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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 and Appellees,

v.

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

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

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

APPEARANCES:

Dale Schowengerdt
LANDMARK LAW PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601
(406) 438-2163
dale@landmarklawpllc.com

Matthew Gordon
PERKINS COIE, LLP
1201 Third Ave., No. 4900
Seattle, WA 98101
(206) 359-9000
mgordon@perkinscoie.com

Leonard H. Smith
CROWLEY FLECK PLLP
P.O. Box 2529
Billings, MT 59103
(406) 252-3441
lsmith@crowleyfleck.com

Peter M. Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, MT 59624
(406) 442-8670
mike@meloylawfirm.com

Mac Morris
E. Lars Phillips
CROWLEY FLECK PLLP
1915 S. 19th Ave.
Bozeman, MT 59719
(406) 556-1430
wmorris@crowleyfleck.com
lphillips@crowleyfleck.com

Christian Corrigan
Solicitor General
Office of the Attorney General
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
christian.corrigan@mt.gov

Attorneys for Defendant and Appellant Secretary of State Christi Jacobsen

Alex Rate
Akilah Deernoes
ACLU OF MONTANA
P.O. BOX 1968
Missoula, MT 59806
(406) 224-1447
ratea@aclumontana.org
deernosea@aclumontana.org

Jacqueline De Leon*
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302-6296
(303) 447-8760
jdeleon@narf.org

Samantha Kelty*
NATIVE AMERICAN RIGHTS FUND
1514 P Street N.W. (Rear) Suite D
Washington, D.C. 20005
(202) 785-4166
kelty@narf.org

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

Abha Khanna*
Jonathan P. Hawley
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
(206) 656-0179
akhanna@elias.law
jhawley@elias.law

Marilyn Robb*
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Washington, D.C. 20001
(202) 968-4490
mrobb@elias.law

Attorneys for Plaintiffs and Appellees Montana Democratic Party and Mitch Bohn

Rylee Sommers-Flanagan
Niki Zupanic
UPPER SEVEN LAW
P.O. Box 31
Helena, MT 59624
(406) 396-3373
rylee@uppersevenlaw.com
niki@uppersevenlaw.com

Attorneys for Plaintiffs and Appellees Montana Youth Action, et al

Theresa J. Lee*
ELECTION LAW CLINIC
Harvard Law School
6 Everett Street, Suite 4105
Cambridge, MA 02138
(617) 998-1010
thlee@law.harvard.edu

Jonathan Topaz*
ACLU
125 Broad Street
New York, NY 10004
(212) 519-7866
jtopaz@aclu.org

Attorneys for Plaintiffs and Appellees
Western Native Voice, et al.

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INTRODUCTION

Appellees wrongly ask this Court to do something no court in the country has ever done—mechanically apply strict scrutiny to all voting regulations simply because such regulations necessarily "implicate" the fundamental right to vote. Appellees do so even while incongruously conceding that rational basis review applies to a law governing voter identification. The Court should reject Appellees' arguments.

The right to vote exists because of the Legislature's role in passing laws setting up the mechanisms for an election to occur. This is true as a matter of both fact and constitutional text. Unlike, for example, the right to privacy, which exists even absent regulations creating it, the right to vote has meaning only in the context of a rulebound process that ensures its orderly and legitimate exercise. As a result, the Legislature's role in regulating elections cannot undergo strict judicial scrutiny in every case.

The laws here were ordinary exercises of the Legislature's authority to regulate elections. Each is a common time, place, and manner regulation with readily apparent legitimate purposes for ensuring orderly elections and the purity of them. They do not justify the extraordinary judicial intervention Appellees advocate.

HB 176 responds to the increasingly acute problems posed by election day registration (EDR) to the orderly administration of elections, the strains put on election administrators trying to run them, and voters facing long lines trying to participate in them. The Legislature narrowly addressed these problems while leaving one of the longest registration periods in the country. And its action was expressly authorized by the plain text of Montana's constitution. Appellees' objections rests on academic hypothesis and policy questions that should be addressed to the Legislature, not this Court.

SB 169 strengthened Montana's voter ID law, providing clarity to it and expanding the forms of ID available to Native Americans. It reasonably requires individuals who might rely on a student ID to vote (Appellees identified no such person) to show some additional indicia of their identity and eligibility. Student IDs, unlike all other primary forms of ID under SB 169, are not government issued IDs, are less secure, and are often held by individuals who can be misled into believing they are eligible to vote in Montana when they are not. The District Court correctly held that the law is subject to rational basis review, but erred in its application of that test by requiring actual evidence of fraud to support SB 169, an error Appellees replicate in their responses.

HB 530 regulates paid ballot collection: a practice clearly subject to regulatory oversight given the inherent insecurities in the electoral process when voters' ballots are handled by people other than the voter or official election officers. Appellees themselves recognize the dangers in this process. But Appellees' challenge to HB 530 is not ripe in any event because it is not effective until the Secretary completes rulemaking under MAPA. Appellees' concerns with HB 530 are also likely unfounded because they do not engage in the practice most logically prohibited by a law prohibiting ballot collection "in exchange for" a pecuniary benefit—ballot collection paid on a per ballot basis.

HB 506 is also modest and justified by common sense: it prohibits providing absentee ballots to individuals not eligible to vote. As the District Court found, it serves compelling state interests. It also solves administrative problems that other options did not.

The Legislature acted well within its constitutional authority in passing these modest time, place, and manner election regulations. Based on the Constitution's plain text and this Court's settled precedent, the Court should reverse the District Court.

I. Appellees are wrong on the standards governing this case; this Court reviews decisions on the constitutionality of statutes de novo and applies deferential scrutiny to election laws like these that do not impose a substantial burden.

Appellees claim that the District Court's decision is subject to abuse of discretion standard, even though this Court consistently reviews decisions on a statute's constitutionality—including the burden and level of scrutiny—*de novo*. Appellees also demand more rigorous across-the-board scrutiny of election laws than applied by any high court, ever. They are wrong on both counts. Their arguments are inconsistent with this Court's precedent and ignore that Montana's Constitution grants broad authority to the Legislature to regulate elections. This Court has the power to review the constitutionality of the Legislature's actions within the ordinary course of judicial review but has, historically, exercised that role with due regard for the separation of powers and the constitutional text.[1]

A. De novo review applies.

Appellees claim the district court's findings of fact in a constitutional challenge are entitled to the extraordinarily deferential abuse of discretion/clear

[1] MDP vaguely argues the Secretary's Statement of the Issues do not encompass the merits of this dispute. MDP Brief at 9. No case law or Appellate Rule supports MDP's assertion. The cases MDP cites stand only for the premise that unsupported arguments may be ignored by this Court. The Secretary's Statement of the Issues clearly encompasses the merits of this appeal: whether HB 176, SB 169, HB 506, and HB 530 are constitutional.

error standard. That is wrong. This Court reviews the constitutionality of a statute *de novo*. *Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conserv.*, 2021 MT 44, ¶ 48, 403 Mont. 225, 481 P.3d 198. To hold otherwise would limit this Court's plenary authority over the interpretation of Montana's Constitution. *State v. Walsh*, 2023 MT 33, ¶ 7, 411 Mont. 244, 525 P.3d 343. Any factual issues included in that analysis are mixed questions of law and fact, also subject to *de novo* review. *Barrus v. Montana First Jud. Dist. Ct.*, 2020 MT 14, ¶ 15, 398 Mont. 353, 456 P.3d 577. No deference is given to the trial court's "assessment of the sufficiency of evidence and the application of the law to that assessment." *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 19, 336 Mont. 105, 152 P.3d 727; *see also Driscoll v. Stapleton*, 2020 MT 247, ¶ 40 n.4, 401 Mont. 405, 473 P.3d 386 (collecting cases) (J., Sandefur, concurring and dissenting).

The abuse of discretion standard also conflicts with a statute's presumption of constitutionality and the requirement that "a party challenging a statute's constitutionality bears the heavy burden of proving the statute is unconstitutional beyond a reasonable doubt." *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548 (citations omitted). A statute is presumed constitutional and must be construed to be constitutional if at all possible. *Mont. Indep. Living Proj. v. Dept's of Transp.*, 2019 MT 298, ¶ 14, 398 Mont. 204, 454 P.3d 1216. And facial

constitutional challenges, like those Appellees assert here, require "the challenger to demonstrate no set of circumstances exists under which the challenged sections would be valid." *City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶21, 391 Mont. 422, 419 P.3d 685. The constitutionality of statute is not simply a matter of resolving a factual dispute at trial, where a single judge is entitled to deference.

Appellees are wrong for an even more practical reason. If the abuse of discretion standard applied, two judges could come to opposite decisions on the same constitutional challenge and both could be right on individual application of the facts to the constitutional questions. "That is why [courts] review district court decisions of constitutional issues—the most important issues of law—not for abuse of discretion but *de novo*." *United States v. Shamsid-Deen*, 61 F.4th 935, 944 (11th Cir. 2023). The possibility of inconsistent opinions here is not hypothetical; a separate challenge against HB 176 is pending in Great Falls. *Montana Fed. Pub. Empl. v. State* (Case No. DV-7-2021-500, Mont. 8th Jud. D. Ct.).

