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IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

Montana Democratic Party and Mitch Bohn,

Plaintiffs,

Western Native Voice, *et al.*,

Plaintiffs,

Montana Youth Action, *et al.*,

Plaintiffs,

vs.

Christi Jacobsen, in her official capacity as Montana Secretary of State,

Defendant.

Consolidated Case No. DV 21–0451

Hon. Michael Moses

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO SUSPEND PRELIMINARY INJUNCTION PENDING APPEAL

EXPEDITED REVIEW REQUESTED

Defendant Montana Secretary of State Christi Jacobsen ("Secretary") respectfully requests the Court suspend its preliminary injunction of HB 176 and SB 169 pending the Secretary's appeal to the Montana Supreme Court of the Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Preliminary Injunctions, Dkt. 124. Due to Plaintiffs' delays, the injunction was entered only 62 days before Montana's June 2022 primary elections and upends the status quo by invalidating nearly a year's worth of efforts by the Secretary to implement the challenged laws, educate voters, train election officials, and update Montana's election infrastructure. To avoid those serious consequences—especially the voter confusion that certainly will result—the Court should exercise its discretion by suspending the preliminary injunction pending the Secretary's expedited appeal. Suspending an injunction pending appeal is consistent with well-settled law. Both the U.S. Supreme Court and the Montana Supreme Court have strongly discouraged courts from modifying election administration on the eve of an election to avoid the very consequences that will result here. *See Republican National Comm. v. Democratic National Comm.*, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election"); Order, *Stapleton v. Thirteenth Judicial District Court*, OP 20-0293 (May 27, 2020).

Additionally, the Secretary moves the Court to modify the scope of its injunction as to HB 506 and HB 530 (and, in the alternative to the relief requested above, as to HB 176 and SB 169) to apply only to the provisions that Plaintiffs challenged in their respective preliminary injunction motions. Montana Rule of Appellate Procedure 22(1)(a)(iii) authorizes the Court to suspend and/or modify the preliminary injunction order.

Secretary Jacobsen respectfully requests the Court conduct an expedited review and issue an order (either granting or denying this motion) so that expedited relief may be sought from the Montana Supreme Court, if necessary, pursuant to Montana Rule of Appellate Procedure 22(2).

Legal Standard

A party may file a motion in the district court to "suspend" or "modify" an injunction "pending appeal." Mont. R. App. P. Rule 22(1)(a)(iii). Further, the Court may suspend or modify an injunction to "secure the opposing party's rights." Mont. R. Civ. P. Rule 62(c). There is no precise formula governing when a stay of an injunction should be granted—such decisions fall within the Court's considerable discretion. *See generally Intermountain Tel. & Power Co. v. Mid-Rivers Tel. Coop.*, 201 Mont 448, 453–454, 655 P.2d 491, 494 (Mont. 1982). The Court possesses inherent power to stay proceedings to ensure the economy of time and effort for litigants. *See Henry v. District Court*, 198 Mont. 8, 13, 645 P.2d 1350, 1352 (Mont. 1982).

I. The preliminary injunction impermissibly alters the status quo and will cause widespread voter confusion.

The limited purpose of a preliminary injunction is to "preserve the status quo and minimize the harm to all parties pending final resolution on the merits." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 14, 401 Mont. 405, 473 P.3d 386 (citations omitted). This Court's preliminary injunction fundamentally alters the status quo: fifty-two different elections occurred in the Fall of 2021, Declaration of Austin James, Dkt. 91 at ¶ 35, and approximately 337,581 votes have been cast following the passage of these laws, Dkt. 91 at ¶ 36. Instead of preserving the status quo, the Court's preliminary injunction not only alters the fundamentals of the upcoming election at the last moment, but will inevitably lead to widespread confusion among voters.

A. Indisputably, the Court's preliminary injunction will confuse voters by undoing the Secretary's efforts to educate Montanans on HB 176 and SB 169.

