting *Davis v. Westphal*, 2017 MT 276, ¶ 10). The district court "does not determine the underlying merits of the case in resolving a request for preliminary injunction. *Weems*, ¶ 18. In the context of a constitutional challenge, an applicant for preliminary injunction need not demonstrate that the statute is unconstitutional beyond a reasonable doubt but must establish a *prima facie* case of a violation of its rights under the Constitution. *Id.* (quoting *City of Billings v. Cty. Water Dist. Of Billings Heights*, 281 Mont. 219, 228, 935 P.2d 246, 251 (1997)). Thus, in the present matter, because Plaintiffs have moved for a preliminary injunction based on constitutional challenges, they must establish a *prima facie* case of a constitutional violation.

Section 13 of Montana's Constitution states: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const. Art. II, § 13. The right of suffrage is a fundamental right. *State v. Riggs*, 2005 MT 124, ¶ 47 (citations omitted). Because voting rights are fundamental, BIPA, which Plaintiffs contend infringes upon the right to vote, "must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *Montana Envtl. Info Ctr. V. Dept't. of Envtl. Quality*, 1999 MT 248, ¶ 63 FULL CITE; *Finke v. State ex Rel. McGrath*, 2003 MT 48, ¶ 15 FULL CITE. It is the State's burden to prove the compelling interest by competent evidence. *Wadsworth v. State*,

275 Mont. 287, 911 P.2d 1165, 1174 (1996). Merely alleging that there is a compelling state interest is insufficient to justify interference with the exercise of a fundamental right. *Id.*

FINDINGS OF FACT

1. In support of the Motion for Preliminary Injunction, the Plaintiffs have submitted the following Affidavits:

   a. Floyd G. Azure
   - Tribal Chairman of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation ("Fort Peck Tribes")

   b. Shelly R. Fyant
   - Chairwoman of the Confederated Salish and Kootenai Tribes ("CSKT")

   c. Dawn Gray
   - Managing Attorney of the Blackfeet Nation

   d. Daniel Craig McCool, Ph.D.
   - Professor Emeritus of Political Science at the University of Utah

   e. Marci McLean
   - Executive Director of Montana Native Vote and Western Native Voice

   f. Ryan D. Weichelt, Ph.D.
   - Associate Professor of Geography at the University of Wisconsin-Eau Claire

   g. Andrew Werk, Jr.
   - President of the Fort Belknap Indian Community

   h. Alex Rate
   - Legal Director of the American Civil Liberties Union of Montana

2. The Court finds that, without exception, all Affidavits were verified and that the material allegations in each Affidavit were made positively and not upon information and belief.

3. The Court finds that, for the purposes of determining whether the Plaintiffs have presented a *prima facie* case for a preliminary injunction, the statements made by the Affiants are credible and based upon extensive personal experience. The Court further finds the expert opinions expressed by Dr. Craig McCool are credible and persuasive. Dr. McCool has extensive education, training and

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

experience in the political relationship between American Indians and Anglos and Indian voting issues.[1] The methodology used by Dr. McCool has been accepted in numerous federal cases.[2] His research has been published in many peer reviewed journals.[3] The Court finds that the State has not challenged Dr. McCool's opinions.

4. Based upon Plaintiffs' Affidavits, the Court finds that BIPA will significantly suppress voter turnout by disproportionately harming rural communities, especially individual Native Americans in rural tribal communities across the seven Indian reservations located in Montana by limiting their access to the vote by mail process.[4]

5. The State argues that the Plaintiffs' Motion for a Preliminary Injunction should be denied because Plaintiffs delayed filing their Motion until March 25, 2020, more than sixteen months after BIPA took effect on November 6, 2018; that Plaintiffs did not file their Complaint until March 12, 2020, didn't serve the Attorney General until March 24, 2020 (six weeks before absentee ballots were made available for the primary election), and therefore, should be estopped from complaining about purported irreparable harm that would result from proceeding with the normal course of litigation.