Appellees' argument rests largely on this Court's prior decision reviewing the District Court's preliminary injunction in this case. But the abuse of discretion standard of review applicable to preliminary injunctions has no place here. In reviewing a preliminary injunction order, this Court does not reach the underlying merits of the dispute and statutes are not afforded a presumption of

constitutionality. *Montana Democratic Party v. Jacobsen*, 2022 MT 184, ¶¶ 11, 17, 410 Mont. 114, 518 P.3d 58.

The abuse of discretion standard would conflict with the presumption of constitutionality, the need for uniform determination of constitutional questions, and this Court's longstanding precedent.

B. Heightened scrutiny of time, place, and manner regulations that do not impose a severe burden is inappropriate.

Appellees are also wrong that the Montana Constitution or this Court's precedent require strict scrutiny whenever a fundamental right is involved. That has never been the law in Montana and it makes no constitutional sense. This Court has always balanced competing constitutional interests, weighing the State's important, constitutionally compelled regulatory interests against fundamental right claims. "The extent to which the Court's scrutiny is heightened depends both on the nature of the interest **and the degree to which it is infringed**." *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173 (Mont. 1996) (emphasis added); *see* Sec. Op. Br., 15, 17–19; RITE Amicus Br., 5–8. Under this Court's precedent, strict scrutiny is required only when a "classification *impermissibly* interferes with the exercise of a fundamental right." *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1173 (emphasis added); *Clark Fork Coal.*, ¶ 48, (only when a statute "substantially interferes with a fundamental right . . . does strict scrutiny apply").

Refusing Appellees' invitation to reflexively apply strict scrutiny to all election regulations is especially important because the Montana Constitution delegates the power to regulate elections to the Legislature. Mont. Const. art. IV, §§ 2–3. The Constitution cannot obligate the Legislature to establish requirements for registration and election administration, and "insure the purity of elections and guard against abuses of the electoral process," Mont. Const. art. IV, § 3, while—in every case—subjecting the Legislature's exercise of those duties to strict scrutiny, which is "seldom satisfied." *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 431, 712 P.2d 1309, 1312 (Mont. 1986). "The Constitution must be considered as a whole." *Jones v. Judge*, 176 Mont. 251, 255, 577 P.2d 846, 849 (Mont. 1978). Subjecting election regulations (which necessarily implicate voting rights) to strict scrutiny, despite the burden imposed, does not fulfill that duty. *See In re Request for Advisory Op.*, 479 Mich. 1, 34–35, 740 N.W.2d 444 (Mich. 2007) (analyzing very similar constitutional language as Montana's article IV § 3, and upholding voter ID law based on balancing test because "the appropriate standard by which to evaluate election laws must be compatible with our *entire* Constitution").

Appellees are wrong that this Court's decisions in *Johnson v. Killingsworth*, 271 Mont. 1, 894 P.2d 272 (Mont. 1995) and *Finke v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576, require strict scrutiny in voting rights cases. WNV

Br., 18–19. Both cases analyzed whether the State may explicitly limit the franchise to certain groups. And because neither case involved a time, place, and manner regulation, like the statutes here, the Court's traditional balancing test did not apply. That is why in *Johnson* the Court did not even cite *Anderson-Burdick*, even though the plaintiffs only raised a federal claim. *Johnson*, 271 Mont. at 3, 894 P.2d at 273; *see also Kramer v. Unition Free School Dist.*, 395 U.S. 621, 626–627 (1969) (granting right to vote to some and denying it to others subject to strict scrutiny). And even in franchise limitation cases, the Court recognized that while strict scrutiny is sometimes appropriate, rational basis scrutiny applied to voting rights cases that limited the franchise in "special interest" elections. *Johnson*, 271 Mont. at 4, 8 (surveying opinions applying rational basis).

State courts and federal courts apply *Anderson-Burdick* to time, place, and manner election regulations because "common sense, as well as constitutional law," compels some deference to the Legislature's duty to regulate elections—even in the absence of Montana's constitutional delegation of exactly that authority to the Legislature. RITE Amicus Br., App A (cataloguing cases adopting *Anderson-Burdick*). All "[e]lection laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). As a result, across the board application of strict scrutiny improperly interferes with state legislatures' ability to

exercise this authority—that is why the flexible *Anderson-Burdick* test was adopted. *See Burdick*, 504 U.S. at 433–35 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Strict scrutiny is reserved for laws that severely burden the right to vote, while lesser burdens trigger less exacting scrutiny; "the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434. As this Court has held, *Larson v. State by and Through Stapleton*, 2019 MT 28, ¶ 40, 394 Mont. 167, 434 P.3d 241, the government plays a necessary role in structuring and administering elections, *Burdick*, 504 U.S. at 433; *see also* U.S. Const. art. 1, § 4, cl.1; Mont. Const. art. IV, § 3.

As a result, no state or federal court has mandated strict scrutiny in all voting rights cases, even though the right to vote is fundamental. *See Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) ("voting regulations are rarely subject to strict scrutiny."). Montana's constitution does not compel a different test. It grants broad power to the Montana Legislature—even broader than the U.S. Constitution gives to States. Mont. Const. art. IV, § 3; Mont. Const. Con. Tr., p. 450 (granting Legislature "very broad" authority to "pass whatever statutes it deems necessary" to keep Montana elections "free of fraud").

Trying to counter the close connection between the *Anderson-Burdick* test and this Court's traditional approach to constitutional questions involving

fundamental rights, Appellees point to a series of state supreme court cases. Appellees contend the supreme courts of Idaho, Illinois, North Carolina, Washington, and Kansas have all approved applying strict scrutiny to any election regulation. None of these cases stand for that principle because each involved direct restrictions on the right to vote. Instead, these decisions show why the regulations here, targeted towards the delivery of absentee ballots, the close of voter registration, and the use of voter identification, are time, place, and manner regulations that should not be subject to strict scrutiny.

For example, *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000), addressed a statute that infringed on the "very basic right of a voter to express support for a candidate within the sanctity of the voting booth" by giving the state's imprimatur to favored candidates. *Id.* As the Idaho Supreme Court noted, the *Anderson-Burdick* test was not appropriate because, "unlike the statute in *Burdick*, [the *Van Valkenburg* statute] is not simply a time, place or manner voting restriction to which a more deferential standard of review might be applied." *Id.*

Appellees also cite the Illinois Supreme Court's decision in *Tully v. Edgar*, 664 N.E.2d 43 (Ill. 1996). But that case addressed a statute that created a "*total* disregard for *all* votes cast by citizens in a particular election" by converting

elected positions into appointed positions shortly after a vote—far different from the effect of the regulations here. *Id.* at 49 (emphasis original). And the remaining cases cited by Appellees have nothing to do with time, place, and manner election regulations, either. *See, e.g., Harper v. Hall*, 380 N.C. 317, ¶¶ 150, 181, 868 S.E.2d 499, 544, 553 (N.C. 2022) (addressing partisan gerrymandering); *Madison v. State*, 163 P.3d 757, 765–766 (Wash. 2007) (addressing a felon's right to vote under the state constitution); *Moore v. Shanahan*, 486 P.2d 506 (Kan. 1971) (evaluating ability to vote on constitutional amendments).

The thrust of these cases is that other state supreme courts have had no problem distinguishing time, place, and manner election regulations (e.g., defining the close of voter registration) from statutes that deprive individuals of their voice at the ballot box based on the plain language of the challenged statute itself. *See, e.g., Finke*, ¶¶ 5, 21 (applying strict scrutiny to a law that removed certain individuals right to vote altogether). Establishing the close of voter registration, the content of acceptable voter ID, and rules governing ballot delivery and collection have never been in the latter category.

While this Court has not had occasion to explicitly adopt the *Anderson-Burdick* test for challenges to neutral, evenly applied election regulations, its precedent dictates a similar framework. *Wadsworth*, 275 Mont. at 302, 911 P.2d

1173–1174; Sec. Op. Br., 20; RITE Amicus Br., 5–8, 12–13. If the Constitution is to be read as a consistent whole, Appellees' claim to strict scrutiny must fail.

II. HB 176 is constitutional because it imposes a reasonable and facially neutral registration deadline that is explicitly authorized by the Montana Constitution.

A. HB 176's one-day registration deadline is a rational policy decision committed to the Legislature that does not substantially burden the right to vote.