Over the past year, the Secretary has taken innumerable actions to implement the changes directed by HB 176 and SB 169 and educate voters on the changes to polling place identification and voter registration prescribed by these laws. *See* Dkt. 91 at ¶¶ 17–18, 32–36, 39, 48–49, 55, 58–64, 72, 74–75, 78–87, 94–99, 105–106, 108, 113, 118–121. A large portion of the Secretary's work has been dedicated to preparing voters for the upcoming elections and ensuring information transmitted to voters was consistent with changes made by HB 176 and SB 169. Montana's May 2022 school board elections are now less than one month away, and Montana's state-wide June 2022 primary elections are two months away. Second Declaration of Austin James, Exhibit 1 at ¶¶ 3–4 (April 8, 2022). Accordingly, much of this preparation has already been implemented by either the Secretary and/or various county election officials.

Consider the following: by statute, county election officials are required to publish notice specifying the days on which regular and late voter registration will close. Mont. Code Ann. § 13–2–301(b). Montana county election administrators are already publishing notices regarding the close of the late registration period with respect to the upcoming school board elections. For example, on Thursday, April 7, 2022—less than 24 hours after the Court issued its injunction—Gallatin County published notice that the late registration period would close at noon the day before the upcoming school board election. Ex. 1 at ¶ 7. But, as the Court has enjoined HB 176, this is no longer correct. The election administrator for Gallatin County submitted a declaration in support of Plaintiffs in this case, and even he failed to accurately inform voters as to when late registration now closes. *See* Declaration of Eric Semerad, Dkt 66 . And the information currently provided by the Missoula County election administrator, who also submitted a Declaration in

support of Plaintiffs in this case, *see* Declaration of Bradley Seaman, Dkt. 68, is also incorrect. As of April 8, 2022, Missoula County is still advising voters that late registration closes "at noon the day before Election Day." Ex. 1 at ¶¶ 8–9. If Montana election officials are confused about Montana election law following the Court's injunction, voters necessarily will be as well. But the difficulty in revising the information county election officials must provide to voters ahead of the upcoming elections is not the only issue.

The Secretary has created and distributed new voter registration cards. Dkt. 91 at ¶¶ 32–34. These cards have been issued to individuals to confirm their voter registration has been processed. Dkt. 91 at ¶ 39. Following passage of SB 169, the Secretary updated the voter registration card to reflect that the card, along with "a photo ID containing [the voter's] name," was sufficient documentation to allow an individual to vote. Dkt. 91 at ¶¶ 32–34. These voter cards have been widely distributed. Dkt. 91 at ¶ 39. But, following the injunction, that statement is no longer valid because the previous version of the law (reimplemented by the Court) required that the photo identification card be "current and valid." Because it is impossible to inform every voter who has received such a card that they now must bring a "current and valid" photo identification card, some voters—and especially voters possessing tribal IDs, as discussed below—may rely to their detriment on SB 169's revision.

And it does not end there. The Secretary has spent an extraordinary amount of time and effort informing Montana voters of the changes made by the laws the Court now enjoins, in particular SB 169 and HB 176. *See* Dkt. 91 at ¶¶ 105–106 (the Secretary has aired public service announcements over 14,000 times on broadcast television regarding registration and identification requirements), ¶ 108 (the Secretary has aired over 18,000 radio ads information

voters about registration and identification requirements). Additionally, every Montana voter has been mailed information regarding the change to voter registration caused by HB 176. Dkt. 91 at ¶ 113. This Court's injunction renders the information provided to voters incorrect. And the immediate nature of this injunction will cause voter confusion, which will be amplified if the Court's decision—or even parts of it—are ultimately overturned by the Montana Supreme Court on appeal. Beyond voter confusion, these consequences will undermine public confidence in Montana elections by highlighting the unsettled and ever-changing rules governing the upcoming elections. Ironically, a primary goal of the challenged legislation was to strengthen voter confidence in Montana elections. It benefits all Montanans to wait until the Supreme Court decides whether a preliminary injunction is appropriate before fundamentally altering the now-established, and widely-broadcast, election requirements.

The Secretary intends to ask for expedited appellate review of the preliminary injunction order prior to the June primary election. Given the proximity of the June primary election, immediate enforcement of this injunction simply does not serve the public interest. Thus, the Court should suspend its injunction pending appeal. Time and time again, the U.S. Supreme Court has strongly cautioned against decisions modifying election administration on the eve of elections. *See Republican National Comm.*, 140 S. Ct. at 1207; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). To be clear, it was Plaintiffs' delay in seeking injunctive relief that caused the preliminary injunction to be issued at this late date. But the consequences of the Court failing to heed the U.S. Supreme Court's warnings will be especially grave in this case. That

disenfranchisement will be the result of a lawsuit purporting to vindicate voting rights is a grave result that should give Plaintiffs, and the Court, pause.