6. In Montana, the right to vote is a fundamental right guaranteed by the Montana Constitution. *State v. Riggs*, 2005 MT 124, ¶ 47. The loss of a constitutional right "constitutes irreparable harm" for the purpose of determining whether a preliminary injunction should be issued." *Mont Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Plaintiffs have shown that BIPA impedes on Montanans' constitutional right to vote; they have

[1] Affidavit of Dr. Craig McCool at 1-2
[2] *Id.*
[3] *Id.*
[4] Affidavits of Floyd Azure, Shelly Flynt, Dawn Gray, Andrew Werk, Dr. Ryan Weeichlet and Alex Rate

demonstrated irreparable harm for the purposes of determining whether a preliminary injunction should be issued.

7. The Defendants cite to *Rep Nat'l Comm v. Dem. Nat'l Comm.*, 206 L.Ed. 2d 452, 453-54 (2020)(*per curiam*) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasy v. Perry*, 574 U.S. 951 (2014)) to argue that the U.S. Supreme Court has "reputedly emphasized" its disfavor of altering election rules by judicial altercation on the eve of an election. The Court finds this argument misplaced. The preliminary injunction does not "fundamentally alter the nature of the election". *Rep. Nat'l Com.* 206 L.Ed.2d 452 at 1006-7. The Court's preliminary injunction will mitigate the voter suppression effects of BIPA. Because the preliminary injunction granted by this court does not "fundamentally alter the nature of the election", the State's reliance on *Rep. Nat'l Comm* is not persuasive.

8. The State argues that because BIPA was passed by Montana's voters by a wide margin, the referendum itself demonstrates a compelling state interest. *Def's Resp.* at 6 (citing *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 384, 632 P.2d 300, 303 (1981)). In *Montana Auto. Ass'n*, the Montana Supreme Court held that "the statewide vote on I-85 is a demonstration of a compelling state interest in the enactment of I-85." *Id.* However, that did not deter the Montana Supreme Court from declaring portions of the initiative unconstitutional. *Id.* While the Montana Supreme Court has held that a statewide initiative passed by Montana voters can indicate a compelling state interest, initiatives must still pass constitutional muster; statutes, whether passed by the legislature of by the voters, cannot violate the Constitution. The Court is not persuaded by the State's argument that BIPA's enactment by referendum shields BIPA from constitutional scrutiny.

9. The Court finds that, in their opposition to the Plaintiffs' Motion for Preliminary Injunction, the State has failed to present any evidence to dispute the Plantiffs' evidence that BIPA disproportionately burdens the voters identified by Plaintiffs or that the statute significantly suppresses voter turnout by making voting more burdensome and costly for voters who rely on ballot collection services.

10. Based upon the Plaintiffs' Affidavits, the Court finds that the Plaintiffs have established a *prima facie* violation of their right to free speech, right to freedom of association and right to due process.[5]

11. The Court finds that, in their opposition to Plaintiffs' Motion for Preliminary Injunction, the State has failed to present any evidence to dispute Plaintiffs' evidence that BIPA infringes on plaintiffs' right to free speech, right to freedom of association and right to due process.

12. Although the State alleges that BIPA promotes the State's compelling interest in maintaining the integrity of elections, the Court finds that the State has failed to present any evidence of Montana voters being subjected to harassment and insecurity in the voting process or even a general lack of integrity in Montana's elections.

13. The Court finds that BIPA serves no legitimate purpose; it fails to enhance the security of absentee voting; it does not make absentee voting easier or more efficient; it does not reduce the costs of conducting elections; and it does not increase voter turnout.

CONCLUSIONS OF LAW

1. The Plaintiffs have successfully demonstrated irreparable harm per se by presenting a *prima facie* case that BIPA violates the right to vote guaranteed by the Montana constitution.

2. The Court finds the cases cited by the Defendant to support their positions to be unpersuasive as these cases dealt with irreparable injury for copyright, trademark, and anti-trust and trade

[5] Affidavit of Marci McLean

violations, not constitutional violations. Def's Resp. 4. (citing *Oakland Tribune, Inc v. Chorinicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *accord Wreal, Ltd. Liab. Co. v. Amazon.com,* 840 F.3d 1244, 1248 (11th Cir. 2016); *Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015) (en banc); *Citibank, N.A.*, 756 F.2d at 276-77).