Appellees cannot cite a single case—anywhere, ever—that struck down a registration deadline. Much longer registration deadlines repeatedly have been upheld by the United States Supreme Court and many state and federal courts.[2]

But it is not just the modest 24-hour registration deadline, less onerous than the other jurisdictions to consider this issue, that renders the Legislature's action appropriate. No other state had a counterpart to Mont. Const. art. IV, § 3, giving the legislature explicit discretion over whether to enact or repeal EDR. No other

[2] Courts have unanimously concluded as a matter of law that registration deadlines are classic examples of permissible regulation, advance important state interests in orderly elections, and are minimally burdensome. *See, e.g., Burns v. Fortson*, 410 U.S. 686, 687 (1973) (50-day registration cutoff); *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (50 days); *Barilla v. Ervin*, 886 F.2d 1514, (9th Cir. 1989) (20 days); *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 952 (9th Cir. 2020) (29 days); *Key v. Board of Voter Registration of Charleston County*, 622 F.2d 88, 90 (4th Cir. 1980) (30 days); *Diaz v. Cobb*, 541 F.Supp.2d 1319, 1333 (S.D. Fla. 2008) (29 days); *ACORN v. Bysiewicz*, 413 F.Supp.2d 119, 122–124 (D.Conn. 2005) (7 days); *Chelsea Collaborative, Inc. v. Secretary of Commonwealth*, 480 Mass. 27, 100 N.E.3d 326 (Mass. 2018) (20 days); *Rutgers University Student Assembly v. Middlesex County Bd. of Elections*, 141 A.3d 335, 342 (N.J. App. 2016)(21 days).

case cited delegates to the Constitutional convention specifically affirming that they intended *not to* constitutionalize EDR so the Legislature had freedom to enact *or repeal* EDR. Sec. Op. Br. 19–20; *see also* Mont. Const. Con. Tr., 402. And no other state in the other cases had a registration deadline of only one day before the election.[3]

But the other cases *did* uniformly cite the strain registration procedures can put on election administration, particularly close to an election. *See* supra n.1. Appellees' own witnesses admitted this at trial. *See, e.g.,* Trial Tr. 1135–1136. Reasonable registration deadlines allow "election officials to direct their exclusive and tireless attention to election management and preparation." *Diaz*, 541 F.Supp.2d at 1333. Courts have also uniformly concluded that a reasonable registration deadline imposes only slight burdens on voters and is supported by the state's important interest in "avoiding confusion and chaos on election day itself." *ACORN*, 413 F.Supp.2d, at 122–124. Voting is a fundamental right. But as the Massachusetts Supreme Judicial Court noted, the "requirement that voters register before exercising their fundamental right to vote is supported by the

[3] The District Court concluded that HB 176 removed a day and a half. That is incorrect. It is uncontested that before HB 176, registration was unavailable after noon the day before election day until the next morning on election day. See Sec. Op. Br., n.2.

legislative objective of conducting orderly and legitimate elections." *Chelsea Collaborative, Inc.*, 480 Mass. at 40 (concluding that 20-day registration deadline was minimal burden and deadline was subject to rational basis review). Those interests easily qualify as compelling, *Diaz*, 541 F.Supp.2d at 1333, even though there is no "precedent where a court has applied a strict scrutiny test to determine the constitutionality of an advance registration requirement," *Rutgers University Student Assembly*, 141 A.3d at 342.[4]

Those compelling interests are well-supported here, which Appellees cannot reasonably contest because their own witness, Geraldine Custer, acknowledged that she had supported elimination of EDR based on her experience as an election administrator. FOFCOL, ¶ 356; App. 198–199. Election administrators testified that, particularly in small counties, usually only the election administrator and perhaps a deputy can register new voters. App. 248–250. Election administrators have limited time to ensure the election runs smoothly so people can vote, they address the many problems that invariably surface every election, they must ensure absentee ballots are handled and counted properly, and they must try to keep lines to a minimum so people are not dissuaded from voting. Sec. Op. Br., 22–26. They also endeavor to count all ballots as soon as possible so that vote totals can be

[4] Even if strict scrutiny applied, HB 176 satisfies that standard. Sec. Op. Br. 22–28.

reported that same evening, even if the technical deadline for reporting is days later. *See* App. 267–268, 350–351. Those reasons amply justify the Legislature's decision to require registration the day before the election, and are likely why only 8 election administrators of Montana's 56 counties opposed eliminating EDR. App. 149.

Appellees respond that larger counties, like Missoula County, have not had a problem. A statute is not unconstitutional simply because one of the largest counties in Montana, with full-time election staff, has the resources to handle the administrative burden election day registration causes. Particularly when—as here—there is a vast disparity between the resources urban and rural counties can dedicate to elections. Sec. Op. Br. 21–28. But even in larger counties Appellees claim is not supported by reality, as became clear right after trial. *See KPAX*, Laura Lundquist, *Same-day registration, technical glitches, slow Montana elections reporting*, Nov. 10, 2022 (available at https://perma.cc/TL4M-T8SD) (last accessed August 14, 2023) (noting that Missoula County had delayed reporting and that there was a line of cars extending three blocks, and reporting delays and election day glitches occurred in Flathead and Gallatin counties).[5] Regardless, the Legislature must

[5] *See also Missoula Current*, Jonathon Ambarian, *Montana voter turnout appears on track to be lower than recent elections*, November 8, 2022 (available at

regulate elections with a mind towards all voters, including those in Malta and Miles City, not just Missoula.

Appellees' reliance on their experts has, similarly, no connection to the realities faced by election administrators in Montana. Appellees' experts' contentions were grounded in academic theorizing, not concrete facts. For example, Kenneth Mayer, a professor at the University of Wisconsin, testified that eliminating EDR in Montana serves no administrative benefit, that wait times in Montana are less than 10 minutes, and that eliminating EDR could curtail voting. Trial Tr. 1305, 1350-1351. Yet he did not speak to a single election administrator or election official in Montana before he testified, nor did he do any research "specific to Montana." Trial Tr. 1401–02; 1406–07. Not only that, but Professor Mayer based his testimony about wait times on a survey that included a mere 200 Montanans, Trial Tr. 1410–1411, while ignoring contrary witness testimony in the case, Sec. Op. Br., 26. And his theory that eliminating EDR would decrease voting assumed that most people would not simply register the day before the election, as they do in most states and did in Montana for most of State history until EDR was

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https://missoulacurrent.com/montana-voter-turnout-2/) (last accessed August 14, 2023).

enacted 15 years ago. App. 133.[6] What is more, Professor Mayer did not even compare voter turnout in Montana before and after EDR was enacted in 2005. Trial Tr. 1402.

Political theorizing does not stand up to the facts. As was widely reported, turnout during the 2022 primary election—when the challenged laws were in force—was unaffected, and, in fact, was nearly record-breaking.[7] Professor Mayer did not bother to evaluate that data or factor it into his analysis at all. Trial Tr. 1401. In fact, turnout during the 2022 general election—when the challenged laws

[6] The District Court incorrectly concluded that "70,0000 Montanans" have registered on election day since 2005, and Appellees replicate the error. That figure includes all registration activity, including correcting errors, changing precincts, updating registration, and re-activating registration, none of which is precluded by HB 176 because those activities are much easier to accomplish than registering new voters. *See* Trial Tr. 1390–1393; App. 449–450.

[7] *See* Montana Secretary of State, *Voter Turnout* (available at https://sosmt.gov/elections/voter-turnout/) (last accessed August 13, 2022) (showing record-setting voter turnout for 2022 primary); *The Missoulian*, Bret Anne Serbin, *Voter turnout 'healthy,' Missoula County elections administrator says*, June 9, 2022 (available at https://perma.cc/PHX4-CZ5V) (reporting that despite elimination of EDR, voter turnout was higher than previous midterm elections) Voter turnout, however, in the general election was lower, despite EDR; *see also supra* n. 6. If nothing else, the data shows that simply eliminating EDR does not have the impact on voter turnout that Appellees' experts surmise, and that turnout reflects more complex factors.

had been enjoined—was lower than it had been during the general elections held in 2018 and 2020.[8]

Given this indisputable reality, Appellees' experts offer—at best—an academic debate about the benefits of EDR in Montana. But the constitutionality of a statute cannot turn on an academic hypothesis. "Without more, evidence of a correlation between an asserted cause and an asserted effect is not evidence of a direct causal link for purposes of assessing the constitutionality of a statute." *Driscoll*, ¶ 41 (Sandefur, J., concurring and dissenting) (referencing Professor Mayer specifically).

This Court has reiterated that debate and decisions about public policy questions "are clearly better suited to the halls of the legislature." *State v. Jensen*, 2020 MT 309, ¶ 16, 402 Mont. 231, 477 P.3d 335; *see also ACORN,* 413 F.Supp.2d at 124 (court refused to "re-weigh the competing public interest . . . and impose election day registration by fiat" because a registration deadline "is quintessentially a legislative judgment"). There is reasonable debate about whether EDR will increase voting more than shorter lines and smoother-running elections. But

[8] *See* Montana Secretary of State, *Voter Turnout* (available at https://sosmt.gov/elections/voter-turnout/) (last accessed August 13, 2022) (reflecting that 61.38% turnout during the 2022 general election, and 74.44%, 71.53%, and 81.33% turnout in the 2016, 2018, and 2020 general elections, respectively). The Secretary requests this Court take judicial notice these records.

resolving questions like those, and balancing the considerations that go into time, place, and manner regulations like registration deadlines, is a function this Court should leave to the Legislature absent substantial evidence of a severe burden on the right to vote. That is precisely what MDP's former attorney concluded after courts rejected challenges to registration deadlines. "Rather, the failure of lawsuits challenging registration deadlines thus far likely speaks to the practical limitations of courts as vehicles for affirmative reform, and counsels a strategy that focuses primarily on legislative efforts to establish EDR…." Dale E. Ho, *Election Day Registration and the Limits of Litigation*, The Yale Law Journal Forum, p. 194. (November 18, 2019). He is right.