B. The preliminary injunction infuses chaos into the administration of Montana's elections by undoing the Secretary's efforts to implement HB 176 and SB 169 and train Montana election officials on HB 176 and SB 169.

Unfortunately, it is not just voters who are facing a litany of consequences due to the timing of the Court's Order. The issuance of the injunction less than one month prior to the May school board elections and two months prior to the June primary disregards, and undoes, the extensive work by the Secretary and Montana election administrators who have been preparing for the 2022 election cycle.

The Secretary has already promulgated guidance to election administrators ahead of the upcoming elections and has engaged in extensive training of election administrators across Montana, many of whom are administering an election for the first time. The Secretary has issued an Election Judge Handbook, a Polling Place Situation Quick Guide, and other Election Judge Training materials. *See e.g.* Dkt. 91 at 118–121. The Election Judge Handbook, for example, was delivered to election administrators last week. Ex. 1 at ¶ 6. In total, 4,400 copies were transmitted by the Secretary to various election administrators, election officials, and poll workers in Montana. *See* Ex. 1 at ¶ 6. The Election Judge Handbook contains information specific to HB 176 and SB 169—information that, due to the Court's injunction—is no longer correct. *See* Dkt. 91 at ¶ 118–121. As a practical matter, it is impossible for the Secretary to revise and re-publish the Election Judge Handbook and redistribute it ahead of the upcoming elections. But even if there were time to do so, the broad scope of the Court's injunction leaves the Secretary unsure as to precisely what revisions must be made. One goal of § 1 of SB 169 was to make it

easier for Montana tribal members to vote with expired tribal ID. Must the Secretary now disallow the use of tribal photo identification cards as stand-alone forms of voter identification if they are not "current and valid"? The Court's Order suggests she must.

Relatedly, there are record numbers of new poll workers volunteering to assist election administrators this year. Ex. 1 at ¶ 5. As they are new, the only training these new poll workers have received to date is based on Montana election laws as modified by HB 176 and SB 169. But because the injunction comes so close to the upcoming elections, it leaves insufficient time to for: (i) the Secretary to issue new training guidance; and (ii) election administrators in all fifty-six counties to re-train these new poll workers ahead of the elections set for May and June 2022.

Additionally, the Court's Order likely mothballs the new election software being developed by the Secretary: ElectMT. After delay caused, in part, by a lack of clarity in Montana's election laws—and subsequently (but, given this Court's order, only temporarily) resolved by HB 506—election officials were slated to run a parallel test of the ElectMT system in the upcoming elections. But this system is based on Montana election law as amended by HB 176, SB 169, and HB 506, *see generally* Declaration of Melissa McLarnon, Dkt. 81, and, as a practical matter, cannot be changed prior to the upcoming elections, particularly because the Secretary's staff must now focus on reverting the changes made to the existing MTVotes system. Given the extraordinarily broad scope of the injunction, the Secretary is likely now prohibited from further implementing this system. Thus, the parallel test likely will be cancelled leading to further delay of the implementation of this long-awaited system, which is designed to harden Montana's election infrastructure and increase voter confidence.

C. It is impossible to foresee all consequences of the Court's preliminary injunction due to its effect on the administrative rules promulgated by the Secretary over the past year.

Over the past year, the Secretary has engaged in an extensive effort to overhaul administrative rules interpreting Montana's election laws. Dkt. 91 at ¶¶ 75, 78–87. This process concluded in January 2022. Dkt. 91 at ¶¶ 78–87. One purpose of the Secretary's efforts was to implement SB 169 and HB 176. Dkt. 91 at ¶ 75. As a result, administrative rules that interpreted previous versions of the statutes modified by both SB 169 and HB 176 were repealed. Thus, the injunction puts Montana election officials in the untenable position of administering an election without the benefit of any guidance from Montana's administrative rules, which historically have included detailed instructions for election administration.

