No. 24-____

In the Supreme Court of the United States

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

v.

MONTANA DEMOCRATIC PARTY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Montana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In state court cases implicating the Elections Clause, this Court has a "duty to safeguard limits imposed by the Federal Constitution." *Moore* v. *Harper*, 600 U.S. 1, 35, 37 (2023). This Court alone can ensure that state courts do "not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution." *Id.* at 37. But it has not yet adopted any "test by which [it] can measure state court interpretations of state law" in those kinds of cases. *Id.* at 36.

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The questions presented are:

1. When this Court reviews a state court's decision invalidating state Elections Clause legislation, what standard does it apply to decide whether that decision exceeds the bounds of ordinary judicial review?

2. Did the Montana Supreme Court's split decision below exceed the bounds of ordinary judicial review by invalidating under the Montana Constitution two Montana election integrity provisions—one setting the voter-registration deadline at noon the day before Election Day, and another requiring the Secretary to promulgate regulations banning paid absentee ballot collection?

LIST OF PARTIES TO THE PROCEEDINGS

Respondents Mitch Bohn, Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe, Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group were the plaintiffs in the district court and the appellees in the Montana Supreme Court.

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STATEMENT OF RELATED PROCEEDINGS

Montana Supreme Court

Montana Democratic Party, et al. v. Jacobsen, No. DA 22-0667 (Mar. 27, 2024).

Montana Thirteenth Judicial District Court, Yellowstone County

Montana Democratic Party, et al. v. Jacobsen, No. DV 21-0451 (Sept. 30, 2022).

Montana Democratic Party, et al. v. Jacobsen, No. DV 21-0451 (July 27, 2022).

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INTRODUCTION

The Elections Clause "expressly vests power to carry out its provisions in 'the Legislature' of each State." *Moore* v. *Harper*, 600 U.S. 1, 34 (2023). Montana's Legislature exercised that power in 2021 to pass two election-integrity laws relevant here. The first moved Montana's voter-registration deadline for state and federal elections from the close of polling on election day to noon the day before. The second instructed Montana's Secretary of State, the Petitioner here, to adopt rules banning paid absentee ballot collection. But in a split 5-2 decision, a majority of the Montana Supreme Court invalidated both provisions under the Montana Constitution.

Whatever deference this Court would ordinarily give to a state court's decision interpreting state law is "tempered" when "required by [this Court's] duty to safeguard limits imposed by the Federal Constitution." *Id.* at 35. State courts cannot "read state law in such a manner as to circumvent federal constitutional provisions," *id.*, and "arrogate to themselves the power vested in state legislatures to regulate federal elections," *id.* at 36.

But that's what happened here. The majority opinion's "cascading analytical sleight of hand" and "faulty constitutional analysis provides analytical cover, under the guise of constitutional conformance review, to second-guess the facially non-discriminatory public policy determinations of the Legislature under Mont. Const. art. IV, §3." Pet'r's App. ("Pet.App.") 109a, ¶148 (Sandefur, J., concurring in part, dissenting in part). This Court's review is needed to correct that

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"eva[sion]" of "federal law." *Moore*, 600 U.S. at 34. The Court should grant the petition.

OPINIONS BELOW

The Montana Supreme Court opinion (Pet.App.1a-149a), is published at 545 P.3d 1074 (Mont. 2024). The Montana district court's September 22, 2022 (Pet.App.150a-350a) and July 27, 2022 (Pet.App.351a-375a) opinions and orders are unpublished.

JURISDICTION

The Montana Supreme Court entered judgment on March 27, 2024. Pet.App.1a. On June 13, 2024, Montana applied for an extension of time to file a petition for a writ of certiorari. Justice Kagan granted that application, extending Montana's time to file a petition to and including August 24, 2024. Because that is a Saturday, Sup. Ct. R. 13.5 extends the deadline to August 26, 2024. Montana timely filed this petition. This Court has jurisdiction under 28 U.S.C. §1257(a).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[1]

U.S. Const., art. I, §4, cl.1:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or

[1] The Montana election-integrity legislation invalidated by the Montana Supreme Court majority below—Montana House Bills 176 ("HB176"), 506 ("HB506"), 530 ("HB530") and Senate Bill 169 ("SB169")—is included in the Appendix. Pet.App.387a-421a.

> alter such Regulations, except as to the Places of chusing Senators.

Mont Const., art. II, §13:

> All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Mont Const., art. IV, §3:

> **Elections.** The legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuse of the electoral process.

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STATEMENT OF THE CASE

A. Before *Moore*, at least four members of this Court recognized that "the extent of a state court's authority to reject rules adopted by a state legislature for use in conducting federal elections" presented "an exceptionally important and recurring question of constitutional law." *Moore* v. *Harper*, 142 S. Ct. 1089, 1089 (2022) (Alito, J., joined by Thomas, J., and Gorsuch, J., dissenting from denial of application for stay); *see also id.* at 1090 (collecting cases where the occasion to address the issue was "inopportune" but noting "[w]e will have to resolve this question sooner or later"); *id.* at 1089 (Kavanaugh, J., concurring in denial of application for stay) (agreeing that this "issue is almost certain to keep arising until the Court definitively resolves it").

B. This Court partially resolved that recurring issue last year. *See Moore*, 600 U.S. at 34. On the merits,

the Elections Clause doesn't "exempt state legislatures from the ordinary constraints imposed by state law"—including state constitutional law—but "state courts do not have free rein.*" Id.* That is, the Election Clause's express vesting of "power to carry out its provisions in 'the Legislature' of each state" was "a *deliberate choice* that this Court must respect." *Id.* (emphasis added). And that requires ensuring that state court interpretations of state law "do not evade federal law." *Id.*

Moore highlighted three areas "where the exercise of federal authority or the vindication of federal rights implicates questions of state law"—private property rights under the Takings Clause, state contract law and the Contracts Clause, and cases implicating the adequate-and-independent-state-grounds doctrine. *Id.* at 34-35. In each of these areas, "the concern [is] that state courts might read state law in such a manner as to circumvent federal constitutional provisions," so federal courts "temper[]" their deference to state court interpretations "when required by [their] duty to safeguard limits imposed by the Federal Constitution." *Id.* at 35.

Moore's bottom line: state courts may "apply state constitutional restraints when legislatures" act under their Elections Clause authority, but they "may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude on the role specifically reserved to state legislatures by [the Elections Clause]." *Id.* at 37; *see also id.* at 36 (state courts may not "arrogate to themselves the power vested in state legislatures to regulate federal elections"). But the Court left open the question of *how* to determine whether a state

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court has transgressed that boundary and impermissibly interfered with a state legislature's authority.

Justice Kavanaugh joined the Court's opinion in full but wrote separately to suggest the appropriate "standard a federal court should employ to review a state court's interpretation of state law in a case implicating the Elections Clause." *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring). He settled on Chief Justice Rehnquist's standard: "whether the state court 'impermissibly distorted' state law 'beyond what a fair reading required.'" *Id.* (quoting *Bush* v. *Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)). That standard, he argued, should apply to both state interpretations of state statutes *and* state constitutions. *Id.* at 39. And in reviewing state court interpretations of state law, courts "necessarily must examine the law of the State as it existed prior to the action of the [state] court." *Id.* (quoting *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring)).

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C. This case arises from legislation the Montana Legislature passed in 2021 to secure and protect the integrity of state and federal elections. The Montana Democratic Party and aligned interest groups challenged four such laws in Montana state court. Here, Petitioners seek relief from this Court as to only two of them: HB176 and HB530. HB176 amended Mont. Code Ann. §13-2-304 to move Montana's voter-registration deadline from the close of polls on election day to noon the day before. Pet.App.388a. HB530, in turn, required the Montana Secretary of State to promulgate regulations banning paid absentee ballot collection. Pet.App.418a.

After a nine-day bench trial, the district court found both bills facially unconstitutional under the Montana Constitution. Pet.App.6a, ¶10; Pet.App.76a, ¶129 (Sandefur, J., concurring in part, dissenting in part) (dissenting from majority's holding that HB176 and HB530 were "facially unconstitutional"). The district court held that both bills violated Montana's fundamental right to vote. Pet.App.6a, ¶10.

Is a split 5-2 decision,[2] the Montana Supreme Court affirmed. Pet.App.3a, ¶4. In doing so, the majority applied for the first time a new standard to election-integrity legislation that in its view balanced two provisions of the Montana Constitution. The majority first recognized that the Montana Constitution expressly protects the right to vote. Pet.App.8a, ¶13 (quoting Mont. Const. art. II, §13 ("elections shall be free and open" and "no power … shall … interfere to prevent the free exercise of the right of suffrage")). But the Montana Constitution also requires the Montana Legislature to "provide by law the requirements for residence, registration, absentee voting, and [election] administration" and to "insure the purity of elections." Pet.App.8a, ¶13 (quoting Mont. Const. art. IV, §3).

The majority thus sought to weigh the right to vote against the Legislature's duty to regulate elections. Pet.App.8a-9a, ¶¶13-14. In doing so, the majority rejected the federal *Anderson/Burdick* framework as a

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[2] Chief Justice McGrath and Justices McKinnon, Shea, and Gustafson joined the majority opinion, Pet.App.70a, and in her concurring opinion, Justice Baker agreed that HB176 and HB530 were facially unconstitutional, Pet.App.73a, ¶124. Justices Sandefur and Rice disagreed that HB176 and HB530 were facially unconstitutional. Pet.App.76a, ¶129; Pet.App.149a.

model, reasoning that *Anderson/Burdick* "now often gives undue deference to state legislatures so as not to 'transfer much of the authority to regulate election procedures from the States to the *federal* courts.'"[3] Pet.App.9a, ¶15 (emphasis in original) (quoting *Brnovich* v. *Democratic Nat'l Comm.*, 594 U.S. 647, 673-74 (2021)).

After rejecting *Anderson/Burdick*, the majority embarked on a meandering trek through state constitutional convention transcripts and legislative intent to find that the Montana Constitution secured "greater protection of the right to vote than the United States Constitution." Pet.App.11a, ¶17; *see also* Pet.App.11a-20a, ¶¶18-27. And in lieu of the *Anderson/Burdick* framework—which the majority decried as "somewhat amorphous," Pet.App.22a, ¶32—the majority held that "when a law *impermissibly interferes* with a fundamental right" it applies strict scrutiny. Pet.App.23a-24a, ¶34 (emphasis added). Applying that test requires a court "to examine the degree to which the law infringes upon" the right to vote. Pet.App.24a, ¶34. Strict scrutiny, the majority said, is inappropriate when the law when the law "only minimally burden[s] it." Pet.App.24a, ¶35. But how to separate impermissible interference from minimal burdens? The majority didn't say.

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[3] At least 18 States likely apply some form of the *Anderson/Burdick* framework for state constitutional right-to-vote challenges. *See* Emily Lau, *Explainer: State Const. Standards for Adjudicating Challenges to Restrictive Voting Laws*, STATE DEMOCRACY RSCH. INITIATIVE, UNIV. OF WISC. LAW SCH., at 2 (Oct. 3, 2023), https://perma.cc/4BZ5-YSBZ.