WNV suggests that ending EDR violates the Constitution even though the Constitution does not require EDR in the first place. WNV Br., 37. But Appellees cannot support their one-way ratchet argument. *See, contra Barilla*, 886 F.2d at 1516 (upholding elimination of Oregon's EDR imposition of 20-day late registration cutoff). Appellees' contention clashes with the delegates expressed intent that EDR was not constitutionally required and that the Legislature had discretion to enact it or *repeal* it. *See, e.g.,* Mont. Const. Con. Tr., pp. 437–438 (expressing intent to give the Legislature "flexibility there to adjust for problems."); 444 (same), 450

("if the Legislature provides for a system of poll booth registration, they're not locked in.").

While the Legislature may not arbitrarily remove a right that "value[s] one person's vote over another," *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219, no evidence supports that HB 176 does anything of the sort. And while WNV criticizes the Secretary for not citing *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014), that case dealt with eliminating the right to register and vote on the same day, which Montana allows during the early voting period, not election day registration. And the plaintiffs brought claims under Section 2 of the Voting Rights Act ("VRA"), not equal protection or the right to vote. Under the VRA, "showing intentional discrimination is unnecessary" because concrete evidence of disparate impact alone is relevant, among other factors. *Id.* at 238; *but see Brnovich v. Democratic National Committee*, 141 S.Ct. 2321, 2343, 2347 (2021) (clarifying that under the VRA a bare claim that a particular voting method "tends to be used most heavily" by a particular group is not enough to establish a violation); *see also, infra*, Section II.B.

In short, HB 176 does not arbitrarily remove a fundamental right; it places a reasonable limitation on the exercise of that right. The Legislature took as narrow an approach as possible to address the problems caused by EDR (Sec. Op. Br. 22–

28).[9] Appellees do not dispute that voter registration in Montana is easy, that the State seeks to reduce that burden even further for vulnerable populations, that Montana allows no-excuse registration and voting by mail, and that Montana has one of the longest late registration periods in the Country. Sec. Op. Br., 15–16. Appellees do not contest that Montana law allows an individual to make a single trip to both register and vote during the late registration period or that special effort is made for those facing difficulty in registering to vote, like Tribal members on public assistance who automatically receive voter registration materials and instructions with that public assistance. Sec. Op. Br., 15–16. Appellees do not even address those undisputed facts.

Appellees and others may persuade the Legislature to allow EDR again. But that is where the debate should be, rather than this Court.

B. Equal protection claims based on disparate impact require proof of discriminatory intent, there is none here, and Appellees make little effort to support the District Court's opinion.

Appellees acknowledge this Court's precedent requires showing a statute was passed with discriminatory intent to prove an equal protection claim based on disparate impact. MDP Br., 20. Yet they claim "more recent" decisions indicate

[9] HB 176 also harmonized the deadlines for finalizing the voter lists and absentee ballot deadline, which makes rational sense, as even Appellees' witness Geraldine Custer affirmed. App. 176, 196, 332.

that a plaintiff could make a successful disparate impact claim without showing discriminatory intent, citing *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶¶ 16–17, 325 Mont. 148, 104 P.3d 445 and *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 420 P.3d 528. Not so. Both *Snetsinger* and *Gazelka* cited this Court's decision in *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421, which reiterated that "it is a basic equal protection principle that the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose." That "basic" equal protection principle is well established. *See e.g., Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002, 1010 (Mont. 1981) ("disproportionate impact of facially neutral law will not make the law unconstitutional, unless a discriminatory intent or purpose is found."); *see also Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 121, 402 Mont. 277, 477 P.3d 1065 (for "facially neutral" law to violate equal protection clause, it must have "a discriminatory purpose and effect on otherwise similarly situated classes") (Sandefur, Gustafson, and Fehr, JJ., dissenting).

Courts have recognized the especially severe impact that a contrary rule would have on election laws. *See Lee v. Virginia State Bd. of Elections*, 843 F.3d 592, 600–01 (4th Cir. 2016) (recognizing that all election laws will invariably result in disparate impacts). The District Court's conclusion that the laws may

disproportionately impact Native Americans and young voters (FOFCOL, ¶¶ 583–584) is not enough to trigger equal protection scrutiny. There is no evidence of discriminatory intent relating to HB 176 and Appellees' efforts to find one are unavailing. Appellees only cite vague statements from Representative Custer that she thought she remembered one legislator stating a political purpose for HB 176. Appellees do not contest Representative Custer's recollection is nowhere in the legislative record. Sec. Op. Br. 30. Nor do Appellees contend that Representative Custer's hearsay statements made about college students voting—which was not even connected to any particular bill, much less HB 176—were admissible or corroborated by any other evidence. *Id.* at 31. The Secretary objected to that testimony because it was hearsay, and the Court allowed it only because it was not being offered for the truth of the matter asserted. App. 190–93. There was no waiver, and the District Court's exclusive reliance on that testimony to conclude there was discriminatory intent in passing HB 176 was clearly error. Sec. Op. Br., 30–32.

Nor do Appellees cite any evidence that there was any intent to discriminate against Native Americans, other than that there was testimony against HB 176 by some Native Americans, which cannot prove discriminatory intent. Sec. Op. Br. 32. And the allegation makes little sense in any event, given the District Court's

conclusion based on substantial evidence that the same legislature sought to make voting easier for Native Americans. *See, e.g.,* FOFCOL, ¶ 413.

HB 176 is facially neutral and the Legislature passed it to ease strain on election staff and to make voting a smoother and more manageable process. Merely because the law may impact some groups more than others does not mean it violates equal protection.

III. Appellees' attacks on SB 169 misapply rational basis review, a standard SB 169 easily satisfies.

A. Appellees lack standing because they do not contest that they failed to identify a single student who has ever used a student ID to vote or would use a student ID to vote, and have alleged no concrete harm.

Despite claiming, for years, that SB 169 would impact "thousands" of students, MDP and MYA have not identified a single student who has ever even used, or even would use, a student ID to vote. FOFCOL, ¶¶ 406, 417. Associational standing requires organizations to show that "at least one of its members would have standing to sue in his or her own right." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 43–45, 395 Mont. 35, 435 P.3d 1187. The decision in *Community Association for N. Shore Conservation, Inc. v. Flathead County*, 2019 MT 147, 396 Mont. 194, 445 P.3d 1195, does not absolve Appellees of that requirement. There, the plaintiffs showed that its members were injured by the defendant's actions. *Id.*, ¶¶ 21, 22. MDP cites *Montana Immigrant Justice v. Bullock*, 2016 MT

104, 383 Mont. 318, 371 P.3d 430, but, in that case, members of the plaintiff organization filed affidavits showing concrete harm. *Id.* at ¶¶ 22, 42. Appellees have made no such showing and did not identify an individual member even allegedly harmed. Appellees own witness testified that student IDs cannot be used "for something serious[.]" FOFCOL, ¶ 397. They cannot even identify a non-member who has ever used or would use a student ID to vote. Appellees lack associational standing.

Appellees lack organizational standing because they proved no concrete harm to the organizations at trial.[10] Neither MDP, Forward Montana, or MontPIRG make any argument to bolster their standing and or identify a concrete injury. While vague allegations may be enough on a motion to dismiss or preliminary injunction, each organization must make a concrete showing of how those resources would be diverted at trial. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.20 (1982). Appellees are wrong that Montana *Immigrant Justice* supports their organizational standing because the Court explicitly declined to address that issue. *Id.*, n.1. And Appellees provide no support for the premise that an

[10] Only MDP's, Forward Montana's, and MontPIRG's claim to organizational standing is at issue. As the Secretary noted, the District Court concluded that Montana Youth Action lacked organizational standing, and WNV does not challenge SB 169.

organization may challenge a law based solely on unspecified allegations that the law may require diversion of the organization's resources. Because Appellees never even tried to show in any concrete way how SB 169 might have caused them to divert resources, despite years in litigation to do so, they lack organizational standing.

B. The District Court misapplied rational basis review by ignoring its own conclusions about the interests served by SB 169 and by requiring actual evidence of fraud.

Appellees concede rational basis review applies to SB 169. And they do not challenge, or address, the District Court's findings that (1) voter identification laws increase voter confidence, FOFCOL, ¶ 412, (2) voter ID increases the likelihood that the person is eligible to vote, FOFCOL, ¶ 389, and (3) these interests motivated the Legislature to pass SB 169. FOFCOL, ¶¶ 383-84, 411. Those are legitimate state interests rationally related to Montana's voter ID requirements.

