IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0667

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

Plaintiffs & Appellees,

v.

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

Defendant & Appellant.

BRIEF OF APPELLEES MONTANA YOUTH ACTION, FORWARD MONTANA FOUNDATION, AND MONTANA PUBLIC INTEREST RESEARCH GROUP

On Appeal from the Montana Thirteenth Judicial District
Yellowstone County
Cause No. DV-21-0451
Honorable Judge Michael G. Moses

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2. Did the District Court manifestly abuse its discretion when it permanently enjoined House Bill 176 and Senate Bill 169 based on the applicable findings of fact and conclusions of law following a two-week trial?

STATEMENT OF THE CASE

In 2021, the Montana Legislature passed an exceptional number of laws raising barriers between Montanans and their ballots. Cases challenging these laws proliferated. Plaintiff-Appellees Montana Youth Action, Forward Montana Foundation, and MontPIRG ("Youth Voters") challenged three: House Bill 176 ("HB 176"), which eliminates Election Day registration, Senate Bill 169 ("SB 169"), which complicates voter ID requirements, and House Bill 506 ("HB 506"), which withholds ballots from voters who turn 18 in the month before Election Day. The District Court consolidated the case with two others.[1]

[1] Youth Voters refer to HB 506, HB 176, and SB 169 as the "challenged laws," but do not address House Bill 530, which Appellees Montana Democratic Party and Mitch Bohn ("MDP" or "Bohn") and Appellees Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish & Kootenai Tribes, Fort Belknap Indian

On April 6, 2022, the District Court preliminarily enjoined all four laws challenged in the consolidated cases. Dkt. 124. Defendant-Appellant Secretary of State Christi Jacobsen (the "Secretary") appealed as to HB 176 and SB 169. This Court affirmed on September 21, 2022. *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 3, 410 Mont. 114, 518 P.3d 58 (hereinafter *MDP*). In the time intervening, the Secretary and Youth Voters cross moved for summary judgment. Dkt. 78, 118. Finding that "HB 506 severely interferes with the right of suffrage" and "needlessly forces one subgroup. . .to vote in person and impermissibly denies this subgroup access to an avenue of voting" available to "all others," the District Court granted Youth Voters' motion on July 27, 2022, and permanently enjoined HB 506. Dkt. 201. The District Court simultaneously denied the Secretary's motion. *Id.* The parties proceeded to a nine-day bench trial on the remaining laws.

Relying on evidence produced through months of discovery and dozens of depositions, the District Court issued its Findings of Fact, Conclusions of Law, and Order, permanently enjoining the remaining three laws on September 30, 2022. Dkt. 265. The 199-page Order details

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Community, and Northern Cheyenne Tribe ("WNV Plaintiffs" or "Native Voters") challenged and address in their concurrently filed response briefs.

how the challenged laws burden Montanans' rights of suffrage and to equal protection, especially young and Native voters. As to HB 176, the District Court concluded the "burdens imposed by the elimination of EDR are not justified by any compelling—or even legitimate—state interests," because eliminating Election Day registration "does not enhance election integrity" or "reduce administrative burdens or wait times," and that Election Day registration was not "implicated in a single instance of voter fraud in Montana since its inception." *Id.* ¶¶ 570–73. As to SB 169, the District Court found that the law "is not rationally related to" the Secretary's professed interests in addressing voter fraud, improving voter confidence, or "ensuring the reliability, integrity, and fairness of Montana's election process," and found evidence of discrimination targeting young voters. *Id.* ¶¶ 663–72. The Secretary appealed.

Youth Voters respond herein to the Secretary's Opening Brief appealing the District Court's orders declaring HB 506, HB 176, and SB 169 unconstitutional and permanently enjoining their enforcement.[2]

[2] Rather than repeat points well argued in consolidated Appellees' response briefs, Youth Voters incorporate herein Native Voters' and Bohn's respective briefs.

STATEMENT OF FACTS

I. The challenged laws' cumulative effect depresses youth voting.

"Over the last decade, youth voter turnout in Montana has increased dramatically." Dkt. 265, ¶ 290. This surge has occurred despite real-world hurdles that tend to make accessing the polls more difficult for young people than older people: young people are "necessarily navigat[ing] the process of registering to vote and voting for the first time, *id.* ¶ 115, tend to move more frequently, *id.* ¶ 291, have less familiarity "with voting requirements and processes," *id.* ¶ 156, and are less likely to have one of the primary forms of identification under SB 169," *id.*; *see id.* ¶¶ 294, 365.

That these laws were passed "just months after Montana's youngest voters turned out to vote at record rates" was "no accident." Dkt. 265, ¶ 670. The District Court found that Election Day registration ("EDR") increases voter turnout: "There is a clear consensus in the empirical political science literature that EDR is likely to increase voter turnout, and repealing EDR is likely to reduce voter turnout." *Id.* ¶ 320. "Since 2006, when EDR first became available, and the enactment of HB 176, more than 70,000 Montanans relied on EDR to successfully case a ballot."

Id. ¶ 317. "In almost every election since 2006, the number of Montanans who registered on Election Day nearly matched the number who registered during the other 29 days of late registration combined." *Id.* ¶ 318. Election Day is now "the most utilized day for late voter registration." *Id.* "Nationally, studies have shown that EDR boosts voter participation between two and seven percentage points." *Id.* ¶ 320.

The District Court also found that the challenged laws specifically burden young Montanans: "Younger voters are far more likely to rely on EDR than older voters" and "eliminating EDR burdens [youth] more heavily than it does older adults." *Id.* ¶ 292. In fact, "[j]ust over 10% of Montana voters are youth aged 18 to 24, but since 2008, more than 30% of voters registering on Election Day are aged 18 to 24." *Id.* ¶ 293 (emphasis added). Because EDR "reduces the cost of voting by combining both registration and voting into a single administrative step" and allows voters "to register and vote when attention to the election has peaked," *id.* ¶ 321, "EDR is particularly popular with young voters and in areas with high student and military populations," *id.* ¶ 322.

As to SB 169, the District Court found that "only 71.5% of 18- to 24-year-olds have a Montana driver's license, while nearly 95% of the over-

18 population possesses one." *Id.* ¶ 294. "Students are generally less likely to have a drivers' license or state ID," or to have utility bills, bank statements, government issued checks, or paychecks that can serve as secondary identification documents. *Id.* ¶ 365. The inability to use student ID or an out-of-state driver's license thereby "poses a particular burden" on young voters. *Id.* ¶ 295.