The majority held that by shifting the deadline for voter registration from the close of polls on election day to noon the day before, HB176 impermissibly interfered with Montanans' right to vote and thus had to survive strict scrutiny. Pet.App.38a, ¶63. Even though the Montana Constitution provides only that the legislature "*may* provide for a system of poll booth registration," *see* Mont. Const. art. IV, §3—which the majority recognized was "permissive language" that doesn't require election day registration, Pet.App.40a, ¶67—the majority still found that election-day registration was required if possible. *See* Pet.App.41a, ¶68. Why? Because "the Framer's intent"—not the constitutional text—"controls our interpretation of a constitutional provision." Pet.App.40a, ¶66. And the majority's view of that intent—which was not expressed in *and ultimately contrary to* the enacted constitutional text, *see* Pet.App.40a-42a, ¶67—clearly established (in the majority's view) that election day registration should be available. Pet.App.41a, ¶68.

The majority also explained that HB176 impermissibly burdened the right to vote because, since its adoption in 2005, more than 70,000 Montanans have used election day registration and thus most of these voters would be disenfranchised. Pet.App.42a-44a, ¶¶70-71; Pet.App.45a ¶74. This, the majority said, doesn't "mean that once the Legislature has expanded the right to vote it may never backtrack if the expansion was unwise." Pet.App.45a ¶74. The catch: the legislature just needs to show that the "backtrack[ing]" law survives strict scrutiny. *See* Pet.App.45a ¶74.

The majority also held that HB530—which required the Secretary to adopt an administrative rule

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prohibiting the receipt of a pecuniary benefit in exchange for collecting and distributing ballots—impermissibly interferes with the right to vote, even though the Secretary hadn't then (and still hasn't) promulgated a rule. Pet.App.51a-52a, ¶87; Pet.App.53a, ¶90. And in this *facial* challenge, *see* Pet.App.7a, ¶11 ("facial challenge of a statute *must show* that a law is unconstitutional in *all its applications*" (emphasis added)), the majority held that HB530 was unconstitutional because the majority's read of the factual record showed that there are *some* unconstitutional applications—specifically with respect to Native American voters. *See* Pet.App.55a-57a, ¶97-99; Pet.App.57a-58a, ¶101.

Justice Sandefur, joined by Justice Rice, dissented from the majority's holdings on HB176 and HB530. They concluded that neither HB176 nor HB530 is facially unconstitutional. Pet.App.76a, ¶129. The dissent first took aim at the majority's conclusion that the Montana Constitution provides more protection to the right to vote than the United States Constitution, arguing that both protect the right to the same degree. Pet.App.79a-93a, ¶¶130-40. As for the challenged provisions, the dissent observed that the majority's faulty analysis "clear[ed] the … way for [it] to subjectively second-guess the Legislature, with *no deference* to legislative policy determinations" in service of the legislature's state constitutional duties. Pet.App.110a, ¶148 (emphasis added). Despite the majority's assurances that election-day registration isn't "baked in" to the Montana Constitution, the dissent saw that the majority's "flawed analysis clearly manifests that it is … for this Court in its infinite wisdom—not the Legislature in accordance with its *express constitutional*

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authority—to decide whether any later legislative push-back is wise … without any deference to the Legislature." Pet.App.121a, ¶158. The majority's holding cited no "credible support" for "the *legal proposition* that the fundamental right to vote necessarily includes the *most convenient or most preferable way to vote*, particularly in light of the fact that a clear majority of the [Montana] Framers refused to enshrine election day registration into [Montana's] new [1972] Constitution, even in the face of a then-prevailing 40-day voter registration deadline." Pet.App.119a, ¶157.

Beyond that, the majority's holding threatens Montana's separation of powers. Courts, the dissent correctly concluded, do not have the "constitutional power or authority to act as a 'super-legislature' second-guessing 'the wisdom, need, and propriety' of legislative enactments'" that may "regulate the time, place, and manner of [the] exercise of the right to vote." Pet.App.147a, ¶171. But here, "in an unprecedented exercise of unrestrained judicial power" the majority struck down "public policy determinations made by the Legislature in the exercise of *its constitutional discretion* … on the most dubiously transparent of constitutional grounds." Pet.App.148a, ¶171.

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REASONS FOR GRANTING THE PETITION

A year ago, this Court held that when state courts review state laws implicating the Elections Clause, they "may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Moore,* 600 U.S. at 36. But the Court declined to adopt a "test by which [it] can measure state

court interpretations of state law" in those cases. *Id.* at 37.

The Montana Supreme Court's opinion below presents an ideal vehicle to resolve this "important question" implicating federal law "that has not been, but should be, settled by this Court." Sup. Ct. R. 10. The Court should grant the petition and reverse the judgment below with respect to HB176 and HB530.

I. This case squarely presents the question this Court left open in *Moore v. Harper*—what are the "ordinary bounds of judicial review"?

The Montana Supreme Court's majority opinion invalidated two state election integrity provisions based on a "significantly flawed constitutional analysis," Pet.App.119a, ¶158 (Sandefur, J., concurring in part, dissenting in part), that "clearly manifests that it is and will be for this [Montana Supreme] Court in its infinite wisdom—not the Legislature in accordance with its express constitutional authority—to decide whether any" changes to election-integrity laws are "wise or 'unwise,' just as here, without any deference to the Legislature," Pet.App.121a, ¶158 (Sandefur, J., concurring in part, dissenting in part). The decision below thus squarely raises the question this Court left unanswered in *Moore*. This Court should grant the petition and answer it.

A. *Moore*'s decision to preserve federal-court review of state-court decisions implicating the Elections Clause rests on correct first principles. Even though this Court "generally defer[s] to state courts on the interpretation of state law," there are still "areas in

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which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring). The Elections Clause is a classic example. Because the Constitution specifically delegates power to regulate federal elections to state *legislatures*, *see* Art. I, §4, cl. 1, "the text of the election law itself"—"not just its interpretation" by a state court—"takes on independent significance." *Bush*, 531 U.S. at 113. (Rehnquist, C.J., concurring). The act of reviewing state-court decisions interpreting the text of state laws governing federal elections thus falls within this Court's "duty to safeguard limits imposed by the Federal Constitution." *Moore*, 600 U.S. at 35.

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But this Court has not yet identified the standard that applies to federal-court review of a state-court decision interpreting a state law enacted under the Elections Clause. That's not for lack of trying. The opinions in *Moore* acknowledged prior efforts to discern an answer. *See id.* at 36; *id.* at 38-39 (Kavanaugh, J., concurring).

Moore first pointed to Chief Justice Rehnquist's statement in *Bush* v. *Gore* that state court decisions implicating the Elections Clause exceed the bounds of ordinary judicial review when they "impermissibly distort" state law "beyond what a fair reading required." 600 U.S. at 36 (quoting *Bush*, 531 U.S. at 115). Chief Justice Rehnquist's formulation captures "essentially the same point" as other potential tests discussed in *Moore*—the views of Justice Souter and the Solicitor General. *Id.* at 39 (Kavanaugh, J., concurring). In Justice Souter's view, a state court decision exceeds the bounds of ordinary judicial review when it "has

displaced the state legislature's provisions." *Bush*, 531 U.S. at 130 (Souter, J., dissenting). To decide that issue, a federal court must look at whether "the law as declared" by the state court is "different from the provisions made by the legislature," to which the federal Constitution "commits responsibility." *Id.* Though Justice Souter concluded that the Florida Supreme Court's decisions in that case were "within the bounds of reasonable interpretation," and "the law as declared" was "consistent with Article II," *id.* at 131, his opinion "implies that, had the state court's ruling gone beyond the bounds of reasonable interpretation, it would have violated the legislature's prerogatives under Article II." Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 518 (2021); *accord Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) ("As I understand it, Justice Souter's standard, at least the critical language, is similar: whether the state court exceeded 'the limits of reasonable' interpretation of state law."). And the Solicitor General in *Moore* "proposed another similar approach: whether the state court reached a 'truly aberrant' interpretation of state law." 600 U.S. at 38-39 (Kavanaugh, J., concurring) (quoting Br. for United States as Amicus Curiae 27).

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Because those formulations "convey essentially the same point," this Court should adopt Chief Justice Rehnquist's "straightforward" standard, *id.* at 39 (Kavanaugh, J., concurring), and hold that a state court exceeds the ordinary bounds of judicial review when its decision "impermissibly distort[s]" a state election law "beyond what a fair reading required." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring). Applying this standard will "ensure that state court interpretations of" state law governing federal elections "do

not evade federal law." *Moore,* 600 U.S. at 34. After all, a "significant departure" from a state legislature's "legislative scheme" for regulating elections "presents a federal constitutional question." *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring). And "federal courts must not abandon their own duty to exercise judicial review." *Moore,* 600 U.S. at 37.

B. This Court's precedents show at least two ways that a state court's decision about a state election law "impermissibly distort[s]" the state constitution "beyond what a fair reading requires." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

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First, this Court has reviewed whether a state court has properly applied a state constitutional provision that *plainly allows (or forbids)* a state legislature's exercise of its Elections Clause authority. *Ohio ex rel. Davis v. Hildebrant* is illustrative. There, the Ohio Supreme Court allowed a state law drawing new congressional districts to be put to a popular vote by referendum. 241 U.S. 565, 566 (1916). That decision fell within the bounds of ordinary judicial discretion because the Ohio Constitution plainly allowed the state's voters "to approve or disapprove by popular vote any law enacted by the general assembly"—even redistricting laws. *Id.*

Smiley v. Holm cut the other way. 285 U.S. 355 (1932). There, the Minnesota Supreme Court held that the Governor violated the Elections Clause by exercising the veto power granted to him in the state constitution on a redistricting map. This Court reversed. Its reasoning shows that the Minnesota court's holding exceed the bounds of ordinary judicial review because state legislatures enacting laws under the Elections

Clause can be forced to follow the "*manner* … in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 367-68 (emphasis added). When a state constitution specifies a plain mechanism of state lawmaking—such as a gubernatorial veto—it exceeds the ordinary bounds of judicial review to conclude that this plain mechanism does not also apply to Elections Clause legislation.

Second, this Court has examined whether a state court has "unconstitutionally intrude[d] upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution," *Moore*, 600 U.S. at 37, by interpreting a *facially ambiguous* state constitutional provision to invalidate an unambiguous state election law that law does not plainly conflict with that ambiguous constitutional text. The paradigmatic case in this category is *Bush* v. *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam). There, this Court vacated a Florida Supreme Court decision that extended a statutory 7-day ballot-count deadline to 12 days based in part on the textually ambiguous "right to vote set forth in the Declaration of Rights of the Florida Constitution." *Id.* at 75.