The District Court's purported rational basis review was strict scrutiny in disguise because it inverted the burden and required the State to present direct and substantial evidence of voter fraud, and Appellees follow the same path. *See, e.g,* MDP Br., 27. But under rational basis review it does matter if there are more effective ways to meet the State's goals, and it does not matter if the law has potential inconsistencies. *Stand Up Montana v. Missoula Cnty. Pub. Sch.*, 2022 MT

153, ¶ 20, 409 Mont. 330, 514 P.3d 1062; *Montana Cannabis Indus. Ass'n v. State,* 2016 MT 44, ¶¶ 26, 39, 382 Mont. 256, 368 P.3d 1131 (hereinafter "MCIA"); Sec. Op. Br., 41–42. As this Court recently reiterated, under rational basis review "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Jensen*, ¶ 16 (quoting *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993)); *see also Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1031 (9th Cir. 2010) ("Under rational basis review, the state actor has no obligation to produce evidence to sustain the rationality of a statutory classification; rather, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.") (quotation omitted).

The District Court recognized the multiple rational bases that supported SB 169, including:

- Experts affirm that voter ID increases voter confidence in elections. FOFCOL ¶ 412.
- The purpose of requiring ID to vote is so election judges can tell who the person is, identify the voter specifically to the voter roll, and increase the likelihood that the person is eligible to vote. FOFOL ¶¶ 388, 389.
- The State noted that student identification cards are easier to forge than government-issued ID. FOFCOL ¶ 415.
- Out of state students can be misled to believe they can vote in Montana elections even if they do not consider Montana their home state and a student ID is not indicative of a student's residency. FOFCOL ¶¶ 393, 416.

- Legislators enacted SB 169 because they heard from constituents concerned about voter identification, and they believe SB 169 increases voter confidence in elections, prevents illegal voting, and makes it easier to administer elections. FOFCOL ¶¶ 383, 384, 411.
- The drafting process was bipartisan and the intent was to make it fair and workable. FOFCOL ¶ 391.
- SB 169 makes it easier for Native Americans to vote. FOFCOL ¶¶ 413, 414.

Those conclusions align with the conclusions of other courts. In *Crawford*, the Supreme Court recognized that requiring government-issued ID supported the state's interest in "counting only the votes of eligible voters," "deterring and detecting voter fraud," in "orderly administration and recordkeeping," and in promoting "public confidence in the integrity of the electoral process." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191, 196–197 (2008). This Court has held that interests like those are compelling. *Larson*, ¶ 20.

But, despite these findings, the District Court analyzed SB 169 as if it were subject to heightened scrutiny by impermissibly requiring the State to produce "evidence that voter fraud is a substantial problem in Montana." FOFCOL ¶ 472; *see also id.* ¶¶ 480–485. That contradicts this Court's direction that a legislative choice may be based on "rational speculation unsupported by evidence or empirical data." *Jensen*, ¶ 16.

And even under heightened scrutiny, the Legislature need not wait until "substantial fraud" occurs before acting to prevent it. Montana's Constitution

commands the Legislature to act proactively to "guard against abuses of the electoral process." Mont. Const. art. IV, § 3. Requiring actual fraud to justify legislative action to prevent fraud would upend not just the election laws here. *See* Sec. Op. Br. 48–49 (citing political contribution limits and disclosure requirements). The Supreme Court has repeatedly rejected that standard because it would impermissibly interfere with the Legislature's authority to address fraud proactively. *Crawford*, 553 U.S. at 194 (affirming state's interest in preventing fraud even though there was no evidence of in-person voter fraud "occurring in Indiana at any time in its history."); *Brnovich,* 141 S. Ct. at 2348 ("it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders."); *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (states are "permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively").

To be sure, the legislative choice to enact SB 169 is supported by evidence, as is clear from the District Court's findings cited above. But under rational basis review it need not be, and it does not matter if the District Court or this Court is convinced that it is a wise policy choice or even if there are perceived inconsistencies. *Stand Up Montana*, ¶ 20; *MCIA*, ¶¶ 26, 30. .

Appellees' quibbles with the line the Legislature drew is not enough to undermine the statute's constitutionality under rational basis review. For example, it is rational for the Legislature to conclude a student ID does not have the same indicia of reliability as a government-issued ID, even when issued by a public university, which is why they are not considered government-issued ID in any context, even by the Universities that issue them. Nor do Appellees explain why student IDs from out-of-state colleges, private colleges, or even foreign universities, should be acceptable forms of voter ID in Montana. FOFCOL ¶ 415; Sec. Op. Br., 44–45. It was also rational for the Legislature to exclude out-of-state drivers' licenses as primary ID because a Montana driver's license is an indicator of residency (FOFCOL ¶ 400), people from other states can be misled to believe they can vote in Montana even if Montana is not their home state (FOFCOL ¶416), and drivers who reside in Montana must get a Montana driver's license (FOFCOL ¶ 395). *See also* Sec. Op. Br. 50 (conceal and carry permits subject to government verification of identity, age, and residency).

The separation of powers and respect for the Legislature's policymaking roll requires deference to the Legislature's reasons for enacting statutes. *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 18, 354 Mont. 133, 227 P.3d 42. This Court also recognizes that the Legislature's decisions are the result of compromises that

courts may not second-guess under rational basis review. *MCIA*, ¶ 36. Here, the District Court showed no deference. Instead, by demanding evidence supporting why the Legislature was compelled to act in the first instance, the District Court created a new rule that the Legislature may only carry out its obligation under Montana's Constitution, *see* Mont. Const. art. IV, §§ 2–3, if the judiciary deems there is sufficient evidence to warrant legislative action. The separation of powers forbids that approach, Mont. Const. art. III, § 1, and, at minimum, that path is fundamentally inconsistent with rational basis review. But regardless, the State provided, and the District Court even acknowledged, the evidence and explanation the District Court demanded. This Court should reverse.

IV. Appellees' challenge to HB 530 is not ripe and, even if it were, their constitutional claims fail.

A. Appellees' challenges to HB 530 are not ripe.

Appellees barely engage with the fundamental problem that has plagued their efforts to litigate the constitutionality of HB 530 from this case's inception. There is no law, rule, nor even any draft rule, that prohibits the ballot collection practices Appellees engage in. To the contrary, the unrebutted evidence indicates that if the formal rulemaking procedures mandated by the Montana Administrative Procedure Act ("MAPA") were allowed to play out, HB 530 would likely only prohibit "cash for ballots"—a practice Appellees do not engage in because they

recognize the dangers in creating "incentives for them to collect extra ballots." *See* App. 346–347, 109; FOFCOL, ¶ 191.

The State has a compelling interest in prohibiting practices that foster such perverse incentives. Appellees do not argue otherwise, and the District Court did not hold otherwise. The plain language of HB 530 supports a prohibition on "cash for ballots," i.e., ballots collected "in exchange for" a pecuniary benefit. The legislative debates about HB 530 likewise support this conclusion. App. 271–272, 2776, 290–292, 365–366.

The problems caused by the lack of ripeness in Appellees' challenge to HB 530 pervade the District Court's analysis. Appellees' lengthy arguments that HB 530 imposes severe and disproportionate burdens on Native Americans hinges on the speculative presumption that the rule the Secretary may adopt after engaging in MAPA's rulemaking process would prohibit all their ballot collection practices. The District Court erred in adopting Appellees' arguments premised on speculation about an as-yet unwritten rule. Appellees' arguments are not ripe. *See 350 Montana v. State*, 2023 MT 87, ¶¶ 22, 24, 412 Mont. 273, 529 P.3d 847 (ripeness doctrine prevents "premature adjudication" when there is factually inadequate record upon which to base effective review). The District Court also failed to "adhere to the principal that courts should avoid constitutional issues

whenever possible," *id*, ¶ 25, by failing to presume the statute constitutional and require Appellees to show that "no set of circumstances exists under which the challenged law would be valid," *see MCIA*, ¶ 14.

The District Court's additional and alternative grounds for declaring HB 530 unconstitutional likewise stumble due to lack of ripeness. Without any adopted rule, HB 530 prohibits no conduct whatsoever. Appellees' due process vagueness challenge accordingly fails because, while it may be unknown what the as-yet unwritten rule may prohibit, HB 530 itself—absent any adopted implementing rule—prohibits nothing. As it is intended to do, MAPA's processes will "add substance to the acts of the Legislature" and "complete absent but necessary details and resolve unexpected problems," *see Mont. Indep. Living Project*, ¶ 32, that will clarify the precise scope of "what is prohibited," *see State v. Dugan*, 2013 MT 38, ¶ 66, 369 Mont. 39, 303 P.3d 755. Because MAPA's "quasi-legislative" rulemaking process has not been completed, there is no implementing rule under HB 530 prohibiting anything. *See* HB 530 § 2; *Mont. Indep. Living Project*, ¶ 32. Appellees cannot complain that they do not know what is prohibited because until an implementing rule is adopted, nothing is prohibited. *See Dugan*, ¶ 66 (holding vagueness concerns arise when law does not allow one to know "what is prohibited").