Finally, under HB 506, otherwise qualified voters who turn 18 in the month before an election may not access their ballots until they have actually turned 18 or been a precinct resident for 30 days. Dkt. 201 at 12. HB 506 thus denies voters who turn eighteen in the month before the election "the opportunity to receive their ballot in the mail, consider their voting options, and return their ballot via mail or some other means." *Id.*

Together, the challenged laws exacerbate one another to specifically burden young Montanans: "working in combination, [the laws] result in greater disenfranchisement than each would on its own." *Id.* ¶ 155 (Dr. Mayer). The interplay between HB 506 and HB 176, in particular, risks denying a ballot to certain young voters. Dkt. 201 at 12.

II. The challenged laws are discriminatory.

Before HB 506, the process election administrators used to issue ballots to voters who would meet age or residency requirements in the month before Election Day varied. Dkt. 201 at 10–11. As introduced, HB 506 barred election officials from issuing ballots to pre-registered, qualified electors who would turn 18 on or before Election Day "[u]ntil the individual meets residence and age requirements." *Id.* at 10, 12. Responding to testimony in public hearings and reflecting some counties' existing practices, the House of Representatives amended the bill to provide: "Until the individual meets residence and age requirements, a ballot submitted by the individual may not be processed and counted by the election administrator." Dkt. 153, Youth Voters' Br. in Supp. of Renewed Mot. for Summ. J., Ex. B, HB 506, Version 2, § 1(2); *see, e.g.*, House State Admin. Hrg. on HB 506 at 10:46:03 (Feb. 24, 2021) ("[Right now, i]f we receive the ballot back before they turn 18. . .we just hold it, until. . .they turn 18, and then we'll process it. . . . [S]ay they turn 18 on Tuesday, we would not be able to start counting that until the Tuesday, the Election Day. So, if this bill passes, I don't believe we'd be able to mail that ballot to the voter, so if they can't come vote in person, I think

that is the concern of the opponents.") (Plettenberg). The resulting House version—which passed out of committee unanimously and passed a floor vote by a count of 90 to 10—achieved consistency among counties without burdening young voters. *See* Dkt. 201 at 15–16. Before the Senate committee, the Secretary's Elections Director Dana Corson testified in support of the House version, explaining that "it helps clarify how 18-years-olds can get a ballot and vote." Senate State Admin. Hrg. on HB 506 at 15:10:41 (Mar. 19, 2021).

But this less restrictive version of the bill—treating young voters the same as other voters—did not survive. Dkt. 201 at 16. After the time for public input had elapsed, the Senate reverted to and passed the introduced version of the bill and HB 506 was sent to a free conference committee, where the decision to pass the Senate version of the bill involved no deliberation at all. Free Conf. Comm. Hrg. on HB 506 at 8:04:43 (Apr. 27, 2021) ("So [the Senate amendment] goes back to exactly the way it came out of the Secretary of State's Office, and I've got no problem with that amendment.") (Rep. Fielder).

SB 169 underwent a similar process wherein the legislature adopted and then rejected less onerous restrictions. Republican

Representative Geraldine Custer—one of the bill's drafters—opposed the amendment to exclude student IDs from the list of "primary" identification "because it's discriminatory." Dkt. 265, ¶ 670. At trial, Custer testified that she was "appalled" because "[t]he prior version [of HB 506] was the result of hard work and was meant to be 'the best photo ID law in the nation without. . .discriminating against anybody.'" *Id.* ¶ 380. But "moving Montana student ID—a form of ID that may be a person's 'only form of ID when they're a first-time voter'—was clear discrimination." *Id.* Meanwhile, a Montana concealed carry permit—a form of identification issued not by the state or federal governments but instead on a county-by-county basis and not required by Montana statute to bear a photograph—was included in SB 169's final list of primary identification. *Id.* ¶ 666.

Custer also testified that, in her view, the "Republican caucus was motivated to pass HB 176 and SB 169 by the perception that students tend to be liberal." Dkt. 265, ¶ 178. This animus was "evident in the floor amendment to SB 169 that excluded Montana University System-issued student ID from the standalone ID category." *Id.* Speaking in favor of that amendment, Speaker of the House Wylie Galt stated: "[I]f

you are 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 anyways. So this just clears it up that they have a little stake in the game." *Id.* ¶ 381.

Custer also "recalled Representative Hinkle's testimony in favor of [HB] 176, where he described seeing long lines at the county courthouse and commented 'that there were some nonprofits working the line, and that wasn't in our favor, meaning the Republican Party favor." *Id.* ¶ 341. She went on to describe the general sentiment of the majority caucus as being "that college students are—tend to be liberal. So that's the concern with them voting, having all of them vote here." *Id.* ¶ 342.

STANDARD OF REVIEW

"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. Fox*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4. Accordingly, this Court reviews "for a manifest abuse of discretion by the district court." *Est. of Mandich v. French*, 2022 MT 88, ¶ 16, 408 Mont. 296, 509 P.3d 6. "A manifest abuse of discretion is an

obvious, evident, or unmistakable abuse of discretion." *Id.* (citing *Davis v. Westphal*, 2017 MT 276, ¶ 10, 389 Mont. 251, 405 P.3d 73).

"Findings of fact are entitled to 'great deference' and reviewed only for clear error, characterized by an absence of support by substantial evidence, a misapprehension of the effect of the evidence, or a review of the record that leaves this Court with the 'definite and firm conviction that a mistake has been' made." *MDP*, ¶ 11 (quoting *In re A.M.M.*, 2016 MT 213, ¶ 10, 384 Mont. 413, 380 P.3d 736). "If the district court issues an injunction based on conclusions of law," the Court reviews "those conclusions for correctness." *Friedman v. Lasco*, 2016 MT 115, ¶ 10, 383 Mont. 381, 372 P.3d 451.

Summary judgment rulings are reviewed *de novo*. *Va. City v. Estate of Olsen*, 2009 MT 3, ¶ 14, 348 Mont. 279, 201 P.3d 115. The moving party must show no genuine issue of material fact exists. *Id.* Summary judgment is warranted when there is no genuine issue of fact and "the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c). "[T]he analysis of a statute pertaining to fundamental rights will generally require strict scrutiny review that ultimately shifts the burden" to the government, but the Court still begins its "review with the

same principle: statutes are presumed to be constitutional." *Weems*, ¶ 34. Some statutes are nevertheless unconstitutional. *See, e.g.*, *Bd. of Regents of Higher Educ. v. Knudsen*, 2022 MT 128, ¶ 11, 409 Mont. 96, 512 P.3d 748 ("We must also consider that Montana's Constitution is a prohibition on legislative power, rather than a grant of power.").