Most importantly, new administrative rules promulgated by the Secretary implemented SB 169 and HB 176, and—at the same time—clarified issues with the then-existing administrative rules. These revisions were completed in packages, meaning there is no practical way for the Secretary to parse which administrative rules were implemented as a direct result of SB 169 or HB 176, and which administrative rules were unrelated. That is especially true given the short timeframe before the upcoming elections. As a result, the preliminary injunction has the practical effect of invalidating broad swathes of administrative rules developed and implemented over the last year—including administrative rules unrelated to the underlying litigation. And the Secretary lacks sufficient time to adopt administrative rules that are consistent with the Montana election laws restored by the Court in its Order.

II. Procedural issues warrant the Court's modification of the scope of the preliminary injunction pending appeal.

An injunction must be fashioned to the specific circumstances of a particular case. *Simpkins v. Speck*, 2019 MT 120, ¶ 19, 395 Mont. 509, 443 P.3d 428 (internal quotations and citations omitted). But the Court's preliminary injunction grants relief not requested by any Plaintiff. Plaintiffs only challenged specific sections of the legislation at issue in this case, but the Court enjoined enforcement of the legislation in its entirety. The Court must, at minimum, modify the injunction issued to apply only to the specific sections of the bills at issue—HB 176, SB 169, HB 506, and HB 530—that were actually challenged by Plaintiffs. If the Court does not do so, the Montana Supreme Court likely will because a district court is "only empowered to grant [injunctive relief] no broader than necessary to cure the effects of the harm caused by the violation." *Simpkins*, ¶ 19.

A. The Court's Order restrains and prohibits the Secretary from enforcing any aspect of SB 169 § 1, SB 169 § 3, and SB 169 § 4 even though Plaintiffs did not seek injunctive relief against these sections.

SB 169 consists of four relevant parts. SB 169 § 1 amends Montana Code Annotated § 13–2–110, to revise the documentation an individual may use to register to vote. SB 169 § 2—challenged by the Montana Democratic Party Plaintiffs and the Montana Youth Action Plaintiffs—amends Montana Code Annotated § 13–13–114 to revise the documentation an individual may provide in order to vote. SB 169 § 3 amends Montana Code Annotated § 13–13–602 to revise the information an individual may provide when voting by mail. SB 169 § 4 amends Montana Code Annotated § 13–15–107 to create a new fail-safe that allows an elector who is unable to provide the necessary identification to vote additional methods of proving their identity to allow them to cast their ballot. In both their complaints and preliminary injunction motions,

Plaintiffs ignored SB 169 § 1, SB 169 § 3, or SB 169 § 4, and never requested any relief from the Court regarding those specific subsections. And similarly, no Plaintiff offered any argument as to why SB 169 § 1, SB 169 § 3, or SB 169 § 4 should be enjoined. In fact, the Montana Democratic Party Plaintiffs specifically asked the Court to only enjoin the changes made by Section 2 of SB 169 to Montana Code Annotated § 13–13–114(1). Dkt. 71 at 2. While the Montana Youth Action Plaintiffs failed to offer similar specificity, they similarly offered no argument against either provision.

Despite no challenge being mounted to either SB 169 § 1, SB 169 § 3, or SB 169 § 4—and with no factual record or legal support to establish that statutory changes made by SB 169 § 1, SB 169 § 3, or SB 169 § 4 were unconstitutional—the Court's preliminary injunction order restrains and prohibits the Secretary, her agents, employees, successors, and "all persons acting in concert with each or any of them," from enforcing "any aspect" of the amendments made by these provisions. Dkt. 124, Order at 57.

The harm that will be caused to Montana voters by this overly broad preliminary injunction is concrete and impending. For example, SB 169 § 1 significantly modified the documentation that individuals—and particularly Native Americans—could rely on when registering to vote. Previously, an individual was allowed to rely on alternative forms of identification to register to vote only if they did not have a Montana driver's license or a social security number. *See* Mont. Code Ann. § 13–2–110(3)–(4) (2019). SB 169 § 1 allowed alternative forms of identification to be used if the applicant was "unable to provide" a primary form of identification—removing the barrier that required individuals to demonstrate they did not, in fact, have a driver's license or social security number.