3. The State has failed to demonstrate through any evidence the existence of any compelling state interest that would warrant the interference of the right to vote created by BIPA.
4. If a preliminary injunction were not granted, BIPA would cause irreparable harm to Montana voters by preventing absentee ballot voters from voting with the assistance of ballot collection organizations.
5. The Court holds that BIPA is subject to strict scrutiny and that the State must demonstrate through competent evidence that the statute furthers a compelling state interest.
6. Based on the evidence submitted to the Court thus far, the Court concludes that the Plaintiffs are likely to prevail on the merits and would be entitled to a permanent injunction to enjoin the enforcement of BIPA.
7. The Court concludes, pursuant to M.C.A. § 27-19-201(1) and (2), that a preliminary injunction should be issued, enjoining the enforcement of BIPA.

Based upon the above Findings of Fact, Conclusions of Law, and Memorandum:

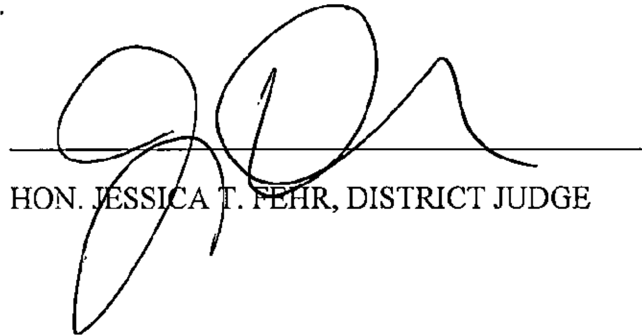
IT IS HEREBY ORDERED:

1. The Plaintiffs' Motion for Preliminary Injunction is **GRANTED.**
2. The Defendants and their agents, officers, employees, successors, and all persons acting in concert with each or any of them are **IMMEDIATELY** restrained and prohibited from enforcing the provisions of the Ballot Interference Prevention Act, M.C.A. § 13-35-701 *et seq.* pending

resolution of the Plaintiffs' request that the State be permanently enjoined from enforcing the statutes cited above.

3. The Court waives the requirement that the Plaintiffs post a security bond for the payment of costs and damages as permitted by M.C.A. § 27-19-306(1)(b)(ii).

DATED this 7th day of July, 2020.



HON. JESSICA T. FEHR, DISTRICT JUDGE

cc: Lillian Alvernaz, ACLU of Montana
Alex Rate, ACLU of Montana
Alora Thomas-Lundborg, ACLU
Dale Ho, ACLU
Ihaab Syed, ACLU
Natalie Landreth, Native American Rights Fund
Jacqueline De Leon, Native American Rights Fund
Timothy C. Fox, Montana Attorney General
J. Stuart Segrest, Chief Civil Bureau
Aislinn W. Brown, Assistant Attorney General
Hannah Tokerud, Assistant Attorney General

CERTIFICATE OF SERVICE
This is to certify that the foregoing was duly served by mail or by hand upon the parties or their attorneys of record at their last known address on this 7 day of July, 2020.
By:

Judicial Asst. to Hon. Jessica T. Fehr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 16th day of November, 2023, by U.S. certified mail in a sealed, postage paid envelope.

Attorney General Austin Knudsen
Office of the Attorney General
215 N Sanders, Third Floor
P.O. Box 201401
Helena, MT 59620-1401

Secretary of State Christi Jacobsen
Office of the Secretary of State
P.O. Box 202801
Helena, MT 59620-2801

Commissioner of Political Practices Chris Gallus
1209 8th Ave
P.O. Box 202401
Helena, MT 59620-2401

By: *<u>/s/ Constance Van Kley</u>*
Constance Van Kley
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, Constance Van Kley, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 11-16-2023:

Rylee Sommers-Flanagan (Attorney)
P.O. Box 31
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Service Method: eService

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Electronically Signed By: Constance Van Kley
Dated: 11-16-2023