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In these cases, a federal court safeguards federal power by reviewing state decisions that rest on open-ended or "vague" provisions in state constitutions—such as "free and equal" clauses in a state constitution—to invalidate a state elections law. *See Republican Party v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting from denial of certiorari). A "state constitutional provision guaranteeing 'free and equal' elections" does not give states courts "the authority to override" "very specific and unambiguous

rules adopted by the legislature for the conduct of federal elections." *Id. at* 739 (Alito, J., joined by Gorsuch, J., dissenting from denial of certiorari); *see also Republican Party v. Boockvar*, 141 S. Ct. 1 (2020) (statement of Alito, J., joined by Thomas, J., and Gorsuch, J.) (casting doubt on state court decision that "justified its decree as necessary to protect voters' rights under the Free and Equal Elections Clause of the State Constitution").[4]

This second category emphasizes that state courts must "respect" the Framers' "deliberate choice" to "expressly vest[] power" to regulate federal elections in "the Legislature." *Moore*, 600 U.S. at 34. The Elections Clause "confer[s] on state legislatures, not state courts, the authority to make rules governing federal elections." *Boockvar*, 141 S. Ct. at 2 (statement of Alito, J.). Its "comprehensive words" let state legislatures "provide a complete code for congressional elections." *Smiley*, 285 U.S. at 366. That clause would be

[4] And many state courts rightly decline to apply their "free and equal" or "free and open" elections clauses to state laws regulating the time, place, and manner of elections. *See, e.g.*, *Thurston* v. *League of Women Voters of Ark.*, 687 S.W.3d 805, 814 (Ark. 2024) (refusing to apply Arkansas' "free and equal election clause" to invalidate state laws "regulating the manner and method of absentee voting," "photo identification requirements," and "anti-influence prohibition[s]"); *Crum* v. *Duran*, 390 P.3d 971, 972, 973-77 (N.M. 2017) (refusing to apply New Mexico's Free and Open Clause to invalidate state law requiring primary votes to designate affiliation with major political party at least 28 days before the primary election); *League of Women Voters of Del., Inc.* v. *State Dep't of Elections*, 250 A.3d 922, 925, 935-38 (Del. Ch. 2020) (refusing to apply Delaware's "free and equal" elections clause to invalidate an emergency law that extended the right to vote by mail but retained existing deadlines).

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rendered "meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Boockvar*, 141 S. Ct. at 2 (statement of Alito, J.); *see also Degraffenreid*, 141 S. Ct. at 733 (dissenting from denial of certiorari) ("Because the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections, petitioners presented a strong argument that the Pennsylvania Supreme Court's decision violated the Constitution by overriding 'the clearly expressed intent of the legislature.'") (quoting *Bush*, 531 U.S. at 113 (Rehnquist, C. J., concurring)); *Palm Beach Cnty.*, 531 U.S. at 76.

C. For both categories of cases, this Court should use the usual tools of judicial interpretation. It reviews whether the state court "employ[ed] the traditional tools of judicial decisionmaking." *Biden* v. *Nebraska*, 600 U.S. 477, 507 (2023). The "first and most important rule" in judicial interpretation, whether constitutional or statutory, "is to heed the text." *United States* v. *Rahimi*, 144 S. Ct. 1889, 1910-11 (2024) (Kavanaugh, J., concurring); *e.g.*, *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) ("[T]he text of the statute controls our decision."). And here, because the Elections Clause delegates authority to regulate federal elections specifically to the state *legislatures*, "the text of the election law" "takes on independent significance." *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring). Thus a court must "give effect, if possible, to every clause and word of [the] statute." *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883).

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A court should also look at a law's context. *See Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring) ("In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court."). And it may properly look at history. *See Rahimi*, 144 S. Ct. at 1912 (Kavanaugh, J., concurring) ("When properly applied, history helps ensure that judges do not simply create … meaning 'out of whole cloth.'" (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1183 (1989))). Indeed, a court "must stick close to the text and the history, and their fair implications." *Id.* (quoting Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 8 (1971)).

If a state elections law's text is unclear, a court may employ other "interpretative tool[s]." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461 (2002). For example, a court can "turn to other canons of interpretation." *Green* v. *Brennan*, 578 U.S. 547, 554 (2016); *see also, e.g.*, *Nat'l Assn. of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 668-69 (2007) (employing text, history, and canon against surplusage); *City of Arlington* v. *FCC*, 569 U.S. 290, 309 (2013) (Breyer, J., concurring in part and concurring in the judgment) (explaining that "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction" are "relevant" in interpreting a law).

The "judicial power" is also "constrained" by "[r]ules about the deference due the legislative process." *June Med. Servs. L.L.C.* v. *Russo*, 591 U.S. 299, 409 (2020) (Gorsuch, J., dissenting). It is "well settled"

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that court "must give the widest deference to legislative judgments that concern the character and urgency of the problems with which the State is confronted." *In re Gault*, 387 U.S. 1, 70 (1967) (Harlan, J., concurring in part and dissenting in part). For it is "the legislature, not the judiciary" that is the "main guardian of the public needs." *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

"When judges disregard these principles and enforce rules inspired only by extratextual sources and [their] own imaginations, they usurp a lawmaking function reserved for the people's representatives." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harv. Coll.*, 600 U.S. 181, 310 (2023) (Gorsuch, J., joined by Thomas, J., concurring) (quotation marks omitted). The ordinary bounds of judicial review forbid such "judicial improvisation." *Id.* at 310.

II. The Montana Supreme Court's decision falls outside the ordinary bounds of judicial review.

Attempting to secure its state's elections and prevent fraud, the Montana Legislature enacted two common-sense election provisions here. HB176 shifts the voter registration deadline for most people from the close of polls on election day to noon the day before the election. Pet.App.4a, ¶6. HB530 directs the Secretary of State to promulgate rules prohibiting paid absentee ballot collection. Pet.App.5a, ¶7. By invalidating these modest legislative judgments based on ambiguous provisions of the Montana Constitution, the Montana Supreme Court has "strayed beyond the limits derived from the Elections Clause" and claimed for itself "the

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power vested in state legislatures to regulate federal elections." *Moore,* 600 U.S. at 36.

In its decision below, the Montana Supreme Court majority "transgress[ed] the ordinary bounds of judicial review" at each turn. *Id.* First, the majority "impermissibly distort[ed]" state law "beyond what a fair reading required" by failing to employ the traditional tools of judicial decisionmaking. *See Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring). As to the registration-deadline provision, the majority contorted the Montana Constitution's text and the history of the Montana Constitutional Convention to reach its desired result. Though the majority acknowledged that the Montana Constitution itself provides that the Legislature "*may* provide for a system of [election day registration]," Pet.App.40a, ¶65 (emphasis in original), it nevertheless concluded that this permissive language was, in fact, mandatory. Pet.App.40a-41, ¶¶67-68. As the convention history shows, the Montana Constitution initially "directed the Legislature to implement election day registration with mandatory language." Pet.App.40a, ¶67 ("The Legislature shall provide for a system of [election day registration]."). But soon after, the Framers "reopened the debate" because, in the majority's view, they were "uncomfortable with the mandatory language in case election day registration turned out to be unworkable." Pet.App.41a, ¶67. The Framers thus "overwhelmingly" rejected the proposed mandatory language and "replaced [it] with permissive language." Pet.App.41a, ¶67. Despite this clear text and history to the contrary, the court nevertheless concluded that the "the Framers' intent was that election day registration" should be mandatory "as long as it was workable in Montana." Pet.App.41a, ¶68. This

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amounts to little more than "faulty constitutional analysis" that "provides analytical cover, under the guise of constitutional conformance review, to second-guess the facially non-discriminatory public policy determinations of the Legislature under Mont. Const. art. IV, §3." Pet.App.109a, ¶148 (Sandefur, J., concurring in part, dissenting in part).

Second, the Montana Supreme Court majority "impermissibly distort[ed]" state law "beyond what a fair reading required," *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring), by invalidating the challenged provisions based on a facially ambiguous state constitutional provision providing that "elections shall be free and open." Pet.App.8a, ¶13; Pet.App.1a, ¶19. The majority relied on the state Constitution's "strong protection of the right to vote" allegedly found in the "free and open" provision. Pet.App.12a, ¶19; *see* Mont. Const. art. II, §13 ("All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."). This is exactly the kind of "vague" provision that members of this Court have repeatedly said does not give state courts "the authority to override" "very specific and unambiguous rules adopted by the legislature for the conduct of federal elections." *Degraffenreid*, 141 S. Ct. at 739 (Alito, J., joined by Gorsuch, J., dissenting from denial of certiorari). Nor does the decision below "respect" the Framers' "deliberate choice" to "expressly vest[] power" to regulate federal elections in "the Legislature." *Moore*, 600 U.S. at 34.

This Court need not take Petitioner's word for it. In dissent, Justice Sandefur explained that the majority opinion employed "an unprecedented exercise of

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unrestrained judicial power" and opted to "override public policy determinations made by the Legislature in the exercise of its constitutional discretion, however ill-advised to some," to strike "down three distinct legislative enactments on the most dubiously transparent of constitutional grounds." Pet.App.148a, ¶171 (Sandefur, J. concurring in part and dissenting in part). In short, the Montana Supreme Court has assumed a de facto new role as the final and exclusive arbiter of all federal election legislation in Montana. This Court's review is urgently needed to determine whether that court has "arrogate[d] to [itself] the power vested in" the Montana Legislature "to regulate federal elections." *Moore*, 600 U.S. at 36.

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III. This case is an ideal vehicle for resolving these exceptionally important questions.

This is an ideal vehicle for answering the questions presented for at least four interrelated reasons.

First, prior petitions have presented these questions in the shadow of a looming (or just-finished) election. *See, e.g.*, *Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting from denial of certiorari); *Boockvar*, 141 S. Ct. at 2 (statement of Alito, J., joined by Thomas, J., and Gorsuch, J.). This petition, in contrast, does not. Nor does Petitioner seek emergency relief. So this Court can answer these questions after plenary merits briefing and oral argument through its regular-order deliberative process.

Second, the vehicle problems that prevented answering these questions in *Moore* do not exist here. There, "[t]he legislative defendants did not meaningfully present the issue in their petition for certiorari

or in their briefing, nor did they press the matter at oral argument." 600 U.S. at 36. The *Moore* petitioners likewise disclaimed that they were arguing that "North Carolina's Supreme Court did not fairly interpret its State Constitution." *Id.* at 37. Neither hurdle exists here. This petition squarely presses the argument that the Montana Supreme Court's majority opinion improperly interpreted the Montana Constitution in ways that resulted in the majority opinion's intruding on the Montana Legislature's Election Clause authority. If the Court grants this petition, Petitioner will also focus merits briefing and oral argument on those errors.

Third, this Court need not rely on Petitioner's arguments alone to find that those errors in the Montana Supreme Court majority's opinion exceeded the bounds of ordinary judicial review. Two dissenting members of that court explained at length why the majority opinion constitutes "an unprecedented exercise of unrestrained judicial power overriding public policy determinations made by the Legislature in the exercise of its constitutional discretion." Pet.App.148a, ¶171 (Sandefur, J., concurring in part, dissenting in part). This "faulty constitutional analysis" merely "provides analytical cover, under the guise of constitutional conformance review, to second-guess the facially non-discriminatory public policy determinations of the Legislature under Mont. Const. art. IV, §3." Pet.App.109a, ¶148. By granting this petition, this Court can rely on reasoning from members of the Montana Supreme Court itself to conclude that the majority "read state law in such a manner as to circumvent federal constitutional provisions." *Moore*, 600 U.S. at 35.

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Finally, given the increased focus nationwide on safeguarding the security of state and federal elections, these questions will continue to arise until this Court resolves them. Petitioner seeks review of holdings invalidating registration-deadline changes and rules governing ballot collectors. These are mine-run election-integrity issues throughout the country. *See, e.g.*, N.Y. State Bd. of Elec., *Registration and Voting Deadlines* (last visited Aug. 21, 2024), shorturl.at/FlIqz (New York voters must register 10 days before the general election); Sec. of Commonwealth of Mass., *Registering to Vote* (last visited Aug. 21, 2024), shorturl.at/FN1IW (Massachusetts voters must register 10 days before the general election); Conn. Gen. Stat. Ann. §9-140b (limiting ballot collection to family member or designated caregiver); Mich. Comp. Laws Ann. §168.764a(1) (Step 6(c) limits ballot collection to immediate family member or household member). That means both that disputes over issues like these are "almost certain to keep arising until the Court definitively resolves" them, *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay), and that clarifying them now could forestall future requests for this Court's intervention in less ideal time constraints.