Appellees' unconstitutional delegation challenge is also unripe. Even if some problematic delegation of legislative authority could be detected in the statute, Appellees cannot show that any unlawful delegation has or likely will harm them. If, as the trial testimony indicates, the rule ultimately adopted by the Secretary prohibits only "cash for ballots," Appellees obviously would lack standing for any due process challenge. The result of the delegation would not harm them. Unlike Montana caselaw considering unlawful delegation challenges, this is not a case where a delegation of legislative authority has harmed plaintiffs. *See Mont. Indep. Living Proj.*, ¶ 12 (challenging allegedly unlawful delegation when it resulted in plaintiff failing to obtain grant funding); *Matter of Peila*, 249 Mont. 272, 815 P.2d 139 (Mont. 1991) (challenging allegedly unlawful delegation when it resulted in suspension of plaintiff's veterinarian license); *State v. Spady*, 2015 MT 218, 380 Mont. 179, 354 P.3d 590 (challenging allegedly unlawful delegation when it resulted in criminal defendant's obligation to pay fee); *State v. Mathis*, 2003 MT 112, 380 Mont. 179, 354 P.3d 590 (challenging allegedly unlawful delegation when it resulted in speeding ticket); *see also 350 Montana*, ¶ 15 ("a general or abstract interest in the constitutionality of a statute is insufficient for standing absent a direct causal connection between the alleged illegality and specific and definite harm personally suffered, or likely to be suffered, by the plaintiff"). Here, by contrast, the delegated

administrative rulemaking process that could even possibly cause any harm to Appellees has not even begun. There can be no ripe claim for unlawful delegation of legislative authority when any such delegation has not even been exercised and Appellees cannot show any harm from it.

In sum, the District Court's order is wrong because it puts the cart before the horse at every step of the analysis. For good reason, Montana law holds that "hypothetical, speculative, or illusory disputes" like Appellees' challenge to HB 530 are not ripe. *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶¶ 54–55, 365 Mont. 92, 278 P.3d 455. For the same good reasons, Montana and federal law is settled that challenges to proposed rules or other non-final action are not ripe for review. *See e.g. Qwest Corp. v. Mont. Dept. of Pub. Serv. Regul.*, 2007 MT 350, 340 Mont. 309, 174 P.3d 496; *Ohio Forestry Ass'n Inc. v. Sierra Club*, 523 U.S. 726 (1998). This settled law requires reversal of the District Court's order.

Appellees' effort to manufacture ripeness by claiming that "HB 530's ambiguities have already harmed" them fails, WNV Brief at 34; MDP Brief at 30, and the District Court's acceptance of this argument was error. Under its plain language, HB 530 requires the Secretary to "adopt a rule" and has no current enforcement power. HB 530 did not "cause" Appellees to cease their ballot collection activities. *Contra* MDP Brief at 31. Any contention that HB 530 itself—

absent any implementing rule—"prohibits" Appellees' ballot collection activities is clear fallacy and defies the law's plain language. Accordingly, Appellees cannot have a reasonable fear of "prosecution" under HB 530, even before any implementing regulation has been adopted by the Secretary.

The only two cases Appellees cites for their "self-censorship" argument are not on point. In both *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003) and *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988), the challenged laws prohibited or required certain conduct. That is not the case here. This is not a "pre-enforcement" case. HB 530 has no current enforcement mechanism. The administrative rule that would allow for enforcing a prohibition on ballot collection "in exchange for" a pecuniary benefit has not been drafted or finally adopted through the requisite MAPA processes—processes that Appellees intend to participate in and hope to affect. *See* App. 39–40, 70–72, 121–122.

Appellees' only other argument is that their challenge is ripe because they must spend resources "educating" people about the "change in the law." *See* MDP Brief at 31. No record evidence supports this. Paragraph 15 of the FOFCOL was cut-and-pasted directly from Appellees' proposed FOFCOL and cites to a section of Hopkins's testimony that does not discuss HB 530 *at all*. Paragraph 592 is also cut-and-pasted from Appellees' proposed FOFCOL and cites nothing. In

any event, such vague, unsupported references to unquantified expenditures does not make Appellees' challenge to HB 530 ripe. *See Texas St. LULAC v. Elfant*, 52 F.4th 248, 254–256 (5th Cir. 2022).

The District Court erred in finding Appellees' challenges to HB 530 ripe. This error pervaded all its rulings about HB 530 and the order should be reversed in its entirety on this basis alone.

B. Even assuming ripeness, Appellees' unconstitutional delegation challenge fails.

Appellees wrongly contend that for a delegation of legislative authority to be proper "the law must leave 'nothing with respect to a determination of what is the law.'" MDP Brief at 33 (quoting FOFCOL, ¶649). That is not the law and the District Court's conclusion was wrong.

Assuming a plaintiff can show harm from exercising a delegation of legislative power, something Appellees cannot do, this Court has upheld such delegations when the statute defines "with reasonable clarity" the intended limits of the delegation and provides "policy guidance." *Matter of Peila*, 249 Mont. at 276, 815 P.2d at 142; *Mathis*, ¶ 15. And this Court has long recognized the "quasi-legislative" quality of rulemaking under MAPA. *Mont. Indep. Living Project*, ¶ 32; *see also State v. Dixon*, 2000 MT 82, ¶ 21, 299 Mont. 165, 998 P.2d 544 ("The Legislature need not define

every term it employs when constructing a statute."). These precedents cannot be squared with the District Court's incorrect contrary ruling.

Even if Appellees' unconstitutional delegation challenge were ripe even before any allegedly delegated authority has been exercised by the Secretary, HB 530 passes constitutional muster. HB 530 does not define every term, but it defines "with reasonable clarity" the limits of its delegation, guided by the law's express policy and plain terms.

C. Even assuming ripeness, HB 530 does not violate Appellees' right to vote.

Appellees spend pages trying to convince the Court that HB 530 imposes a severe burden on their right to vote, while ignoring their admission that they do not know the meaning of "pecuniary benefit" or "in exchange for." These arguments reinforce the conclusion that Appellees' challenge is unripe. *See 350 Montana*, ¶ 16. But even indulging Appellees' speculative interpretation of HB 530 and assuming ripeness, the Legislature's commonsense regulation of paid ballot collection is constitutional.

Appellees' own testimony and documents show the risks and compelling regulatory interests in paid ballot collection. WNV admits its ballot collection practices are subject to "the potential for people interested in infiltrating the organization." Dkt. 219.1 at 506–507. MDP recognizes that its ballot collection

practices create "potential for a ballot to be misplaced" and the threat that a ballot collector will "interfere with [a voter's] right to vote." App. 520, 524. And, despite MDP's caution to its ballot collectors not to "pressure a voter to provide their ballot for return," App. 524, MDP simultaneously instructs ballot collectors to "try to convince" voters to vote if they don't want to, App. 526–527. Appellees also ignore evidence that ballot collection does, and has, undermined voter confidence in Montana:

> HELENA – More than a dozen voters contacted the Missoula County elections office Monday morning concerned about what happened to their ballots after people going door-to-door offered to deliver them, and in Livingston one resident complained to police.

See App. 516–519. And they ignore Montana's long history of battling the corrupting influence of money in its electoral system. *See W. Trad. P'ship., Inc. v. Att' Gen of State*, 2011 MT 328, ¶ 25, 363 Mont. 220, 217 P.3d 1.

Montana is also not the only state to experience problems with paid ballot collection, as HB 530's sponsor noted when introducing the bill. App. 430. The Commission on Federal Election Reform thus unsurprisingly recommended that States "reduce the risks of fraud and abuse in absentee voting by prohibiting third-party organizations, candidates, and political party activists from handling absentee ballots." *See Brnovich.*, 141 S.Ct. at 2347 (quoting Report of Comm'n on Fed. Election Reform). The District Court's finding that "no evidence" links ballot

collection with voter coercion, fraud, or problems with voter confidence was clearly erroneous.

The District Court's conclusion that HB 530's regulation of this fraught practice furthers "no legitimate…state interest" was also error. Even were there not evidence of problems with paid ballot collection in Montana, the Legislature "may take action to prevent voter fraud without waiting for it to occur and be detected within its own borders." *Id.* at 2348. It may do so because Montana "indisputably has a compelling interest in *preserving* the integrity of its election process" and because "[c]onfidence in the integrity of our electoral processes is essential to the functioning or our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (emphasis added).

Appellees' other contention, adopted by the District Court, that HB 530 furthers no legitimate state interest because other statutes criminalize voter fraud and intimidation, similarly fails. This is like arguing that a speed limit serves no legitimate state interest because reckless driving is already illegal. The Legislature can regulate conduct to prevent the conditions for abuse, not simply react (if it catches it) after the fact. *See Munro*, 479 U.S. at 195–196.

D. Even assuming ripeness, HB 530 does not violate equal protection.

Appellees recognize facially neutral laws, like HB 530, do not trigger equal protection scrutiny unless the law is "a device *designed to* impose different burdens on different classes of persons." *See* WNV Brief at 29 (quoting *Snetsinger*, ¶ 16) (emphasis added). They thus tacitly admit Montana law requires a discriminatory purpose to prove an equal protection claim. The District Court erred in concluding otherwise.