SUMMARY OF ARGUMENT

In Montana, "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. Because the Montana Constitution expressly guarantees suffrage in Article II, it is a fundamental right. Government interference with fundamental rights is subject to strict scrutiny.

In 2014, only 18% of Montana voters aged 18 to 29 cast a ballot. Four years later, 42% of young Montanans voted, making Montana the national leader in growing its share of young voters. In 2020, the proportion grew further: 56% of young Montanans voted—meaning that 18- to 29-year-olds cast nearly a fifth of all votes cast in Montana.

This extraordinary increase in engagement is no accident. While structural barriers especially afflict young voters, Appellee youth civic

organizations Forward Montana Foundation and MontPIRG have spent decades empowering young people and facilitating greater and greater youth voter turnout. Since 2019, middle and high school students with Appellee Montana Youth Action have promoted political understanding and provided their peers with civic engagement opportunities. Oblivious to these efforts—or worse, in response to them—the 2021 Montana Legislature passed a cocktail of laws that suppress young voters.

To be allowed to burden voting, the legislature must narrowly tailor their interference to a compelling state interest. Yet the laws challenged here were passed for no reason other than the professed bogeyman of voter fraud. From the out, bill sponsors could identify no benefit that could justify their bills' adverse impacts—together and separately—on young Montanans' ability to remain active and engaged participants in democracy. Even after months of discovery and a nine-day bench trial, no relevant evidence of a compelling interest or closely tailoring emerged. This Court should affirm the District Court's extensive findings of fact and conclusions of law enjoining HB 176 and SB 169 and correct summary judgment ruling enjoining HB 506.

ARGUMENT

I. The District Court applied the correct standard.

A. Montana courts apply strict scrutiny to laws that implicate fundamental rights.

Against decades of precedent, the Secretary invokes a two-word phrase to claim that strict scrutiny is appropriate only where the law "'impermissibly interferes' with the exercise of [a fundamental right]." Appellant's Br. 19 (quoting *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996)) (emphasis added). But "[s]trict scrutiny. . .is applied to a statute that implicates, infringes on, or interferes with a fundamental right." *MDP*, ¶ 18 (emphasis added); *see* WNV Br. § I(A)(1) (collecting cases).

"The right of suffrage is a fundamental right." *Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, 325 P.3d 1204. As chronicled in Native Voters' and Bohn's contemporaneously filed briefs, which Youth Voters incorporate here by reference, the absolute weight of authority in Montana dictates that "any statute or rule which implicates [a fundamental right] must be strictly scrutinized." *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 68, 296 Mont. 207, 988 P.2d 1236; *accord Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 16,

366 Mont. 224, 286 P.3d 1161 (hereinafter *Mont. Cannabis I*); *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445; *see generally* WNV Br. § I(A)(1); MDP Br. § I(A)(1).

The District Court correctly applied strict scrutiny.

B. The Court should decline the Secretary's invitation to impose a new standard of review for fundamental rights' violations.

The Secretary urges this Court to apply the federal *Anderson-Burdick* standard, arguing that applying strict scrutiny to laws that interfere with suffrage is a slippery slope that will inevitably block or disincentivize all election laws. *See* Appellant's Br. 20–21. These arguments fall flat—not least because this Court has long applied strict scrutiny with no such troubling outcome. *See Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 21–23, 314 Mont. 314, 65 P.3d 576 (applying strict scrutiny to invalidate a law that limited the franchise to real property owners).

Federal courts apply *Anderson-Burdick* to state laws that burden voting, balancing the states' role in regulating elections with the right-to-vote floor set out in the federal Constitution. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). As this Court has explained, however, "[a] party may establish sound and

articulable reasons. . .that the Montana Constitution contains unique language, not found in its federal counterpart, that dictates this Court should recognize [an] enhanced protection." *State v. Covington*, 2012 MT 31, ¶¶ 20–21, 346 Mont. 118, 272 P.3d 43; *see State v. Martinez*, 2003 MT 65, ¶ 51, 314 Mont. 434, 67 P.3d 207 ("[W]e are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection.").

The Montana Constitution clearly exceeds the federal floor, providing that "[a]ll 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. Notably, this guarantee is positive and explicit. Anthony Johnstone, *The Montana Constitution in the State Constitutional Tradition*, 352 (2022) ("The federal Constitution does not guarantee the right to vote in those terms."); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 93 (2014) (the federal Constitution couches the right to vote in general, negative language while the Montana Constitution, among a few others, includes an express, positive right to vote); Hannah Tokerud, *The Right*

of Suffrage in Montana: Voting Protections Under the State Constitution, 74 Mont. L. Rev. 417, 420 (2013) ("[T]o the 1972 Convention delegates, 'free' probably meant both without cost and without restraint.").

The delegates described suffrage as "the basic right without which all others are meaningless." *MDP*, ¶ 19 (quoting Mont. Const. Conv. Comm'n, Conv. Study No. 11, 25: Suffrage & Elections (1971) (quoting Lyndon Baines Johnson)). Indeed:

> It is perhaps the most foundational of our Article II rights and stands, undeniably, as the pillar of our participatory democracy. "If we are to have a true participatory democracy, we must ensure that as many people as possible vote for the people who represent them."

Id. (quoting Mont. Const. Conv., III Verbatim Tr. at 402 (Feb. 17, 1972) (Del. McKeon)); *see also* Mont. Const. Conv., III Verbatim Tr. at 445 (Feb. 17, 1972) ("[I]n the Bill of Rights, we've been working with a number of areas which we consider sacred. . . [T]he right to vote is certainly the most sacred right of them all.") (Del. Campbell). While the legislature must "provide by law the requirements for residence, registration, absentee voting, and administration of elections," it must do so "in conformity with the fundamental right to free and open elections where no power shall at any time interfere to prevent the free exercise of

the right." *MDP*, ¶ 19 (quoting Mont. Const. art. IV, § 3; art. II, § 13); *see also id.* ¶ 35 ("The delegates' discussion demonstrates that they understood Article IV, Section 3 as ultimately protecting the fundamental right to vote.").[3]

Federal law must not replace the Montana Constitution's deliberate protection of the fundamental right of suffrage.