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CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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AUGUST 2024

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APPENDIX

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APPENDIX A — Opinion of the Supreme Court of the State of Montana, Filed March 27, 2024

DA 22-0667

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2024 MT 66

MONTANA DEMOCRATIC PARTY AND MITCH BOHN, WESTERN NATIVE VOICE, MONTANA NATIVE VOTE, BLACKFEET NATION, CONFEDERATED SALISH AND KOOTENAI TRIBES, FORT BELKNAP INDIAN COMMUNITY, AND NORTHERN CHEYENNE TRIBE, MONTANA YOUTH ACTION, FORWARD MONTANA FOUNDATION, AND MONTANA PUBLIC INTEREST RESEARCH GROUP,

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, IN HER OFFICIAL CAPACITY AS MONTANA SECRETARY OF STATE,

Defendant and Appellant.

Appeal from the District Court of the Thirteenth Judicial District, In and For the County of Yellowstone, Cause No. DV 21-0451 Honorable Michael G. Moses, Presiding Judge.

Submitted on Briefs: October 25, 2023
Decided: March 27, 2024

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Appendix A

OPINION

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Montana Secretary of State Christi Jacobsen (Secretary) appeals from a July 27, 2022 order of the Thirteenth Judicial District Court, granting summary judgment on plaintiffs' and appellees' claim that House Bill 506 (HB 506) is unconstitutional. The Secretary also appeals from a September 30, 2022 order finding House Bill 176 (HB 176), House Bill 530, § 2 (HB 530), and Senate Bill 169, § 2 (SB 169) unconstitutional. The challenged portion of HB 506 amended § 13-2-205, MCA,[1] which restricted access to absentee ballots to voters currently qualified to vote, where before, those who would be qualified to vote by election day could access an absentee ballot during the early voting period. *See* 2021 Mont. Laws ch. 531. The challenged portion of HB 176 amended § 13-2-304, MCA, which changed the voter registration deadline from the close of polls on election day to noon the day before the election. *See* 2021 Mont. Laws ch. 244. HB 530, § 2, chaptered as 2021 Mont. Laws ch. 534, required the Secretary to adopt administrative rules banning paid absentee ballot collection. Finally, the challenged section of SB 169 amended § 13-13-114, MCA, which revised voter ID requirements such that those wishing to vote with a Montana student ID had to show additional supporting documentation. *See* 2021 Mont. Laws. ch. 254.

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1. Unless otherwise noted, all references to statutes are to the 2021 versions as enacted in these Bills.

Appendix A

¶2 We restate the issues on appeal as follows:

Issue One: Did the District Court err in finding § 13-2-205(2), MCA, unconstitutional? (HB 506)

Issue Two: Did the District Court err in finding § 13-2-304, MCA, unconstitutional? (HB 176)

Issue Three: Did the District Court err in finding HB 530, § 2, unconstitutional?

Issue Four: Did the District Court err in finding § 13-13-114, MCA, unconstitutional? (SB 169)

FACTUAL AND PROCEDURAL BACKGROUND

¶3 The Legislature passed HB 506, HB 176, HB 530, and SB 169 during the 2021 Montana legislative session. Plaintiffs and Appellees Montana Democratic Party, Mitch Bohn, Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe, Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group (Appellees), each challenged one or more of these four laws.

¶4 The District Court consolidated the cases and conducted a nine-day trial, consisting of both factual and expert witness testimony. Ultimately, the District Court determined that each of the challenged statutes were unconstitutional. We affirm.

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Appendix A

HB 506

¶5 The Montana Constitution requires a qualified elector to be 18 years old or older. Mont. Const. art. IV, § 2. Prior to the enactment of HB 506, someone who was not yet 18, but who would be 18 by election day, was eligible to register to vote. Section 13-2-205, MCA (2019). Montana law also allows electors to receive and vote with an absentee ballot, as relevant, up to 30 days before an election. Sections 13-13-201, -205, MCA. But in no case are those ballots counted until the day of or day before election day. Section 13-13-241(7)-(8), MCA. HB 506 prohibited an absentee ballot from being issued to an elector who was not yet 18, though they would be 18 by election day. Section 13-2-205(2), MCA.

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HB 176

¶6 Montana enacted election day registration in 2005, which allowed a voter to both register to vote and vote on election day. Section 13-2-304(1)(a), MCA (2005 Mont. Laws ch. 286, § 1). Election day registration has become wildly popular, with over 70,000 Montanans utilizing it since 2006. In a 2014 referendum, Montana voters rejected eliminating election day registration by a 14-point margin. HB 176 eliminated election day registration for all but a select category of people[2] and pushed the registration deadline back to noon the day before the election. Section 13-2-304(1)(a), MCA.

2. Election day registration was still allowed for those who moved within the county but to a different precinct since the last election.

Appendix A

<u>*HB 530, § 2*</u>

¶7 HB 530, § 2, instructed the Secretary to promulgate rules that would not allow anyone to accept a "pecuniary benefit" to assist a voter by returning their ballot for them (among other ballot assistance activities). *See* 2021 Mont. Laws ch. 534, § 2. It added a civil penalty of $100 for each ballot collected in violation of the rule. Appellees provided evidence that many groups, including Native Americans, people with disabilities, and other voters, rely on organized groups to help them deliver their voted ballots to election officials.

<u>*SB 169*</u>

¶8 Prior to the enactment of SB 169, a Montana elector who wished to vote at the polls needed to show a photo ID (including a driver's license or student ID) that had the elector's name and photo, or, among other things, a current utility bill, bank statement, or paycheck that had their name and address on it. Section 13-13-114(1), MCA (2019). The purpose of showing ID at the polling location is to check the name and photo on the ID to verify the person is who they say they are and that they are registered to vote. The question of whether a person is actually eligible to vote under Montana law is a function of the registration process. *See* §§ 13-2-110, -208, MCA. SB 169 changed these requirements by listing certain acceptable "primary" photo IDs that would suffice by themselves, such as a Montana driver's license, U.S. passport, or a Montana concealed carry permit. Section 13-13-114(1)(a)(i), MCA. Other IDs, such as postsecondary education photo IDs,

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were moved into a class of "secondary" IDs that required an elector to show that ID plus an additional document such as a utility bill, bank statement, or government document that lists the person's current name and address. Section 13-13-114(1)(a)(ii), MCA.[3]

¶9 The parties filed cross motions for summary judgment on each of the Bills. On July 27, 2022, the District Court granted appellees' motion for summary judgment on HB 506. It found that § 13-2-205(2), MCA, severely interfered with the right to vote for the specific subgroup of people who would turn 18 within 30 days before an election by taking away their ability to vote absentee as all other voters in Montana are eligible to do. The court therefore applied a strict scrutiny analysis and found that § 13-2-205(2), MCA, (HB 506) was unconstitutional as it interfered with the fundamental right to vote. The District Court denied summary judgment on the other three Bills because issues of fact remained.

¶10 The court conducted the nine-day trial on the remaining three Bills. On September 30, 2022, the court ruled that the other three Bills were unconstitutional. It found § 13-2-304, MCA, (HB 176) unconstitutional under the right to vote and equal protection. The court found HB 530, § 2, unconstitutional under the right to vote, equal protection, freedom of speech, due process, and as an improper delegation of legislative power. Finally, the court found that § 13-13-114, MCA, (SB 169) did not

3. Although "primary" and "secondary" do not appear in the statute, this is how the parties referred to the two levels of ID in SB 169 and how we refer to them here.

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implicate the right to vote, but that it was unconstitutional under an equal protection rational basis analysis. The Secretary appeals.

STANDARD OF REVIEW

¶11 The constitutionality of a statute is a question of law, and we have plenary review of constitutional questions. *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 174 P.3d 469. Statutes are presumed constitutional, and the party challenging a statute has the burden of proving it unconstitutional or showing that the statute infringes on a fundamental right. *Bd. of Regents of Higher Educ. of Mont. v. State*, 2022 MT 128, ¶ 10, 409 Mont. 96, 512 P.3d 748; *Weems v. State*, 2023 MT 82, ¶ 34, 412 Mont. 132, 529 P.3d 798; *Mont. Auto. Ass'n v. Greely*, 193 Mont. 378, 382-83, 632 P.2d 300, 303 (1981). If the challenger shows an infringement on a fundamental right, a presumption of constitutionality is no longer available. *Greely*, 193 Mont. at 382-83, 632 P.2d at 303. We review the statute under a higher level of scrutiny and the burden necessarily shifts to the State to demonstrate that the statute is constitutional. *Weems*, ¶ 34. A facial challenge of a statute must show that a law is unconstitutional in all its applications. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (*MCIA*).

¶12 We review a district court's findings of fact for clear error. *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241. A finding of fact is clearly erroneous if it is not supported by substantial evidence, the court misapprehended the effect of the evidence, or our review

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of the record leaves us with a firm conviction that the court was mistaken. *Larson*, ¶ 16. Whether a party is entitled to judgment as a matter of law is a conclusion of law reviewed de novo for correctness. *Speer v. State*, 2020 MT 45, ¶ 17, 399 Mont. 67, 458 P.3d 1016.

DISCUSSION

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¶13 The right to vote is a clear and unequivocal fundamental right under the Montana Constitution: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const. art. II, § 13; *Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, 325 P.3d 1204. Certain powers regarding elections are delegated to the Legislature: "The legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process." Mont. Const. art. IV, § 3.

¶14 However, the Legislature's responsibility must be carefully scrutinized against our most basic right to vote, which is "the pillar of our participatory democracy," and "without which all other[] [rights] are meaningless." *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 19, 410 Mont. 114, 518 P.3d 58; Montana Constitutional Convention Commission, Convention Study No. 11: Suffrage and Elections 25 (1971). Notably, Montana's Constitution is a prohibition on legislative power rather than a broad grant of power. *Bd. of Regents*, ¶ 11; *see also* Mont. Const. art.

II, § 1 ("All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."); Mont. Const. art. II, § 2; Mont. Const. preamble ("We the people of Montana . . . do ordain and establish this constitution.").