Additionally, SB 169 § 1 allowed a tribal photo identification card to be used as a stand-alone form of identification. Mont. Code Ann. § 13–2–110(4) (2021). Previously, such documentation was required to be "current and valid." Mont. Code Ann. § 13–2–110(4) (2019). SB 169 § 1 reflected the Montana Legislature's intention to dismantle barriers to Native Americans attempting to register to vote by removing the requirement that "tribal photo identification cards" be "current and valid" for voter registration purposes. However, because the Court's order enjoins the entirety of SB 169—instead of only SB 169 § 2—expired "tribal photo identification cards" can no longer be used as stand-alone forms of ID when an individual is attempting to register to vote.

In short, the preliminary injunction grants relief not requested by any party and goes far beyond what is necessary to prevent the harms alleged by Plaintiffs. *See Simpkins*, ¶ 19 (a district court is "only empowered to grant relief no broader than necessary to cure the effects of the harm caused by the violation"). Indeed, the unnecessarily broad scope of the injunction harms the third parties Plaintiffs all ostensibly seek to protect. Additionally, because SB 169 contains a severability clause, there can be no argument that enjoining enforcement of the entire statute is necessary to protect Plaintiffs from the alleged harm. *See* SB 169, § 6. For these reasons, the Court should modify the scope of the preliminary injunction.

B. The Court should modify its preliminary injunction as to HB 506 and HB 530.

1. The Court's Order restrains and prohibits the Secretary from enforcing any aspect of HB 506 § 1 and HB 506 § 3 even though Plaintiffs did not seek injunctive relief against these sections.

The injunction against the Secretary is also overly broad as to HB 506. HB 506 contains three relevant sections. HB 506 § 1 amends Montana Code Annotated § 5–1–115 to revise the

redistricting criteria utilized to establish legislative and congressional districts. HB 506 § 2—the only provision challenged by a Plaintiff in this case—amends Montana Code Annotated § 13–2–205 to revise when ballots may be issued to individuals. HB 506 § 3 amends Montana Code Annotated § 13–15–401 to revise the timeframe within which county canvassers must meet to complete the canvas of returns. The argument stated above as to SB 169 applies with equal force here. The Montana Youth Action Plaintiffs—the sole challenger to HB 506—did not offer any argument as to why either HB 506 § 1 or HB 506 § 3 are unconstitutional, nor did the Montana Youth Action Plaintiffs target these provisions in their request for injunctive relief. Additionally, because HB 506 contains a severability clause, there can be no argument that enjoining enforcement of the entire statute is necessary to protect Plaintiffs from the alleged harm. *See* HB 506, § 5. The Court should also modify its injunction to the specific circumstances of this case. *Simpkins*, ¶ 19 (citations omitted).

2. The Court's Order restrains and prohibits the Secretary from enforcing any aspect of HB 530 § 1 even though Plaintiffs did not seek injunctive relief against this section.

HB 530 consists of two parts. HB 530 § 1 directs the Secretary to (i) "adopt rules defining and governing election security"; (ii) annually assess compliance with election security rules; and (iii) provide an annual summary report on statewide election security. Meanwhile, HB 530 § 2 directs the Secretary to adopt an administrative rule regulating certain aspects of third-party ballot collection in Montana. The Montana Democratic Party Plaintiffs are the sole challengers to HB 530 § 1, but they offered no argument as to why injunctive relief was warranted and made no showing of immediate harm. But the Court's Order restrains and prohibits the Secretary from taking any action under HB 530 § 1. As stated above, an injunction that is not tailored to remedy

the specific harm alleged by the moving party is invalid. *See Simpkins*, ¶ 19 (citations omitted). Additionally, because HB 530 contains a severability clause, there can be no argument that enjoining enforcement of the entire statute is necessary to protect Plaintiffs from the alleged harm. *See* HB 530 § 4. The Court should modify its injunction as to HB 530 to target only HB 530 § 2—the provision analyzed by the Plaintiffs in their request for injunctive relief.

Conclusion

For the reasons stated above, the Secretary requests the Court: (i) suspend the preliminary injunction issued on April 6, 2022 pending the Secretary's pending appeal to the Montana Supreme Court; and/or (ii) modify the scope of the Court's preliminary injunction order. The Secretary respectfully requests expedited review of this motion.

Dated this 8th day of April, 2022.

By *Dale Schowengerdt*

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