II. The District Court correctly determined that HB 506 is unconstitutional.

HB 506 amended Section 13-2-205, 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." But in Montana, a person need meet only citizenship, age, and residency requirements—by Election Day—to vote. Arbitrarily barring certain qualified voters from accessing the ballot before Election Day violates the Montana Constitution.

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[3] The Secretary argues for application of the independent state legislature theory, Appellant's Br. 87, but even the U.S. Supreme Court has now definitively rejected it. *See Moore v. Harper*, No. 21-1271, 2023 WL 4187750 (June 27, 2023). The Elections Clause cannot insulate state legislatures from state judicial review or from state constitutional law. *Id.* at *8–10. But even before the *Moore* decision, precedent, history, and constitutional text, nearly uniformly rejected an interpretation of the Elections Clause that would vest state legislatures with exclusive authority to set federal election rules. *Id.* at *12–15 (collecting cases); Dkt. 265, ¶¶ 528–531.

Having observed that HB 506 caused "substantial interference with a fundamental right," the District Court found that strict scrutiny applied—under *Anderson-Burdick* or the Montana Constitution. Dkt. 201 at 13. To survive, HB 506 must be "narrowly tailored to further a compelling government interest." *Id.* (quoting *Driscoll v. Stapleton*, 2020 MT 247, ¶ 39, 401 Mont. 405, 473 P.3d 386 (citing *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997); *Reno v. Flores*, 507 U.S. 292, 302 (1993)). Although the District Court found the Secretary had identified compelling interests that might justify a law like HB 506, "the unadopted version of HB 506 would have permitted everyone in the electorate to have the same access to their ballots," while the version the legislature passed instead "arbitrarily subjects a subgroup of the electorate to different requirements and irrationally forecloses and avenue of voting available to all others." *Id.* at 16.

The District Court correctly determined HB 506 is unconstitutional. This Court should affirm.

A. Any and every application of HB 506 is unconstitutional.

For the first time on appeal, the Secretary argues that Youth Voters failed to show that HB 506 is unconstitutional in all its applications.

Appellant's Br. 74. The argument is waived, *see, e.g.*, *Kellogg v. Dearborn Info. Servs., LLC*, 2005 MT 188, ¶ 15, 328 Mont. 83, 119 P.3d 20 ("A party may not raise new arguments or change his legal theory on appeal because it is unfair to fault the trial court on an issue that it was never given an opportunity to consider."), but fails anyway.

According to the Secretary, Youth Voters "induced the District Court into concluding that if HB 506 was unconstitutional as applied to the 'specific subgroup' then it was unconstitutional as to everyone." Appellant's Br. 75. In fact, although the Secretary never acknowledged the law's residency provision below, Youth Voters did. Despite focusing primarily on the constitutional violation certain to result in hundreds of real-world constitutional deprivations in every election, Youth Voters argued consistently that HB 506 "is discriminatory on its face because it necessarily turns on distinguishing between individuals based on when they meet residency and age requirements—not at the time when it is necessary to meet those requirements, but at an arbitrary moment in time pre-election." *See, e.g.*, Dkt. 180, Youth Voters' Reply Br. in Supp. of Renewed Mot. for Summ. J. at 7 (emphasis added). HB 506 applies exclusively to individuals who become eligible to vote in the twenty-five

days on or before Election Day—whether by turning 18 or by reaching 30 days' residency. Like the age requirement, the residency requirement is discriminatory. *Cf. Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[T]his Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."). But it is also inadministrable: outside voters' affirmation under penalty of perjury in their registration applications, election administrators have no way to ascertain how long a voter has lived in a precinct. *See* Dkt. 265, ¶ 325.

The Secretary also claims that HB 506 prevents election officials from issuing a ballot to a 16-year-old. Appellant's Br. 75–76. But election officials already do not issue ballots to individuals who are ineligible to vote in a given election. HB 506 deprives only eligible voters of equal ballot access, discriminating against them based on their status as a new voter or resident. This is as facially unconstitutional as a law that conditions access to absentee ballots on race or sex—the fact that it only affects electors with attributes unrelated to being a qualified voter is what makes it unconstitutional. *See State v. Yang*, 2019 MT 266, ¶ 14, 397 Mont. 486, 452 P.3d 897 (to be facially unconstitutional either "no set

of circumstances exists under which the statute would be valid" or "the statute lacks a 'plainly legitimate sweep'") (cleaned up). Every application of HB 506 is unconstitutional.

B. The right to vote is fundamental and HB 506 interferes with it under any standard.

i. Constitutional framework: The Montana Constitution's suffrage-related provisions logically define relevant terms, powers, and obligations related to suffrage. Article II, § 13 guarantees the right itself—"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"—thus protecting the right to vote, the right to free elections, and freedom from interference in accessing either. Article IV, § 2 defines a "qualified elector" as "[a]ny citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law." Article IV, § 3 obligates the legislature to "provide by law the requirements for residence, registration, absentee voting, and administration of elections." The rest of Article IV provides implementation guidance, protecting electors from arrest and providing for secret ballots, eligibility for public office, and how to determine election results. Mont. Const. art. IV.

Thus, summarizing, Article II, § 13 defines and guarantees the right, while Article IV, § 2 defines the "qualified elector" who may exercise the right, and Article IV, § 3 gives specific legislative assignments (to set residence, registration, and absentee voting requirements) and uses the broader phrase "administration of elections," to give the legislature discretion—necessarily cabined by other constitutional provisions. *See Bd. of Regents of Higher Ed. v. Judge*, 168 Mont. 433, 444, 543 P.2d 1323, 1330 (1975) ("Constitution[al provisions] bearing upon the same subject matter are to receive appropriate attention and be construed together."). The Secretary manufactures tension between the two Articles. *See, e.g.*, Appellant's Br. 82 (arguing that Article IV is rendered "meaningless"). But these provisions simply accord with one another: the legislature must administer elections and ensure that "as many people as possible vote for the people who represent them." *MDP*, ¶ 19 (quoting Mont. Const. Conv., III Verbatim Tr. at 402 (Feb. 17, 1972) (Del. McKeon); *cf. Cross v. VanDyke*, 2014 MT 193, ¶ 11, 375 Mont. 535, 332 P.3d 215 ("[W]e must implement [the framers'] intent by viewing the plain meaning of the words used and applying their usual and ordinary meaning."). Article IV

does not empower the legislature to undermine Article II, § 13. *See Knudsen*, ¶ 12 ("Montana's Constitution is a prohibition on legislative power.").