¶15 As an initial matter, the Secretary urges us to adopt the federal *Anderson-Burdick* balancing test when deciding cases under the Montana Constitution's right to vote. Federal courts apply the *Anderson-Burdick* standard to state election laws challenged under the First and Fourteenth Amendments to the United States Constitution. *See Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570, 75 L.Ed.2d 547 (1983); *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L.Ed.2d 245 (1992). Originally, as the Dissent makes clear, *Anderson-Burdick* was a more meaningful test similar to "intermediate scrutiny." Dissent, ¶ 145. However, after four decades of federal precedent, the *Anderson-Burdick* balancing test now often gives undue deference to state legislatures so as not to "transfer much of the authority to regulate election procedures from the States to the *federal* courts." *Brnovich v. Democratic Nat'l Comm.*, ___ U.S. ___, 141 S. Ct. 2321, 2341, 210 L.Ed.2d 753 (2021) (emphasis added); *see also*, *e.g.*, *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 204-05, 128 S. Ct. 1610, 1624-25, 170 L.Ed.2d 574 (2008) (Scalia, J., concurring) (proposing a deferential standard of review unless the law is "so burdensome [on the right to vote] as to be virtually impossible to satisfy," which would call for strict scrutiny (internal citations and quotations omitted));

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Appendix A

Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill Rts. J. 59 (2021). *Compare Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1086 (9th Cir. 2020) (requiring only a rational basis for a state election law in staying a district court's order which had enjoined the law), *with Mont. Democratic Party*, ¶¶ 20-24 (declining to interfere with district court's application of strict scrutiny at the preliminary injunction stage). This weakening of the *Anderson-Burdick* test leads the Secretary to argue that, under current federal precedent, rational basis review would apply to the laws at issue here when they "minimally burden" the right to vote. When the law does more than minimally burden the right, the Secretary urges a balancing of the constitutional right to vote in Article II with the constitutional provision entrusting the Legislature with authority regarding elections in Article IV.

¶16 This Court can diverge from the minimal protections offered by the United States Constitution when the Montana Constitution clearly affords greater protection—or even where the provision is nearly identical. *State v. Guillaume*, 1999 MT 29, ¶ 15, 293 Mont. 224, 975 P.2d 312; *see also Butte Cmty. Union v. Lewis*, 219 Mont. 426, 433, 712 P.2d 1309, 1313 (1986); *Buhmann v. State*, 2008 MT 465, ¶ 159, 348 Mont. 205, 201 P.3d 70 (Nelson, J., dissenting) ("The delegates intended the Declaration of Rights to stand on its own footing and provide individuals with fundamental rights and protections far broader than those available through the federal system in order to meet the changing circumstances of contemporary life." (internal quotations and ellipsis omitted)); *Moore*

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v. Harper, 600 U.S. 1, 143 S. Ct. 2065, 2081, 216 L.Ed.2d 729 (2023) ("'[a] law violating a constitution established by the people themselves, would be considered by the Judges as null & void.'" (quoting James Madison in the Federal Convention of 1787)). Indeed, as Justice Brennan so aptly put it, "federal law . . . must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977).

¶17 We must first decide whether the Montana Constitution affords greater protection of the right to vote than the United States Constitution. We hold that it does. *See Mont. Democratic Party*, ¶ 19.

¶18 The Framers' intent controls our interpretation of a constitutional provision. *Bd. of Regents*, ¶ 11. We generally look first to the plain language to determine intent, but even when the language is clear and unambiguous, we determine constitutional intent by also considering the historical and surrounding circumstances under which the Constitution was drafted, the nature of the subject matter the Framers faced, and the objective they sought to achieve. *Bd. of Regents*, ¶ 11; *see also Nelson v. City of Billings*, 2018 MT 36, ¶¶ 14-15, 390 Mont. 290, 412 P.3d 1058. Part of the surrounding circumstances includes whether the United States Constitution expressly includes a mirror of the right at issue. *Compare State v. Hardaway*, 2001 MT 252, ¶ 14, 307 Mont. 139, 36 P.3d 900, *with Hardaway*, ¶ 34. We may also consider the Constitution

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as a whole. *State ex rel. Livingstone v. Murray*, 137 Mont. 557, 564, 354 P.2d 552, 555-56 (1960).

¶19 The Montana Constitution has contained a clear, explicit, unequivocal, and strong protection of the right to vote since before statehood: "All elections shall be free and open, and *no power*, civil or military, *shall at any time interfere* to prevent the free exercise of the right of suffrage." Mont. Const. art. II, § 13 (emphasis added); *see also* 1889 Mont. Const. art. III, § 5 (same); 1884 Mont. Const. art. I, § 5 (same). "[N]o power" includes the Legislature, and it must regulate elections in conformance with the right. *Mont. Democratic Party*, ¶ 19. The Dissent contends that because the right existed verbatim before the 1972 constitutional convention, the Framers of the 1972 Constitution (and implicitly the Framers of the 1884 and 1889 Constitutions) could not have intended a broader right than the right to vote "implicit" in the United States Constitution. Dissent, ¶¶ 130, 134.

¶20 However, both the plain meaning of the right, unchanged since 1884, and history show that this right is broad and strong. As acknowledged by the Dissent, the United States Constitution contains no explicit protection of the right to vote. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665, 86 S. Ct. 1079, 1080, 16 L.Ed.2d 169 (1966) ("[T]he right to vote in state elections is nowhere expressly mentioned [in the United States Constitution]."); *cf. Hardaway*, ¶¶ 14, 34. True, the United States Constitution and Montana Constitution both contain rights to the equal protection of the laws. U.S. Const. amend. XIV; Mont. Const. art. II, § 4. The United States Constitution also prohibits the denial or abridgment of

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the right to vote based on race, color, previous condition of servitude, and sex. U.S. Const. amends. XV, and XIX. But we decide plaintiffs' challenge under the Montana Constitution's fundamental right to vote—not equal protection.

¶21 The Dissent contends that the Montana Constitution's right to vote mirrors the right to vote *implied* in the United States Constitution.[4] Dissent, ¶ 134. Implicit rights embedded in the United States Constitution are subject to expansion or contraction. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022). And even when the United States and Montana Constitutions have "nearly identical" express language we can—and have—broken with United States Supreme Court precedent on independent state constitutional grounds when that Court has changed the protections afforded under the United States Constitution. *See, e.g.*, *State v. Bullock*, 272 Mont. 361, 372-73, 901 P.2d 61, 68-69 (1995) (holding that Article II, Section 11, of the Montana Constitution provides broader standing for defendants to challenge searches or seizures for crimes of possession than the nearly identical Fourth Amendment to the United States Constitution); *Guillaume*, ¶ 15 (collecting cases).

¶22 Moreover, if the Framers intended to enshrine the implicit right to vote from the United States Constitution

4. This is relevant, if at all, to determine what the Framers intended the strength of that right to be when they voted to keep it unchanged in 1972.

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as the Dissent dubiously asserts, then we should look to the right as it stood in 1972 rather than as the Supreme Court interprets it now. *Accord Nelson*, ¶¶ 14-15. The Dissent's own citations show that the United States Constitution's implicit right to vote was viewed much stronger in the 1800s through the 1970s than it is today:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and *any restrictions* on that right strike at the heart of representative government.
>
> . . .
>
> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. *Other rights, even the most basic, are illusory if the right to vote is undermined.*
>
> . . .
>
> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a *free and unimpaired manner* is preservative of other basic civil and political rights, *any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.*
>
> . . .

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Appendix A

> As long as ours is a representative form of government . . . the right to elect legislators in a *free and unimpaired* fashion is a bedrock of our political system.

Reynolds v. Sims, 377 U.S. 533, 555, 560-62, 84 S. Ct. 1362, 1378, 1380-82, 12 L.Ed.2d 506 (1964) (emphasis added and internal quotations omitted). Nearly a century before *Reynolds*—and two years after our 1884 Constitution was adopted with the language that still exists today—the United States Supreme Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights" and declared that the Legislature had power to reasonably and uniformly regulate elections to secure and facilitate the exercise of the right as long as "under the pretence and color of regulating, [it did not] subvert or injuriously restrain the right itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 370-71, 6 S. Ct. 1064, 1071, 30 L.Ed. 220 (1886) (internal quotations omitted); *see also Harper*, 383 U.S. at 670, 86 S. Ct. at 1083 (requiring strict scrutiny where right to vote asserted and citing *Reynolds* and *Carrington v. Rash*, 380 U.S. 89, 85 S. Ct. 775, 13 L.Ed.2d 675 (1965) for same test); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626-27, 89 S. Ct. 1886, 1889-90, 23 L.Ed.2d 583 (1969); *Wesberry v. Sanders*, 376 U.S. 1, 17-18, 84 S. Ct. 526, 535, 11 L.Ed.2d 481 (1964); *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995, 1000, 31 L.Ed.2d 274 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. . . . [B]efore that right to vote can be restricted, the purpose of the

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restriction and the assertedly overriding interests served by it must meet *close constitutional scrutiny.*" (internal citations, quotations, and brackets omitted, emphasis added)). The right to vote was strongly protected by the United States Supreme Court prior to *Anderson-Burdick.* Thus, if the Framers did intend to mirror the protections implicitly afforded in the United States Constitution when they left the right to vote unchanged in the 1972 Constitution, they intended the strong protections of that time—which demanded close constitutional scrutiny for laws impacting the right to vote.

¶23 Our own long history construing the right before 1972 is also instructive. We have long held that the right to vote freely and unimpaired preserves—and is a bulwark for—other basic civil and political rights. *See Peterson v. Billings*; 109 Mont. 390, 395, 96 P.2d 922, 924-25 (1939) ("The elective franchise is not conferred upon the citizen by the legislature, or by virtue of legislative enactments. The right to vote is a constitutional right, and is one of the bulwarks of our form of government and system of civil liberty." (internal quotation omitted)). We have also long carefully scrutinized laws which interfered on the right. *See*, *e.g.*, *Harrington v. Crichton*, 53 Mont. 388, 394-96, 164 P. 537, 539-40 (1917).

¶24 The Montana Constitution as a whole also reflects the people's desire to retain authority—of which the right to vote is essential. *Peterson*, 109 Mont. at 395, 96 P.2d at 924-25. Beginning with the preamble to the Constitution, it highlights that "the people of Montana . . . do ordain and establish this constitution." The people then

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declared their rights first and foremost, beginning with their rights of popular sovereignty and self-government. Mont. Const. art. II, §§ 1-2. They then declared a litany of other rights, including a clear and unequivocal right to vote. Mont. Const. art. II, § 13. The people reserved their right to establish laws by initiative and approve or reject laws by referendum; retained the power to revise, alter, or amend the Constitution; and established their right to vote for all three branches of government. Mont. Const. art. III, §§ 4-5; art. V, §§ 1, 3; art. VI, § 2; art. VII, § 8; art. XIV, §§ 1-3, 8-9.

¶25 They also granted to the Legislature the responsibility to "provide by law the requirements for residence, registration, absentee voting, and administration of elections" and to "insure the purity of elections and guard against abuses of the electoral process," but in no way does this responsibility allow the Legislature to enact laws contravening such other rights. Mont. Const. art. IV, § 3; *accord Forty-Second Legislative Assembly v. Lennon*, 156 Mont. 416, 428, 481 P.2d 330, 336 (1971); *Great Falls Tribune Co. v. Great Falls Pub. Sch.*, 255 Mont. 125, 130, 841 P.2d 502, 505 (1992).

¶26 The Dissent also claims the Framers did nothing more than carry forward, without any discussion, the same language from the 1889 Constitution's right to vote. Dissent, ¶ 130. Not true. The history from the constitutional convention supports that the Framers continued to intend a strong right to vote remain in the Constitution. The Bill of Rights Committee "felt that [Section 13] should be left as is, a *guarantee* that the

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right of suffrage *shall not be interfered with*" and thus left it verbatim from the prior Constitution. Montana Constitutional Convention, Committee Proposals, Vol. II, p. 634 [hereinafter Committee Proposals] (emphasis added). They went on to say, however, that Section 13 is supplemented by the proposals of the General Government Committee on Suffrage and Elections. Committee Proposals, p. 634. Thus, the Framers' discussion on these proposals is also instructive. That committee proposed, and the delegates ultimately adopted, what is now Article IV, Section 3, of the Montana Constitution. The minority proposal, which was substantially adopted, "centered on the word 'registration' in section 3" which was "aimed primarily at eliminating antiquated requirements which unnecessarily burden the potential voter." Committee Proposals, Vol. I, p. 342.