The District Court's alternative finding that the Legislature passed HB 530 for a discriminatory purpose was clearly erroneous. Appellees' repetition of the District Court's flawed conclusions does not change this. BIPA was a different law. It did not target ballot collection "in exchange for" a pecuniary benefit—which Appellees recognize can create problematic "incentives … to collect extra ballots." *See* App. 109. And BIPA prohibited even friends and family members from collecting more than six ballots even though "many Native Americans living on reservations pool their ballots together with one family or community member who will collect and deliver them." *Driscoll*, ¶ 7. Further, BIPA so limited who could collect *any* ballots that "unorganized ballot-collection efforts" for seniors and the disabled were prohibited. *Id.*, ¶ 5. Thus, even assuming *arguendo* the Legislature knew of the BIPA litigation, this does not show the Legislature acted with a

discriminatory purpose in passing HB 530's targeted regulation of ballot collection "in exchange for" a pecuniary benefit.

The only other purported "evidence" of the Legislature's alleged discriminatory purpose is even more flawed and the District Court's reliance on it even more clearly erroneous. The Legislature's decision *not* to pass the more restrictive ballot collection measure HB 406 does not show the Legislature acted with a discriminatory purpose in passing HB 530. And, the conclusion that "rushed passage" of a law proves legislative discriminatory intent represents a bold, speculative leap of logic, which, if credited, would threaten to undermine large swaths of legislative action.

The District Court's conclusion that HB 530 violates equal protection was error. Appellees' claim of disparate impact hinges on a speculative reading of the law rooted in an impermissible presumption that the law is *not* constitutional while failing to adhere to the principal that constitutional questions should be avoided whenever possible. At any rate, disparate impact alone cannot trigger equal protection scrutiny and the District Court erred in holding otherwise. The District Court also clearly erred in its alternative finding that the Legislature was motivated by a discriminatory purpose when passing HB 530's facially neutral regulation of ballot collection "in exchange for" a pecuniary benefit.

E. Even assuming ripeness, HB 530 does not violate Appellees' free speech.

Even assuming HB 530 would prohibit any of Appellees' activities, collection of ballots in exchange for money is not expressive conduct that implicates freedom of speech under Article II, Section 7 of Montana's Constitution. Many well-reasoned decisions of federal courts have similarly concluded. *See e.g. Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018); *Voting for Am. Inc. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013). Appellees' unripe challenge to regulating ballot collection "in exchange for" a pecuniary benefit should not invite this Court to reach a contrary holding and conclude that paid ballot collection is "expressive conduct" implicating freedom of speech under Montana's constitution. Such a ruling here, necessarily in the abstract, would have potentially dangerous implications for Montana's elections, undermining voter confidence and inviting voter fraud and coercion. Even assuming ripeness, HB 530 does not implicate the right to free speech. The District Court's conclusion that HB 530 violates Appellees' right to free speech was error.

V. MYA's attempt to support the District Court's invalidation of HB 506 is unavailing.

At its core, the District Court's decision to apply strict scrutiny to HB 506 and invalidate the Legislature's decision to modify § 13–2–205, MCA, is wrong for a simple reason: minors do not have a constitutional right to access absentee ballots

before they are qualified to vote. The District Court's invalidation of HB 506 should be reversed.

A. MYA's preferred version of HB 506 is not the "least restrictive means" available to further the government's compelling interests.

Having found the Secretary's interests compelling, the District Court's decision turned on whether HB 506 was narrowly tailored. Doc. 201 at 15–16. The District Court determined HB 506 was not the "least restrictive means" available to further the government's interests because a prior draft of HB 506 was a "less onerous" way to meet the government's goal. On appeal, MYA argues the District Court was correct because the constitutional rights of minors are implicated by HB 506 and HB 506 is more "complicated" and "less administrable" than the prior draft. MYA is wrong on both counts.

1. MYA's constitutional challenge to HB 506 must fail.

The alleged right asserted by MYA—that individuals who turn eighteen less than twenty-five days before an election must receive their absentee ballot in the mail—is not a "right" guaranteed by Montana's Constitution. Unqualified voters do not have a constitutional right to be mailed an absentee ballot twenty-five days before election day. On this record, that is the only alleged harm.[11]

[11] Additionally, the alleged harm does not stem only from HB 506 but rather is the result of other statutes—unchallenged in this litigation—that require election

MYA's failure to prove a constitutionally protected interest in receiving an absentee ballot before they are qualified to vote—let alone receiving an absentee ballot at all—is fatal to their claims. Montana's Constitution says an individual must be eighteen to be considered a "qualified elector," Mont. Const., art. IV, § 2, and gave the Legislature the authority to regulate absentee voting, Mont. Const., art. IV, § 3. Taken together, these constitutional provisions cannot be read to require the provision of absentee ballots to unqualified electors. Nor does Mont. Const. art. II, § 13, apply in any manner. MYA does not, and cannot, argue that HB 506 deprives any individual of access to their absentee ballot once they are qualified to vote, and MYA's own witness voted absentee despite turning eighteen only three days before election day. *See* Trial Tr. 1116.

"The government need not demonstrate that a law survives . . . any level of scrutiny where the movant fails to make out a prima facie case of a violation of its constitutional rights." *Netzer L. Off., P.C. v. State by & Through Knudsen*, 2022 MT 234, ¶ 34, 410 Mont. 513, 520 P.3d 335. This Court should end its analysis here and reverse the District Court.

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administrators to mail absentee ballots to voters twenty-five days before election day, *see* § 13–13–205(a), MCA; § 13–13–214(b), MCA.

2. The prior draft of HB 506 did not meet the State's objective.

"A narrowly tailored law is 'the least onerous path that can be taken to achieve the state objective.'" *Weems v. State by & through Knudsen*, 2023 MT 82, ¶ 44, 412 Mont. 132, 529 P.3d 798 (quoting *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174). The only basis for both MYA and the District Court's contention that HB 506 is not the "least restrictive means" available is a prior draft of HB 506. But that prior draft did not accomplish the government's objectives and, as a result, could not be the "least onerous path" available.

The District Court recognized the government has a compelling interest in "prevent[ing] election administrators from having to separately hold voted absentee ballots received from underage voters until the time the voter turns 18, a practice that is inconsistent with § 13–13–222(3), MCA[.]" Doc. 201 at 15. The prior draft of HB 506 does not resolve this issue. MYA concedes this point. MYA Brief at 38 ("had the legislature passed [the prior version of HB 506], election official s 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*) (emphasis added). In short, the prior draft of HB 506 cannot be "less onerous" than HB 506 due to its failure to address the compelling interest identified by the District Court—an interest that HB 506 itself remedied.

3. The prior draft of HB 506 is not less onerous.

MYA's contention that HB 506 is a "more complicated, less administrable way to distribute ballots" is wrong, too. MYA Brief at 38. The record shows the prior draft of HB 506 imposed several additional administrative burdens above and beyond those imposed by HB 506, including requiring election administrators to (1) create a process to securely store unripe ballots (e.g., Missoula County held unripe ballots in a "vault" until they cured), App. 460; (2) create a process to sort received absentee ballots into those that are ripe and those that are not, *see* App. 410–411, 406; and, (3) determine when unripe ballots may be counted, (e.g., one county waited until Election Day to count unripe ballots, while another county would review unripe ballots each day and determine whether any had cured), App. 410–411.[12] HB 506 avoids these additional burdens in furtherance of the no less than six compelling interests identified by the District Court. Doc. 201 at 15.

B. The requirement that MYA prove HB 506 unconstitutional in all its applications is not waived.

MYA argues the Secretary waived her argument about MYA's failure to meet the requirements of a facial challenge.[13] Not so. The District Court

[12] Further, MYA simply ignores the uncontroverted record evidence that the lack of uniformity in handling unripe ballots negatively impacted the development of the State's election management software. App. 408–411.

[13] MYA Brief at 19 ("For the first time on appeal, the Secretary argues that [MYA] failed to show that HB 506 is unconstitutional in all its applications.").

recognized MYA asserted a facial challenge.[14] The Secretary raised this argument before the District Court.[15] And MYA at least impliedly conceded it was asserting a facial challenge below.[16]

C. The District Court had good reason to refuse to address MYA's additional claims.

MYA raises two claims not ruled on by the District Court, which should be disregarded. *See generally Weems*, ¶ 6 n.1 (noting that claims not considered by the district court on summary judgment were not included on direct appeal). But whether the merits of those claims are properly before this Court does not matter because neither changes the dispositive issue here: HB 506 should be subject only to rational basis review and the District Court's strict scrutiny analysis was flawed. But there was also good reason for the District Court to refuse to reach those claims.