The right of suffrage requires "free and open" elections and absolutely prohibits interference in the free exercise of the right to vote. By limiting the time period during which newly 18-year-olds may vote—a limit no other voter faces—HB 506 literally "interfere[s] to prevent the free exercise of the right of suffrage."

ii. Absentee voting: In arguing that the U.S. Supreme Court "has firmly distinguished between the right to vote and the ability to vote absentee" Appellant's Br. 80, the Secretary commits two fundamental errors. First, this case is not in federal court and Youth Voters' claims do not rely on federal law.[4] *Cf. State ex rel. Bartmess v. Bd. of Trs. of*

[4] In briefing below and before this Court, the Secretary claims that the U.S. Constitution does not guarantee the right to vote absentee. She relies on two categories of cases. In the first, cases are about generally applicable deadlines: in *Mays v. LaRose*, plaintiffs challenged a generally applicable deadline for requesting absentee ballots, 951 F.3d 775, 791–92 (6th Cir. 2020); in *Common Cause Indiana v. Lawson*, the challenged law required receipt of absentee ballots by Election Day, 977 F.3d 663, 664 (7th Cir. 2020); in *Organization for Black Struggle v. Ashcroft*, plaintiffs challenged distinctions between absentee and mail-in ballots, also involving deadlines for the latter, 978 F.3d 603, 607–08 (8th Cir. 2020).

Two cases do suggest the U.S. Constitution does not protect absentee voting. *See McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809–10 (1969) (allowing Illinois to treat "pretrial detainees" and "the physically handicapped" differently); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 188 (5th Cir. 2020) (ruling

Sch. Dist. No. 1, 223 Mont. 269, 272, 726 P.2d 801, 803 (1986) ("[W]e conclude that participation in extracurricular activities is not a fundamental right under the U.S. Constitution. However, that does not preclude a finding that the right is fundamental under Montana's Constitution."). Second, the Secretary assumes incorrectly that the Montana Constitution does not protect absentee voting. But the Montana Constitution specifically requires the legislature set absentee voting requirements—presupposing its availability in Montana. Mont. Const. art. IV, § 3. For the proposition that "this Court has never held that the right to vote includes the right to vote absentee," Appellant's Br. 80, the Secretary relies on *State ex rel. Van Horn v. Lyon*, 119 Mont. 212, 173 P.2d 891 (1946). *Lyon* predates Montana's 1972 constitutional convention by more than a quarter century.[5]

Regardless, Montana law expressly allows any elector to vote absentee. Section 13-13-212(3), MCA ("An elector may at any time

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that the Twenty-Sixth Amendment permits limiting absentee ballots to specific classes of voters). This is irrelevant here.

[5] Whether the Montana Constitution guarantees a right to vote absentee is not squarely presented and the Court need not reach the question, but the constitutional convention transcripts show the delegates intended its availability. Mont. Const. Conv., II Verbatim Tr. at 431–33 (Feb. 17, 1972) (unanimously rejecting a proposal to limit the availability of absentee ballots to servicemen and students); *see also Driscoll*, ¶¶ 5–6 (noting the "importance of absentee ballots and ballot-collection efforts is more significant for Native American voters than for any other group").

request to be mailed an absentee ballot for each subsequent election in which the elector is eligible to vote as long as the elector remains qualified to vote and resides at the address provided."). Montanans need no reason to justify voting absentee. *Id.* § 13-13-212(1)(a). By way of example, in 2018, more than 70% of Montanans voted absentee. Dkt. 54, Expert Report of Michael Herron, ¶ 28, Table 1. HB 506 thus restricts newly 18-year-olds' access to a tool that Montana voters use routinely, which is expressly contemplated in the Montana Constitution, and that Montana law guarantees to all electors.

iii. When a vote is cast: The Secretary also claims § 13-13-222, MCA, justifies not distributing ballots to qualified electors. Appellant's Br. 78. Subsection (1) requires election administrators to "permit an elector to apply for, receive, and mark an absentee ballot" (emphasis added) as soon as official ballots become available for in-person absentee voting. Subsection (3) provides that for "an official ballot is voted when the ballot is received at the election administrator's office." The Secretary claims that this means the House version of HB 506 would allow unqualified electors to cast votes. Appellant's Br. 78. But this is the Secretary's misreading of Article IV, § 2, brought to bear on another

statute: Article IV, § 2 defines who a qualified elector is, not <u>when</u> they can vote. Subsection (3) simply defines the act of voting—helpful for administrative reasons, *see, e.g.*, § 13-13-204, MCA (circumstances for issuing a replacement ballot)—but not relevant to determining <u>who</u> may vote in a specific election. Indeed, subsection (1) refers to "electors," *i.e.*, that is, voters who are qualified for that election under Article IV, § 2.

iv. <u>*Anderson-Burdick*</u>: The *Anderson-Burdick* framework can do nothing to rescue HB 506.[6] At its first step, the test questions the extent to which an election law burdens individual rights. *Burdick*, 504 U.S. at 434. "[W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id.* Being unable to access a ballot at the same time as other eligible voters—based exclusively on the happenstance of a birthdate—is a severe, unnecessary, and unjustifiable restriction.

The Secretary nonetheless leaps to the conclusion that "the asserted injury" HB 506 causes—"certain individuals must pick up their absentee ballots in person if they vote early"—"is minimal" and requires

[6] Youth Voters incorporate here by reference WNV's Section I(A)(2), which explains why applying *Anderson-Burdick* makes no difference in the constitutional analysis of HB 176. The same analysis applies to HB 506.

only an important state interest. Appellant's Br. 83, 86. But "HB 506 forecloses voters turning eighteen in the month before the election from an avenue of voting available to all others" and, "given the interplay between HB 506 and HB 176," anyone who does not realize pre-registration is available may be obstructed from voting. Dkt. 201 at 12. The Secretary insists these new voters are not "qualified" to vote, essentially moving the date of qualification from Election Day to individual voters' eighteenth birthdays. Appellant's Br. 83–84. Under this strained reading, the Secretary needlessly trades discriminating against the newest and youngest voters for "treating all individuals equally regardless of their county of residence." *See id.* at 83.