¶27 The Framers of the Montana Constitution understood this strong protection when they retained the right in our 1972 Constitution as seen in their lengthy discussion in which they first voted to require election day registration and later amended Article IV, Section 3, to encourage election day registration. A vast majority of delegates voted in favor of this proposal to protect the right to vote from registration deadlines that had infringed on the right to vote. *See generally* Montana Constitutional Convention, Verbatim Transcript, February 17, 1972, Vol. III, pp. 400-13, 428-52 [hereinafter Convention Transcript]; *see, e.g.*, Convention Transcript, p. 401 ("[T]he act of voting is not a privilege that the state merely hands out, but it is a basic right—a right that in no way should be infringed unless for very good reasons."); Convention

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Transcript, p. 402 ("It is our contention that the right to vote is so sacred and so important that it does deserve Constitutional treatment. . . . If we are to have a true participatory democracy, we must insure that as many people as possible vote for the people who represent them in government."); Convention Transcript, p. 409 ("I came over here to preserve the rights of the public. The only way you preserve the rights of the public is to preserve their vote, because that's the only power the public has."); Convention Transcript, p. 445 (discussing areas of the Bill of Rights that the Framers saw as sacred and in need of definite protection and "the right to vote is certainly the most sacred right of them all"); *see also Mont. Democratic Party*, ¶ 35 ("The delegates' discussion demonstrates they understood Article IV, Section 3 as ultimately protecting the fundamental right to vote.").[5] In a later discussion, the Framers rejected a proposal that would have allowed the Legislature to amend the Constitution without submitting the amendment to the people because it would be "a filching of the peoples' rights." Convention Transcript, pp.

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5. The Dissent criticizes these statements as cherry picked, but a full reading of the discussion shows that the vast majority of delegates were in favor of a strong and protective right to vote. Although we will refrain from using the Framers' discussion when it shows two, or even three positions that do not manifest a collective intent, *see Keller v. Smith*, 170 Mont. 399, 408-09, 553 P.2d 1002, 1008 (1976), we will use them, as here, when the discussion shows an intent of the majority. *See*, *e.g.*, *Nelson*, ¶¶ 14-21. Here, the discussion overwhelmingly showed an intent for a strong right to vote. The only position which was inconsistent was whether enactment of election day registration should be mandatory or left to legislative discretion. *See* Discussion on Issue Two in this Opinion, ¶¶ 64-69, for further analysis of this point.

501-05. The Framers of the 1884, 1889, and 1972 Montana Constitutions clearly intended to strongly protect the right to vote as seen through the plain language of the right, history, the Constitution as a whole, and the Framers' discussion on supplemental constitutional provisions.

¶28 Given the importance of the right to vote granted in Article II of the Montana Constitution, we must decide whether the responsibility regarding elections given to the Legislature in Article IV of the Montana Constitution is important enough for us to apply the "persuasive non-binding interpretive framework" of the unduly deferential balancing test employed by *Anderson-Burdick* and its federal progeny. Dissent, ¶ 145. Although we have adopted balancing tests like those sought by the Secretary when a case involved two competing Article II rights, *see State ex rel. The Missoulian v. Mont. Twenty-First Judicial Dist. Court*, 281 Mont. 285, 296, 304-05, 933 P.2d 829, 836, 841 (1997), we have rejected similar balancing arguments when a mandate of power given in Article X of the Montana Constitution was limited by an express right conferred by Article II of the Constitution. *See generally Great Falls Tribune*, 255 Mont. 125, 841 P.2d 502.

¶29 In *Great Falls Tribune*, the Great Falls Public Schools' Board of Trustees argued that the right to know in our Constitution should be balanced against the constitutional grant of power given to the Board to supervise and control schools. *Compare* Mont. Const. art. II, § 9, *with* Mont. Const. art. X, § 8. We held that "despite the mandate of power given the local boards to control their schools, Article X, Section 8, does not confer

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on school boards the power to act in violation of express guarantees contained in the Constitution. For example, school boards must comply with . . . the right of suffrage." *Great Falls Tribune*, 255 Mont. at 130, 841 P.2d at 505.

¶30 Similarly, although the Legislature is given power regarding elections, it may not exercise that authority in a way that violates the freedom and openness of our elections or interferes with the free exercise of the right of suffrage. Mont. Const. art. II, § 13; Mont. Const. art. IV, § 3; *Mont. Democratic Party*, ¶¶ 19, 36. We have held that the Legislature's responsibility to pass laws to ensure the purity of elections and guard against abuses of the electoral process "prohibits the legislature from enacting laws contravening such goals." *Lennon*, 156 Mont. at 428, 481 P.2d at 336 (discussing a provision of Article IX, Section 9, of the 1889 Montana Constitution that is similar to the provision now in Article IV, Section 3, of the 1972 Montana Constitution). The Legislature's duty is "first to secure to the voter a free, untrammeled vote, and, second, to secure a correct record and return of that vote." *Harrington*, 53 Mont. at 394, 164 P. at 539. It is our solemn duty "to review the Legislature's work to ensure that the right of suffrage guaranteed to the people by our Constitution is preserved" and to ensure rules which were intended to "prevent fraud and injustice" do not become "instrument[s] of injustice." *Mont. Democratic Party*, ¶¶ 19, 36; *Harrington*, 53 Mont. at 394-96, 164 P. at 539-40.

¶31 The *Anderson-Burdick* test requires strict scrutiny only for a law that "severely burdens" the right to vote, which is undefined but has been suggested to be only

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those laws "so burdensome as to be virtually impossible to satisfy." *Crawford*, 553 U.S. at 205, 128 S. Ct. at 1625 (Scalia, J., concurring) (internal citations and quotations omitted). This standard finds no textual or historical support in the Montana Constitution. Our Constitution affords no suggestion that a person should have to mount all but the "virtually impossible" hurdle simply to participate in the most elemental characteristic of citizenship.

¶32 What is more, the *Anderson-Burdick* standard appears somewhat amorphous. For example, the United States Supreme Court noted in *Anderson* that "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson*, 460 U.S. at 793, 103 S. Ct. at 1572. But the Court in *Crawford* then rejected a view that would consider the burdens on only one class of voters, indicating that if a statute facially imposes a restriction with "broad application to all [the State's] voters," it "imposes only a limited burden on voters' rights." *Crawford*, 553 U.S. at 202-03, 128 S. Ct. at 1623 (plurality opinion) (internal quotations omitted). Even if the law results in a heavy burden on some voters, it nonetheless clears the federal bar without intense scrutiny if the law uniformly imposes the same burden on all voters. *Crawford*, 553 U.S. at 205, 128 S. Ct. at 1625 (Scalia, J., concurring). As the three-member concurring opinion emphasized—noting the 14th amendment hook for voting rights—"a generally applicable law with disparate impact is not unconstitutional" without "proof of discriminatory intent." *Crawford*, 553 U.S. at 207, 128 S. Ct. at 1626

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(Scalia, J., concurring). Given the textual strength and history of Montana's explicit constitutional protection, and its independent analysis from the equal protection clause, we should not put its independent force at risk of dilution by later federal precedents. We thus decline to adopt the federal *Anderson-Burdick* standard, which now provides less protection than that clearly intended by the plain language and history of the Montana Constitution's right to vote.

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¶33 Without a doubt, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433, 112 S. Ct. at 2063 (internal quotations omitted). But if the Legislature passes a measure that impacts "the free exercise of the right of suffrage," it must be held to demonstrate that it did "not choose the way of greater interference." *Dunn*, 405 U.S. at 343, 92 S. Ct. at 1003. This standard should govern equally when a facially neutral restriction disproportionately impacts identifiable groups of voters. *Accord Crawford*, 553 U.S. at 236, 128 S. Ct. at 1643 (Souter, J., dissenting) (expressing the view that the challenged statute "crosses a line when it targets the poor and the weak"). Montana best serves the independence of its explicit constitutional guarantee of the right to vote by retaining a state-constitution-driven analytical framework for evaluating challenges to voting regulations so as to maintain that strong protection of every person's right to vote.

¶34 Montana caselaw holds that when a law impermissibly interferes with a fundamental right, we apply a strict

scrutiny analysis. *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173-74 (1996). We determine whether a law impermissibly interferes with a fundamental right by examining the degree to which the law infringes upon it. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1173; *Driscoll v. Stapleton*, 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386; *see also Finke v. State ex rel. McGrath*, 2003 MT 48, ¶¶ 17-19, 314 Mont. 314, 65 P.3d 576 (holding that, except in special interest elections, "if a challenged statute grants the right to vote to some [citizens] and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." (quoting *Kramer*, 395 U.S. at 627, 89 S. Ct. at 1890)). Plaintiffs have the burden of demonstrating the law interferes with all electors' right to vote generally, or interferes with certain subgroups' right to vote specifically. *Cf. Driscoll*, ¶¶ 18, 21. As such, when a law impermissibly interferes with the right to vote, we will apply strict scrutiny. Under strict scrutiny analysis, the State must show that a law is the least onerous path to a compelling state interest. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174.

¶35 As discussed, the Montana Constitution strongly protects the fundamental right to vote. Mont. Const. art. II, § 13. Yet it also entrusts the Legislature with the responsibility of providing procedures for conducting our elections. Mont. Const. art. IV, § 3. As such, strict scrutiny is inappropriate when the law has not interfered with the right to vote but has only minimally burdened it. *Accord State ex rel. Bartmess v. Board of Trustees*, 223 Mont. 269, 275, 726 P.2d 801, 804 (1986).

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¶36 When a right is not fundamental but is still protected in our Constitution, we apply our own "middle-tier analysis," which balances the rights infringed and the government interest served by the infringement. *See, e.g.*, *Butte Cmty. Union*, 219 Mont. at 434, 712 P.2d at 1313-14 (welfare under the pre-1988 amendment to Article XII, Section 3(3), of the Montana Constitution); *Bartmess*, 223 Mont. at 275, 726 P.2d at 805 (education).[6]

¶37 If a statute does not implicate a fundamental right under the Constitution, we review it under a rational basis analysis, which upholds the law if it is rationally related to a legitimate government interest. *Mont. Shooting Sports Ass'n v. State*, 2010 MT 8, ¶ 20, 355 Mont. 49, 224 P.3d 1240. But rational basis review is inappropriate when the right to vote is implicated given the protections afforded by our most basic right under the Montana Constitution.

¶38 This Court has yet to determine the level of scrutiny to apply when a law does not impermissibly interfere with the fundamental right to vote but minimally burdens it. *See Mont. Democratic Party*, ¶ 24; *Driscoll*, ¶ 20. The Secretary urges us to adopt rational basis review given that the Constitution also gives the Legislature authority regarding elections.[7] Mont. Const. art. IV, § 3. However,

6. This standard is unique from the federal "intermediate scrutiny."

7. The Secretary devotes one page of its nearly 90-page brief to argue that the Elections Clause of the United States Constitution prevents our review of these four laws. *See* U.S. Const. art. I, § 4. We wholly reject this argument. Like the responsibility

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we hold that when a law minimally burdens the right to vote, but does not impermissibly interfere with it, middle-tier analysis is appropriate. *Cf. W. Tradition P'ship v. AG*, 2011 MT 328, ¶ 34, 363 Mont. 220, 271 P.3d 1, *judgment rev'd sub nom. on other grounds by Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 132 S. Ct. 2490, 183 L.Ed.2d 448 (2012) (citing federal caselaw that analyze First Amendment cases under intermediate scrutiny if a law places only a minimal burden on speech).