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[14] Doc. 201 at 10 ("Because Youth Plaintiffs bring a facial challenge, they 'must show that no set of circumstances exists under which the [challenged sections] would be valid, i.e., that the law is unconstitutional in all of its applications.'").
[15] Doc. 161 at 2 ("Youth Plaintiffs bring a facial challenge against § 13–2–205, MCA (the statute amended by HB 506 § 2), meaning a challenge to the law itself . . . Youth Plaintiffs must demonstrate 'the law is unconstitutional in all of its applications."); *see also* Doc. 181 at 13.
[16] Doc. 180 at 8 ("[A] facial challenge is appropriate because there is no valid application of HB 506[.]"). HB 506 avoids these additional burdens in furtherance of the no less than six compelling interests identified by the District Court. Doc. 201 at 15.

First, MYA argues HB 506 violates equal protection under Mont. Const. art. II, § 4. It does not. The alleged discriminatory feature of HB 506 is that one class of individuals—those who turn 18 in the month before or on election day—do not receive absentee ballots in the mail while the other class—those who turn 18 at any other time—does. MYA Brief at 30–31. But these two classes are not similarly situated, *MCIA*, ¶¶ 17–18, because the first group is not age-qualified to vote under the Constitution, Mont. Const. art. IV, § 2, while the second group is. As MYA concedes, minors cannot vote until they turn eighteen. MYA Brief at 29.[17]

Second, MYA argues HB 506 violates the Constitution's "rights of minors" provision. Mont. Const. art. II, § 15. Not so. The Framers drafted that provision to ensure minors had the same rights as adults, "with respect to arrest, detention, and trial." Mont. Const. Con. Tr. Vol. 5, p. 1751 (March 8, 1972). There is no support in the text, or the legislative history, for MYA's attempt to read the provision as requiring that minors be given access to absentee ballots before they are qualified to vote. Consider *Matter of J. W.*, 2021 MT 291, ¶ 23, 406 Mont. 224, 498 P.3d 211,

[17] MYA's argument that the only distinction that matters is the age of the individual on Election Day also misses the mark because HB 506 does not preclude a qualified individual from receiving an absentee ballot on election day and voting it. Instead, the relevant point in time is twenty-five days before election day—not an arbitrary date (as MYA suggests), but a date compelled by statute, § 13–13–205(a), MCA; § 13–13–214(b), MCA.

where this Court evaluated a claim that Article II, Section 15, required a jury to consider characteristics of youth before reaching a verdict in juvenile criminal cases. That requirement would "enhance" the rights of certain minors by essentially imposing a heightened burden of proof before a juvenile could be convicted. But this Court rejected that argument because, at its core, that is not what Article II, Section 15, means. Rather, that provision means only that "Montana youths are constitutionally guaranteed the same fundamental rights as adults." *Matter of J. W.*, ¶ 23. HB 506 prevents adults that are not qualified because of registration or residency from accessing absentee ballots, just as it prevents minors from accessing absentee ballots before they are age qualified. Minors do not have a special fundamental right to receive their absentee ballot in the mail twenty-five days before an election when they are not yet eligible to vote, and Mont. Const. art. II, § 15 does not apply.

VI. Applying strict scrutiny to all election laws, regardless of the burdens such laws impose, contradicts the Elections Clause.

Judicial review is fundamental to our system of government. *Brown*, ¶¶ 52–62 (Rice, J., concurring); *Moore v. Harper*, 143 S. Ct. 2065, 2079 (2023). This Court is "duty-bound to decide whether a statute impermissibly curtails rights the constitution guarantees." *Driscoll*, ¶ 11 n.3. At the same time, the Elections Clause of the United States Constitution empowers state legislatures to prescribe rules

governing federal elections. U.S. Const. art. I, § 4; *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013); *Moore*, 143 S. Ct. at 2074. These principles, considered together, empower this Court to review legislative decisions regulating federal elections through the "ordinary exercise" of judicial review. *Moore*, 143 S. Ct. at 2081.

This Court's exercise of judicial review over constitutional challenges to statutes is well established: (1) determine whether a constitutional right is interfered with, (2) if so, determine the extent of interference, and (3) apply the corresponding level of scrutiny. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1173–1174. But the "ordinary exercise" of judicial review is not what Appellees ask for here. Instead, Appellees ask this Court to cut out the first two steps. They say this Court should not determine whether an election regulation interferes with a constitutional right or determine the extent of the interference. Instead, they say this Court should apply strict scrutiny no matter what.

Adopting Appellees' proposal—and concluding that any election regulation implicating the right to vote in any way is subject to strict scrutiny—suspends the ordinary exercise of judicial review. That is because legislation would be *presumptively unconstitutional* upon passage, requiring extraordinary justification "seldom satisfied." *Butte Cmty. Union*, 219 Mont. at 431, 712 P.2d at 1312. Put

another way, any legislation regulating Montana's elections would be—immediately—constitutionally suspect. *State v. Hinman*, 2023 MT 116, ¶ 55, ___ Mont. ___, 530 P.3d 1271 (McGrath, C.J., concurring) (strict scrutiny requires the State to show "exceptionally pressing circumstances and the most careful government response."). Taking such a path would require this Court to impermissibly distort the challenged law by construing its effect before its text was ever considered. *See generally Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., Scalia, Thomas, JJ., concurring).

The remedy for this problem is simple and requires only that this Court apply its well-established method for evaluating constitutional challenges. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1173–1174. As this Court recently recognized, beginning judicial review by presuming a statute is anything but constitutional infringes on the separation of powers and the deference owed to the Legislature. *Weems*, ¶ 34. Appellees request for across-the-board strict scrutiny of all election regulations must be denied.

Conclusion

This Court should reverse the District Court and affirm the constitutionality of HB 176, SB 169, HB 530, and HB 506.

Respectfully submitted August 14, 2023.

/s/ *Dale Schowengerdt*

Attorney for Appellant Secretary of State Jacobsen

Certificate of Compliance

I certify that this Brief is printed with a proportionately spaced Equity typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 12,349 words including footnotes. Mont. R. App. P. 11(4).

/s/Dale Schowengerdt

CERTIFICATE OF SERVICE

I, Dale Schowengerdt, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 08-14-2023:

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

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

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

Christian Brian Corrigan (Govt Attorney)
215 North Sanders
Helena MT 59601
Representing: Christi Jacobsen
Service Method: eService

Matthew Prairie Gordon (Attorney)
1201 Third Ave
Seattle WA 98101
Representing: Montana Democratic Party, Mitch Bohn
Service Method: eService

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

Service Method: eService

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

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe
Service Method: eService

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

Robert Cameron (Attorney)
203 N. Ewing St
Helena MT 59601
Representing: Restoring Integrity & Trust in Elections
Service Method: eService

Daniel Kenneth Stusek (Attorney)
3477 Birkland Drive
Helena MT 59602
Representing: Lawyers Democracy Fund
Service Method: eService

Raphael Jeffrey Carlisle Graybill (Attorney)
300 4th Street North
PO Box 3586
Great Falls MT 59403
Representing: Montana Federation of Public Employees
Service Method: eService

Rylee Sommers-Flanagan (Attorney)
P.O. Box 31
Helena MT 59624
Representing: Montana Youth Action, Forward Montana Foundation, Montana Public Interest Research Group
Service Method: eService

Niki Zupanic (Attorney)

PO Box 31
Helena MT 59624
Representing: Montana Youth Action, Forward Montana Foundation, Montana Public Interest Research Group
Service Method: eService

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

Henry James Brewster (Attorney)
46 S Street NW
Washington DC 20001
Representing: Montana Democratic Party, Mitch Bohn
Service Method: eService

Caitlin Boland Aarab (Attorney)
11 5th St N
207
Great Falls MT 59401
Representing: Richard Briffault, Jessica Bulman-Pozen, Joshua A. Douglas, Helen Hershkoff, Bertrall L. Ross II, Miriam Seifter, Joshua S. Sellers, Justin Weinstein-Tull, Robert F. Williams, Robert Yablon
Service Method: eService

Patrick F. Philbin (Attorney)
1155 F Street NW, Suite 750
Washington DC 20004
Representing: Restoring Integrity & Trust in Elections
Service Method: E-mail Delivery

John Victor Coghlan (Attorney)
1155 F Street NW, Suite 750
Washington DC 20004
Representing: Restoring Integrity & Trust in Elections
Service Method: E-mail Delivery

Theresa J. Lee (Attorney)
125 Broad Street, 18th Floor
New York NY 10004
Representing: Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe
Service Method: E-mail Delivery

Jonathan Topaz (Attorney)
125 Broad St FL 18
New York NY 10004-2454

Representing: Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe
Service Method: E-mail Delivery

Samantha Blencke Kelty (Attorney)
1514 P. Street, NW, (Rear) Suite D
Washington DC 20005
Representing: Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe
Service Method: E-mail Delivery

Jacqueline De Leon (Attorney)
1506 Broadway
Boulder CO 80302
Representing: Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe
Service Method: E-mail Delivery

Abha Khanna (Attorney)
1700 Seventh Ave., Suite 2100
Seattle WA 98101
Representing: Montana Democratic Party
Service Method: E-mail Delivery

Electronically Signed By: Dale Schowengerdt
Dated: 08-14-2023