Even if the burden were less than severe, *Anderson-Burdick* still requires the Court to consider whether the "corresponding interest sufficiently weight to justify the limitation." *Norman v. Reed*, 502 U.S. 279, 289 (1992). The ready alternative bill that the House passed, discussed *infra* § II(C), shows again that the burden is unjustifiable because treating all voters equally—both across counties and with regard to age—is entirely achievable.

v. Other concerns: The Secretary implies several arguments made below without spelling them out in her Opening Brief. *See* Appellant's Br. 81. To the extent these arguments reappear on reply, they are straw men. By turns, she has argued that the state can impose residency requirements—it can, *Emery v. State*, 177 Mont. 73, 79, 580 P.2d 445, 448–49 (1978); that minors can be excluded from the franchise—undoubtedly, *see id.* (citing *Gray v. Sanders*, 372 U.S. 368, 380 (1963)); and that constitutional provisions should be interpreted not as solo acts, but as harmony, *see City of Missoula v. Cox*, 2008 MT 346, ¶ 11, 346 Mont. 442, 196 P.3d 452 ("[O]ur rules of construction require. . .giving effect to each constitutional provision—our role is not to insert what has been omitted or to omit what has been inserted.") (cleaned up).[7] While true statements of law, not one bears on HB 506's constitutionality.

[7] The Secretary also contends in an aside that "even the most fundamental rights may be regulated." Appellant's Br. 81. Of course; no right is absolute. *See, e.g.*, *Nelson v. City of Billings*, 2018 MT 36, ¶ 13, 390 Mont. 290, 412 P.3d 1058 ("Like other constitutional rights, however, the right to know is not absolute.") (collecting cases). Applying strict scrutiny does not render a right absolute. *See, e.g.*, *Ramsbacher v. Jim Palmer Trucking*, 2018 MT 118, ¶ 14, 391 Mont. 298, 417 P.3d 313 ("To withstand a strict-scrutiny analysis, the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest."). Nor does applying strict scrutiny to laws that infringe on voting usurp meaning from Article IV—as the framers reflected, Article IV

On appeal, the Secretary makes no attempt to address Counts Four and Five of Youth Voters' Complaint. But this Court "may uphold a judgment on any basis supported by the record, even if the district court applied a different rationale." *Rooney v. City of Cut Bank*, 2012 MT 149, ¶ 25, 365 Mont. 375, 285 P.3d 241.

C. HB 506 unconstitutionally targets new voters in violation of their right to equal protection.

HB 506 withholds ballots from newly qualified electors until they turn 18, while older Montana voters may access their ballots at any time in the month preceding Election Day. *See supra* at 6. "Montana's equal protection guarantee embodies a fundamental principle of fairness: that the law must treat similarly situated individuals in a similar manner." *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 7, 392 Mont. 1, 420 P.3d 528 (cleaned up). HB 506 violates this fundamental principle of fairness.

To assess an equal protection challenge, Montana courts "first identify the classes involved, and determine if they are similarly situated." *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 10, 325 Mont. 1, 103 P.3d 1019. HB 506 creates two classes: 1) individuals who turn 18

"supplemented" the right of suffrage. Mont. Const. Conv., V Verbatim Tr. at 1745 (Mar. 8, 1972) (Del. Sullivan).

in the month before or on election day, and 2) individuals who turn 18 at any time before the month before election day. All that distinguishes one class from the other is when individuals turn 18 in proximity to a given election. As the Secretary has agreed, members of both classes "indisputably can vote" in the relevant election. Dkt. 161, Def.'s Br. in Opp'n to Youth Pls.' Renewed Mot. For Summ. J. at 9; *see Gazelka*, ¶ 16 ("[T]wo groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination."). The Secretary maintains that Youth Voters are "unqualified individuals." Appellant's Br. 85. But this deliberately ignores *when* an elector must be 18—or have established residency—to qualify for a given election.

HB 506 is facially discriminatory because it necessarily turns on distinguishing between individuals based on when they meet residency and age requirements—not at the time when it is necessary to meet those requirements, but at an arbitrary moment pre-election. *See, e.g.*, *Roosevelt v. Mont. Dep't of Rev.*, 1999 MT 30, ¶ 46, 93 Mont. 240, 975 P.2d 295 ("To violate equal protection on its face means that the law by its own terms classifies persons for different treatment.") (cleaned up). Voter age before Election Day bears no rational relationship to voter

eligibility. *See Jaksha v. Butte-Silver Bow Cty.*, 2009 MT 263, ¶¶ 23–24, 352 Mont. 46, 214 P.3d 1248 (finding a statute unconstitutional because age "bore no rational relation to the [statute's] purported objective").

Even if HB 506 were not facially discriminatory, which it is, there is evidence that discriminatory purpose animated the legislature's decision to pass the final, amended version of HB 506. *See* House State Admin. Hrg. on HB 506 at 10:32:08 (Feb. 24, 2021) (opponent testimony establishing that HB 506 "would make it very burdensome for 17-year-olds to participate in their first election when they have a birthday very close to Election Day"); *see also* House State Admin. Hrg. on Amendment to HB 506 at 8:38:43 (Feb. 26, 2021) ("[W]ith this amendment I'm very much in favor of this because I think it cleans it up and we are not disenfranchising people that are in that small window.") (Rep. Walsh); *infra* § II(E), n.6; *see also Veasey v. Abbott*, 830 F.3d 216, 262 (5th Cir. 2016) (passing discriminatory ID law despite disparate impact testimony "supports a conclusion of lack of responsiveness").

HB 506 narrows the window during which certain new voters can exercise the right to vote—the degree of narrowing dictated purely by birthdate and varying person by person—and will prevent some young

people from voting altogether. *See, e.g.*, Dkt. 70, Ex. I, Decl. of Isaac Nehring, ¶ 26 ("I know that other new adults will be unable to overcome the obstacle that House Bill 506 creates."); Ex. B, Decl. of Ali Caudle, ¶ 15 ("If I had waited until election day, I would not have been allowed to vote."); Ex. G, Decl. of Scott Lockwood, ¶ 4 ("While I clearly recall the important issues in the 1968 presidential election, I did not vote because I was unsure how to go about it."); *cf. Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219 ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.").

HB 506 is a facially discriminatory law, motivated by discriminatory intent. It reduces newly 18-year-olds' opportunity to access their ballots, rendering an already new and sometimes bewildering process all the more confusing, and so increasing the cost of voting for many young people that they may be deterred from voting at all. Dkt. 54, ¶¶ 11–12 ("an individual will turn out to vote only if the benefits of doing so outweigh the costs"); *see also Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 19, 382 Mont. 256, 368 P.3d 1131 (hereinafter *Mont. Cannabis II*) ("Equal protection emphasizes disparity

in treatment by a State between classes of individuals whose situations are arguably indistinguishable.") (cleaned up).