¶39 In deciding middle-tier analysis was appropriate, this Court has said "[t]he old rational basis test allows government to discriminate among classes of people

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granted to the Legislature in Article IV, Section 3, of the Montana Constitution, the Elections Clause is subject to other provisions of our Constitution, such as the right to vote. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *State v. Gateway Mortuaries, Inc.*, 87 Mont. 225, 238-39, 287 P. 156, 159 (1930). Indeed, "constitutional provisions governing the exercise of political rights [are] subject to constant and careful scrutiny." *Smiley v. Holm*, 285 U.S. 355, 369, 52 S. Ct. 397, 400, 76 L.Ed. 795 (1932). *Smiley* considered the legislative power under the Elections Clause and concluded it was subject to state constitutions. *Smiley*, 285 U.S. at 369, 52 S. Ct. at 400. The United States Supreme Court has recently revisited this argument and held that the "Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review." *Moore*, 143 S. Ct. at 2081; *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817-18, 135 S. Ct. 2652, 2673, 192 L.Ed.2d 704 (2015) ("Nothing in [the Elections] Clause instructs . . . that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution.").

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for the most whimsical reasons." *Butte Cmty. Union*, 219 Mont. at 434, 712 P.2d at 1314. A rational basis classification is appropriate in many situations, such as in economic regulation cases where fundamental rights are not implicated. In such cases, the Legislature is in the best position to make policy decisions and we will afford deference. *See, e.g.*, *MCIA*, ¶ 31. However, the right to vote is fundamental and it is this Court's duty to review the Legislature's work to ensure that the right to vote guaranteed by the Montana Constitution is preserved. *Mont. Democratic Party*, ¶ 19. Rational basis review does not allow for such considerations. *See, e.g.*, *MCIA*, ¶ 22 ("The legislation's purpose does not have to appear on the face of the legislation or in the legislative history, *but may be any possible purpose of which the court can conceive.*" (internal quotations omitted and emphasis added)). The Legislature must regulate elections in conformance with Article II, Section 13, of the Montana Constitution. *Mont. Democratic Party*, ¶ 19. Thus, when a law implicates the right to vote, rational basis review is inconsistent with the Montana Constitution's strong and explicit protections of the right.

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¶40 Under our middle-tier analysis, which we developed in *Butte Community Union*, we balance the rights infringed and the governmental interest to be served by the infringement. *Bartmess*, 223 Mont. at 275, 726 P.2d at 805; *Butte Cmty. Union*, 219 Mont. at 434, 712 P.2d at 1313-14. Our first inquiry is whether the State has shown that the classification is reasonable (i.e., not arbitrary and justified by relevant and legitimate state interests). *Butte Cmty. Union*, 219 Mont. at 434, 712 P.2d at 1314.

This first step is similar to rational basis review except that the burden is on the State to show that the law is reasonable rather than us upholding it if we can conceive of "any possible purpose" for the legislation.[8] *MCIA*,

8. We do not hold, as the Dissent asserts, that the State necessarily has an evidentiary burden to show its interests in a law, and its citation to *Greely* is unenlightening. Dissent, ¶¶ 161-163. The Dissent's argument that the State could merely cite to Article IV, Section 3, of the Montana Constitution and be automatically forgiven for any number of laws interfering with the right to vote is not supported by precedent or the Constitution—"[t]he mere recitation of a compelling state interest in the [law] itself would not be conclusive." *Greely*, 193 Mont. at 383, 632 P.2d at 303. Nor does our analysis below require any such thing. *See*, *e.g.*, Opinion ¶ 102 (taking notice that we have found a compelling interest that the Secretary asserts for its support of HB 530). But even with a compelling interest, the State must still necessarily demonstrate that the law is narrowly tailored to its interest—whether factually or otherwise. *Greely*, 193 Mont. at 383, 632 P.2d at 303; *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174; *W. Tradition P'ship*, ¶ 35. As discussed above, challengers have the initial evidentiary burden of demonstrating the burden or interference of a statute implicating the right to vote. The State then has the burden of showing (through notice, argument, or otherwise) interests and tailoring that satisfy the appropriate level of scrutiny. Evidence produced at trial may also establish that the State's purported interest is a "mere recitation" that is not in fact conclusive. Nor do we require fact-finding by the Legislature and recited in legislation to uphold a law. But in the face of evidence presented by plaintiffs that the State's alleged justifications are not furthered by the law, the State may not just rest on mere recitations of an interest to prevail. *Cf.* M. R. Civ. P. 56(e)(2). Even *Anderson-Burdick* originally required *the State* to put forward "precise interests" in justification of the burdens imposed by the law. *Anderson*, 460 U.S. at 789, 103 S. Ct. at 1570; *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063.

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¶ 22; *Butte Cmty. Union*, 219 Mont. at 432-34, 712 P.2d at 1312-14. Given the importance of the right to vote in our Constitution, we think it improper for us to imagine possible reasons the Legislature has enacted a law that burdens the right to vote. *Accord Kramer*, 395 U.S. at 627-28, 89 S. Ct. at 1890 ("[W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable.").

¶41 Our second step under middle-tier analysis is to examine whether the asserted government interest is more important than the infringement of the right. *Bartmess*, 223 Mont. at 275, 726 P.2d at 805; *Driscoll*, ¶ 18.

¶42 For example, *Butte Community Union* permanently enjoined a law which restricted certain welfare benefits from able-bodied individuals under 50 with no minor children. *Butte Cmty. Union*, 219 Mont. at 428, 712 P.2d at 1310. Under the first step of middle-tier analysis, this Court found that the Legislature's classification was arbitrary because the State had not shown "that misfortunate people under the age of 50 are more capable of surviving without assistance than people over the age of 50." *Butte Cmty. Union*, 219 Mont. at 434, 712 P.2d at 1314. Under the second step, we held that a balancing of the State's interests with the infringement of those under 50 not receiving welfare also did not tip the scales in the State's favor. We balanced the State's interest in saving money and held that it was not as important as

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welfare recipients' interests because the State was not in a financially unsound position that justified taking away the constitutionally granted benefit. *Butte Cmty. Union*, 219 Mont. at 434, 712 P.2d at 1314.

¶43 We also applied our middle-tier analysis in *Bartmess*, where we upheld a Lewis and Clark County School District requirement that Helena high school students participating in extracurricular activities maintain a GPA. *Bartmess*, 223 Mont. at 270, 726 P.2d at 802. After noting that various aspects of education could be fundamental, we held that the educational aspects of extracurricular activities were subject to middle-tier analysis. *Bartmess*, 223 Mont. at 275, 726 P.2d at 804. Under the first prong, we concluded the rule was reasonable because "it cannot be denied that the rule is an incentive" for students wishing to participate in extracurricular activities and because it "promotes adequate time to study" for those below the average. *Bartmess*, 223 Mont. at 276, 726 P.2d at 805. Under the second prong, we concluded that the general interest in developing full student potential and providing a quality public education outweighed the students' interests in participating in extracurricular activities. *Bartmess*, 223 Mont. at 276, 726 P.2d at 805. In *Kaptein by & Through Kaptein v. Conrad Sch. Dist.*, 281 Mont. 152, 161-62, 931 P.2d 1311, 1316-17 (1997), we again held the school district's decision to limit participation in extracurricular activities to those enrolled in the public school system met middle-tier analysis because (1) limiting participation within the public school system was reasonable given the Constitution's heavy emphasis on "a system," and (2) the district's exclusion, for the purpose of effectively integrating academics with extracurricular

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activities, outweighed the private-school-student's interest in participation.

¶44 We applied middle-tier analysis in *Deaconess Medical Ctr. v. Dep't of Soc. & Rehab. Servs.*, 222 Mont. 127, 720 P.2d 1165 (1986), where we upheld the constitutionality of both a state statute and a county rule that limited state assistance for medical benefits to people below certain incomes. The statute in *Deaconess* limited medical assistance to those whose income was below 300% of the limit for general welfare assistance. Under the first prong of middle-tier analysis, we held that the statute was reasonable because it was reasonable to assume that someone with an income three times higher than that needed for basic necessities would be able to purchase medical insurance and pay other medical bills. *Deaconess Medical Ctr.*, 222 Mont. at 132, 720 P.2d at 1168-69. We then held under the second step that the State's interest in limiting medical benefits to those with an income less than 300% of that needed for general assistance was greater than the people's interest in receiving those benefits. *Deaconess Medical Ctr.*, 222 Mont. at 132-33, 720 P.2d at 1169. We reasoned that there would be little incentive for anyone to purchase personal medical insurance if the State could not limit those who were entitled to medical assistance; that most uninsured people would be unable to pay their bills in the event of an emergency; that the costs to the State would become prohibitive; and that those with an income greater than 300% of the general assistance level could reasonably be expected to obtain their own insurance. *Deaconess Medical Ctr.*, 222 Mont. at 132-33, 720 P.2d at 1169.

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¶45 We also subjected the county rule to middle-tier analysis, which limited medical assistance to people with an income below that required for general assistance. We found that rule unreasonable (considered in isolation from the county's other rules) under the first step of middle-tier analysis because the general welfare assistance standard only assumed that people at or above that level were able to pay for their basic necessities without factoring in medical costs. *Deaconess Medical Ctr.*, 222 Mont. at 133, 720 P.2d at 1169. Therefore, it would be unreasonable to assume that people who could only pay for basic necessities would also be able to purchase medical insurance or pay medical bills. *Deaconess Medical Ctr.*, 222 Mont. at 133, 720 P.2d at 1169. However, we held the limitation passed middle-tier analysis for the same reasons as the state statute when considered together with the rest of the county's rules, which only considered the applicant's income level once medical expenses and insurance were deducted from their income. *Deaconess Medical Ctr.*, 222 Mont. at 134, 720 P.2d at 1169-70.

¶46 Thus, when analyzing laws under the right to vote, we first determine whether the challenger has shown that a statute impermissibly interferes with the right to vote. If it does, we apply strict scrutiny, where the State must show that the statute is the least onerous path to a compelling state interest. If the statute minimally burdens the right to vote, we apply middle-tier analysis, where the State must show that the statute is (1) reasonable, and (2) that its asserted interest is more important than the burden on the right to vote.

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¶47 *Issue One: Did the District Court err in finding § 13-2-205(2), MCA, unconstitutional? (HB 506)*

¶48 Section 13-2-205(2), MCA, restricts a voter from receiving or submitting an absentee ballot if they would be eligible to vote on or before election day but were not yet eligible to vote. Under our framework for analyzing right to vote claims, we first hold that § 13-2-205(2), MCA, does not impermissibly interfere with the right to vote but is subject to middle-tier analysis as it minimally burdens the right to vote. We hold that § 13-2-205(2), MCA, is not reasonable under the first step of middle-tier analysis.