D. HB 506 violates minors' right to equal access of all fundamental rights.

Article II, § 15 provides: "The 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." The Bill of Rights Committee Proposal described the motivation behind the provision:

> The committee adopted, with one dissenting vote, this statement explicitly recognizing that persons under the age of majority have <u>all the fundamental rights</u> of the Declaration of Rights. . . . The committee took this action in recognition of the fact that young people have not been held to possess basic civil rights. . . . [T]he Supreme Court has not ruled in their favor under the equal protection clause. . . . What this means is that persons under the age of majority have been accorded certain specific rights which are felt to be a part of due process. However, the broad outline of the kinds of rights young people possess does not yet exist. This is the crux of the committee proposal: <u>to recognize that persons under the age of majority have the same protections from governmental and majoritarian abuses as do adults</u>.

Mont. Const. Conv., II Verbatim Tr. at 635–36 (Feb. 22, 1972) (emphasis added); *see also* Mont. Const. Conv., V Verbatim Tr. at 1750 (Mar. 8, 1972) (Del. Monroe) (The purpose of Section 15 is "help young people

reach their full potential"; "whatever rights and privileges might be given to [juveniles] in the future, we also want to protect them," and, importantly, "we do not want them to lose any rights that any other Montana citizen has.").

Treating minors differently because they are minors is an affront to Article II, § 15. *See* Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 Syracuse L. Rev. 653, 676 (2017) ("Deliberately making it more difficult for *new* voters to build that habit of political participation quite literally threatens the future of participatory democracy."). HB 506 expressly prohibits nearly-18-year-olds from accessing their ballots when they are qualified to vote in an upcoming election, precisely because they are nearly but not yet 18. This does not enhance minor Montanans' rights. *See Matter of S.L.M.*, 287 Mont. 23, 35, 951 P.2d 1365, 1373 (1997) (exceptions to Article II, § 15's guarantee "must not only show a

compelling state interest but must show that the exception is designed to enhance the rights of minors") (emphasis added).

HB 506 violates Article II, § 15.

E. HB 506 is not closely tailored to advance a compelling government interest.

Because HB 506 violates fundamental rights—the right of suffrage, the guarantee of equal protection, and the rights of persons not adults—it must satisfy strict scrutiny to survive. To satisfy strict scrutiny, the Secretary must show "the law is narrowly tailored to serve a compelling government interest," *Mont. Cannabis I*, ¶ 16, and is "the least onerous path that can be taken to achieve the State's objective," *Mont. Env't Info. Ctr.*, ¶ 63. The Secretary cannot meet this burden.

On appeal, the Secretary summarizes her compelling interests in HB 506 as "treating all individuals equally regardless of their county of residence," and "establishing uniformity in election regulations to facilitate administration of the State's election management system." Appellant's Br. 83. But, as the District Court found, the final version of HB 506 was the worse of two options that both achieved those interests.[8]

[8] The decision to pass the Senate version of the bill appeared completely divorced from reason. *Compare* Free Conference Comm. Hrg. on HB 506 at 8:04:43 (Apr. 27, 2021) ("So [the Senate amendment] goes back to exactly the way it came out of the

The unadopted version was nondiscriminatory. Dkt. 201 at 15–16. After the time for public comment had elapsed, however, the legislature reverted to and passed the discriminatory version of the law. *Cf. Veasey v. Abbott*, 830 F.3d 216, 262 (5th Cir. 2016) (passing discriminatory ID law despite testimony about disparate impact "supports a conclusion of lack of responsiveness"). Moreover, the Secretary was aware that election administrators across Montana had been handling distribution of ballots to new 18-year-olds in different ways since at least 2014. Dkt. 79, Def.'s Br. in Resp. to Pls.' Prelim. Inj. Mots. & in Supp. of Def.'s Mot. For Summ. J. at 35 (citing Dkt. 81, ¶ 6); *see also Malcomson v. Northwest*, 2014 MT 242, ¶ 31, 401 Mont. 405, 473 P.3d 386 (where the state had long administered workers' compensation cases "without exposing injured workers to a potential violation of their constitutional right of privacy," the new statute allowing *ex parte* communications was overbroad and could not stand).

Secretary of State's Office, and I've got no problem with that amendment.") (Rep. Fielder) *with* House State Admin. Hrg. on HB 506 at 11:00:35 (Feb. 24, 2021) ("Ms. Plettenberg seemed to say that what's working in their county is that they. . .issue those ballots prior to the individual meeting the residency or, in this case, age requirements, and then they hold those ballots and they don't actually enter them into the voting system until the individual reaches age 18, so that might be an option for this committee to amend this bill so that we'll have consistency throughout the whole 56 counties in the state of Montana.") (Rep. Fielder).

Rather than rely on a nondiscriminatory, proven, and efficient method for handling ballots, the legislature chose the option that burdened first-time voters—and for no apparent gain to election administrators, who would then hold back ballots until an individual's actual birthday. *See* Dkt. 153, Youth Voters' Br. in Supp. of Renewed Mot. for Summ. J. at 4–5; House State Admin. Hrg. on HB 506 at 10:46:03 (Feb. 24, 2021) (informational witness Regina Plettenberg testifying about normal practices in Ravalli County, where administrators sent ballots to all voters eligible for an upcoming election at the same time); Dkt. 81, Decl. of Melissa McLarnon, ¶ 6(f) (describing a similar process in Missoula County). Indeed, had the legislature passed the House version of HB 506, election officials could have treated all ballots the same way, simply distributing ballots in the normal course and only holding returned nearly 18-year-olds' ballots until Election Day. HB 506 would instead require officials to distribute ballots on random dates that change every year. The passed version of HB 506 is the worse alternative both because it unconstitutionally burdens Youth Voters' rights and because it is a more complicated, less administrable way to distribute ballots.

HB 506 is subject to strict scrutiny thrice over. *See Mont. Cannabis II*, ¶ 38 ("The question under rational basis review. . .is not whether the provision is necessary, but whether the provision is arbitrary or. . .has a 'reasonable relation to some permitted end of governmental action.'") (quoting *Powder River Cty. v. State*, 2002 MT 259, ¶ 79, 312 Mont. 198, 60 P.3d 357).

HB 506 is unconstitutional.

III. The District Court correctly determined that HB 176 and SB 169 are unconstitutional.

A. The District Court was correct: Youth Voters have standing.

In its findings of facts and conclusions of law, the District Court affirmed its previous rulings, incorporating Appellees' standing analysis in paragraphs 572 through 614 of their proposed findings of fact and conclusions of law, and concluding that "each Plaintiff has standing to pursue their claims." Dkt. 265, ¶ 541.

As the District Court found previously, Montana Youth Action and MontPIRG "have missions germane to protecting the youth voting and youth civic engagement," and their members "would have standing to sue in their own right as evidenced in MYA's Complaint and the declarations submitted by MYA." Dkt. 124, ¶ 24. Because Youth Voters sought

declaratory relief, individual member participation "is not required." *Id.*; *see also* MDP Br. § II(A) (applying standing law to MDP in the same way that it applies to Youth Voters).

The District Court also found that Forward Montana Foundation and MontPIRG demonstrated that the challenged laws would injure their operations. Dkt. 124, ¶ 20; *see id.* ¶ 17 ("Forward Montana Foundation 'dedicates itself. . .to voter registration and 'get out the vote' efforts'"); *id.* ¶ 18 (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'"); *id.* ¶¶ 17–18 (the challenged laws harm both organizations by forcing them to "expend significant resources in developing new voter education materials, engaging campaigns to reeducate young voters. . .and conducting expanded get out the vote efforts.").

Finally, the District Court found after trial that at "least one MYA board member intends to rely on Montana University System-issued student ID to vote," and that the organization "has a broader interest in maintaining the availability of student ID as a standalone form of voter

ID because it is less burdensome than the combination forms of ID that SB 169 requires." Dkt. 265, ¶ 114.

Youth Voters have standing.

B. The District Court correctly found that SB 169 violates Montana's equal protection guarantee.

For nearly two decades, students, who are generally less likely to have a driver's license or state ID, Dkt. 265, ¶ 365, could use a school-issued photo identification card to verify their identity at the polls, *id.* ¶ 362. In demoting student identification to a secondary form—requiring that it be presented alongside a current utility bill, bank statement, paycheck, government check, or other government document—SB 169 arbitrarily altered young voters' ability to access elections. *Id.* ¶¶ 372, 385. Trial testimony showed students are not only less likely to possess a driver's license, but are simultaneously less able to procure the additional designated documents. *Id.* ¶¶ 365, 668.

As consolidated Appellees show, the record below is unambiguous in establishing that SB 169 does not satisfy rational basis review. MDP Br. § II(B). The District Court found—as a factual matter—that isolating student ID and out-of-state driver's licenses in a category separate from other forms of government-issued photo identification is not rationally

related to any of the Secretary's purported interests. *Id.* In sum, SB 169 achieves none of its intended goals. It does not "distinguish between governmental and non-governmental IDs." Dkt. 265, ¶¶ 194, 362, 367, 385–87. It cannot reduce the "infinitesimally small" rate of voter fraud, which bears no connection to the use of student identification. *Id.* ¶¶ 470, 472, 477–78, 480–81. It does not improve information about voter qualifications. *Id.* ¶¶ 385, 401, 666. It does not improve voter confidence. *Id.* ¶¶ 157, 484, 666. And it increases administrative burdens on election officials by complicating the verification process. *Id.* ¶¶ 364, 667. *See* MDP § II(B).

Moreover, it was "no accident that the Legislature passed SB 169 just months after Montana's youngest voters turned out to vote at record rates." Dkt. 265, ¶ 670. As one bill drafter testified, "relegating student IDs to a secondary form of identification" was "discriminatory," because it "essentially required that young voters 'have to have a job or have been paying taxes in order to. . .vote. That went out in the 60s when. . .you used to have to own personal property in order to vote." *Id.* Based on these findings, the District Court concluded "Montana Legislature passed

SB 169 with the intent and effect of placing increased barriers on young Montana voters." *Id.* ¶ 672.

The District Court correctly found that SB 169 is unconstitutional.

C. The District Court correctly found that HB 176 burdens the right to vote and to equal protection in Montana.

HB 176 deprives Montanans of a crucial method of ballot access. Election Day registration is a government's single most effective tool for increasing voter turnout. Dkt. 265 ¶ 320 ("EDR has the largest effect on increasing turnout."). And EDR does not burden other facets of election administration. "[W]ait times in Montana are consistently below ten minutes, have been decreasing across time, and are well below the national average." *Id.* ¶ 152. Moreover, the availability of EDR does not significantly impact election officials. *Id.* ¶ 509 ("[T]he implementation of EDR had no ultimate impact on [Custer's] Election Day schedule. Both before and after EDR, [Custer] generally got home around 2 a.m. during major elections."); *id.* ¶ 498 ("McCue also testified that ending EDR was 'not. . .helpful administratively'"). "If EDR leads to additional work for election administrators, it is only because it boosts voter turnout." *Id.*

Young Montanans rely disproportionately on Election Day registration. Dkt. 265, ¶ 293 ("10% of Montana voters are youth aged 18

to 24, but since 2008, more than 30% of voters registering on Election Day are aged 18 to 24."). Because young people are more transient, need to update registration information more frequently, *id.* ¶¶ 291, 350, and are inherently less experienced than older voters, *id.* ¶¶ 195, 502–503, eliminating EDR harms young people acutely, *id.* ¶¶ 292–293, 567. EDR "is a failsafe against disenfranchisement." *Id.* ¶¶ 364, 502.

Consolidated Appellees Bohn and Native Voters demonstrate in thorough, contemporaneously filed briefing that the District Court correctly found that HB 176 violates Montanans' rights of suffrage, MDP Br. § I(A)–(C), WNV Br. § II(A), and to equal protection, MDP Br. § I(D). And, though not required, the District Court found ample evidence of discriminatory purpose, concluding that the Montana Legislature "was motivated to pass HB 176" because of "the perception that students tend to be liberal," was aware that HB 176 would disproportionately harm young voters, and "nonetheless intentionally repealed a critical method for accessing voting." *Id.* ¶¶ 178, 585.

CONCLUSION

Youth Voters respectfully request that the Court affirm the District Court's permanent injunction of HB 506, SB 169, and HB 176.

Respectfully submitted this 30th day of June, 2023.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Montana Rule of Appellate Procedure 11, is double spaced except for footnotes, quotes, and indented material, and is proportionally spaced utilizing a 14-point Century typeface. The total word count for this document is 9478 words, as calculated by my word processing program.

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