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¶49 The Secretary argues that the Legislature passed the law in an attempt to clarify election laws and make them easier to administer, noting that § 13-2-205(2), MCA, cleared up two issues between §§ 13-13-201(1) and -205, MCA: (1) the law was unclear whether absentee ballots should be issued to registered voters who would be eligible to vote by election day but did not yet meet age or residence requirements, and (2) electors who did receive an absentee ballot may have been voting illegally if they returned their ballot before they had actually met the requirements. The Secretary argues § 13-2-205(2), MCA, at best, affects a limited subclass of voters and was designed to make sure all voters were treated equally. Appellees argue that § 13-2-205(2), MCA, deprives that subclass of equal ballot access by eliminating the option of receiving an absentee ballot before the election as every other eligible voter in Montana is entitled to without excuse. Appellees note that while § 13-2-205(2), MCA, does not disenfranchise voters, the Constitution also

protects from State interference with the right to vote. Mont. Const. art. II, § 13; *Mont. Democratic Party*, ¶ 19.

¶50 Under existing Montana law, a voter who has not yet met residence or age requirements to vote, but who will have met them on or before election day, may register to vote. Section 13-2-205(1), MCA. Further, an elector may request an absentee ballot for an election, which, in person, may be done within 30 days prior to an election. Sections 13-13-201(1), -205, MCA.

¶51 Section 13-2-205(2), MCA, does not interfere with the right to vote. No person is prevented from voting by this law, nor did appellees identify any person who could not or did not vote. However, the law takes away from this subclass an option to vote that all other eligible voters have: absentee voting.

¶52 Absentee voting has transformed elections in Montana. Once regarded as a mere privilege from the customary and usual manner of voting, absentee voting has now become the predominate form of voting by all electors in Montana—accounting for almost three quarters of all voters in the 2018 election.[9] By taking this predominate form of voting away from a subclass of voters, § 13-2-205(2), MCA, minimally burdens their right to vote.

¶53 Thus, middle-tier analysis applies, and the Secretary must show (1) that the law is reasonable, and (2) that the

9. Due to COVID-19, the 2020 election was an all-mail election, so we use 2018 data for a more accurate picture of how the average Montanan votes today.

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government's interests as asserted outweigh the burden on the right to vote.

¶54 The Secretary asserts that allowing someone to turn in their ballot before they turn 18 (although they will be 18 by election day) is illegal voting, and thus it is reasonable to prevent them from voting absentee. The Secretary argues that since a ballot is considered "voted" once it is turned in to the election administrator's office, these people are voting while they are ineligible. *See* § 13-13-222(3), MCA ("For the purposes of this section, an official ballot is voted when the ballot is received at the election administrator's office."). However, other provisions provide that absentee ballots are not actually counted until the day of or day before election day. *Compare* § 13-13-222(3), MCA, *with* § 13-13-241(7)-(8), MCA. State law requires courts to construe statutes in harmony, if possible, and give effect to them all. Section 1-2-101, MCA; *Clark Fork Coal. v. Mont. Dep't of Natural Res. & Conservation*, 2021 MT 44, ¶ 36, 403 Mont. 225, 481 P.3d 198.

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¶55 Again, we first look to the plain meaning of the words used, but we must do so in the context of the statute as a whole and in furtherance of the manifest purpose of the statutory provision and the larger statutory scheme in which it is included. *Clark Fork Coal.*, ¶ 36.

¶56 The plain language of § 13-13-222(3), MCA, limits its application to "the purposes of this section," which addresses marking a ballot in person at the election administrator's office before election day. Thus, it does not apply to mailed-in ballots, which are governed by § 13-13-201, MCA, and allows "legally registered elector[s]

or provisionally registered elector[s]" to vote their absentee ballot by mail. (Emphasis added.) This would seem to dispose of the Secretary's argument, as even provisionally registered voters are allowed to request and cast an absentee ballot. However, this does not resolve the question of a registered 17-year-old attempting to mark a ballot in person before election day. The legislative history is informative.

¶57 Section 13-13-222(3), MCA, was first enacted in 2009 with House Bill 19 (HB 19). The original language was substantially the same as it is now. *See* § 13-13-222(4) (2009 Mont. Laws ch. 297, § 24) ("The ballot is considered voted at the time it is received by the election administrator."). HB 19 added a definition for "voted ballot" to mean when a ballot is deposited in the ballot box, received at the election administrator's office, or returned to a place of deposit. Section 13-1-101(35), MCA (2009) (now codified as § 13-1-101(56), MCA). The sponsor of this new section, Representative Pat Ingraham, spoke as to why this legislation was necessary: "Up until the point it's deposited, or received as a voted ballot, you still have opportunities to have a replacement ballot should something arise, in case you've spoiled it, but once it's voted it's voted." Hearing on HB 19 before the House Committee on State Administration, 61st Leg., 9:05:30 (Mont. Jan. 13, 2009) (testimony of Rep. Pat Ingraham, chief sponsor); *accord* § 13-13-204, MCA (procedure for replacing a ballot that has "been received but not voted"). Further, at trial, the Missoula County Elections Administrator testified that although the county verifies the signature on the secrecy envelope when the ballot comes in, it does not start preparing the ballots for counting until four days before the election and does not

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start counting until election day. *Accord* § 13-13-241(1), (7)-(8), MCA. So although a person may have "voted" in the sense that they would not be able to get another ballot to vote again, their ballot is not officially counted until, at most, the day before the election.

¶58 The distinction the Secretary is now trying to make between classes of voters is arbitrary because § 13-2-205, MCA, was intended to allow only those who are *guaranteed* to be eligible to vote by election day the ability to exercise their right to vote. There is no reasonable distinction in preventing someone from voting absentee when that person has provisionally registered and verified that they will meet age and residency requirements to vote by election day, while the rest of the population is able to vote absentee—including other provisionally registered voters. *See* § 13-2-110(5)(b), MCA; § 13-13-201(4), MCA (allowing provisionally registered voters to vote by absentee ballot). Moreover, the restriction imposes an additional duty for administrators to identify each ballot that comes in from a 17-year-old and it would be absurd to prosecute a 17-year-old who was turning 18 five days before the election for mailing in their absentee ballot nine days before the election.[10] Section 13-2-205(2), MCA, is not reasonable.

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10. The Secretary's argument that this Bill was necessary to prevent a 16-year-old from receiving a ballot has no merit. The plain language of § 13-2-205, MCA, prohibits anyone from registering to vote unless they will meet the residence or age requirements "on or before election day." Under the law, only those individuals who will be 18 on or before election day are eligible to (1) register to vote, and (2) receive an absentee ballot up to 30 days before an election. Sections 13-2-205, 13-13-205, MCA.

¶59 We find § 13-2-205(2), MCA, to be unreasonable and arbitrary. We need not balance the State interests against the burden imposed because the State has not demonstrated that its interests are reasonable.

¶60 Appellees also contend that this Bill was an attempt to discourage young voters and prevent them from voting. The District Court did not address Appellees' equal protection arguments because it had found the law unconstitutional under the right to vote. We also need not resolve Appellee's equal protection claims because the record demonstrates the law arbitrarily and unnecessarily subjects a subclass of electors to different requirements than the rest of the electorate.

¶61 We affirm the District Court's grant of summary judgment and hold that § 13-2-205(2), MCA, (HB 506) is unconstitutional.

¶62 *Issue Two: Did the District Court err in finding § 13-2-304, MCA, unconstitutional? (HB 176)*

¶63 The Secretary argues that the Legislature's decision to eliminate election day registration is not subject to judicial scrutiny. We conclude that it is subject to judicial scrutiny and apply our framework. We hold that § 13-2-304, MCA, impermissibly interferes with the right to vote due to its effect on numerous Montanans who utilize election day registration to both register and vote at the same time on election day. Under strict scrutiny, the Secretary does not demonstrate that eliminating election day registration is the least onerous path to a compelling

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state interest. We thus hold that § 13-2-304, MCA, is unconstitutional.

¶64 The Framers of the 1972 Montana Constitution provided that the Legislature "*may* provide for a system of poll booth registration [(election day registration)]." Mont. Const. art. IV, § 3 (emphasis added). The Legislature provided for election day registration in 2005. *See* 2005 Mont. Laws ch. 286, §1.[11] Since it was enacted in 2005, over 70,000 Montanans have been able to vote because election day registration allowed them to register and vote at the same time on election day. Indeed, the Secretary agreed at trial that it led to an improvement in Montana's elections. Significantly, Montanans soundly rejected a referendum that would have eliminated election day registration in 2014. The Legislature passed HB 176 despite vociferous opposition to the Bill in public hearings. HB 176 eliminated election day registration and pushed the registration deadline back to noon the day before the election. *Compare* § 13-2-304(1)(a), MCA (2019), *with* § 13-2-304(1)(a), MCA (2021).

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¶65 As an initial matter, the Secretary argues that we need not even apply our framework to determine whether

11. Election day registration is a failsafe that allows eligible voters to vote on election day if they would otherwise not be able to vote due to registration issues. Registration issues may occur on election day due to our sometimes-confusing labyrinth of election laws. For example, voters who have moved from one county to another since the last election and who have not updated their voter registration would be prevented from voting without election day registration unless they could make it back to their old county before polls closed.

this law is evaluated under strict scrutiny or middle-tier analysis because the plain language of Article IV, Section 3, of the Montana Constitution clearly provides discretion to the Legislature to enact election day registration: "[The Legislature] *may* provide for a system of [election day registration]." (Emphasis added.) The Secretary argues that because this language is permissive rather than mandatory, the Legislature has discretion to both enact election day registration and to take it away for any reason or no reason at all.

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¶66 The Framers' intent controls our interpretation of a constitutional provision. *Bd. of Regents*, ¶ 11. We generally look first to the plain language to determine intent, but even when the language is clear and unambiguous, we determine constitutional intent by also considering the circumstances under which the Constitution was drafted, the nature of the subject matter the Framers faced, and the objective they sought to achieve. *Bd. of Regents*, ¶ 11; *see also Brown v. Gianforte*, 2021 MT 149, ¶¶ 33-34, 404 Mont. 269, 488 P.3d 548.

¶67 Although our Constitution uses permissive language that would allow the Legislature to enact election day registration, our review of the Constitutional Convention transcripts does not lead us to the conclusion that the Legislature has the unfettered authority to terminate it outside of constitutional constraints. As initially passed, Article IV, Section 3, directed the Legislature to implement election day registration with mandatory language: "The Legislature *shall* provide for a system of [election day registration]." *See* Convention Transcript,

p. 413 (emphasis added). The Framers wanted to protect voters from abuses that had occurred with arbitrary registration laws, which caused many voters to become disenfranchised. Convention Transcript, p. 434; *see also* Convention Transcript, p. 402 ("[R]egistration has been the greatest factor in subverting the turnout of the American electorate in the history of our country."). Later, however—uncomfortable with the mandatory language in case election day registration turned out to be unworkable in Montana—the Framers reopened the debate. *See*, *e.g.*, Convention Transcript, pp. 429, 436, 438, 444. Significantly, those that opposed the mandatory language were not opposed to election day registration—only to having to amend the Constitution again if it became unworkable. Ultimately, the mandatory language was rejected and replaced with the permissive language in Montana's Constitution today. The provision with the amendment to replace the mandatory language "shall" with the permissive language "may" overwhelmingly passed. *See* Convention Transcript, p. 452.

¶68 Notwithstanding the use of the permissive word "may," it is clear that the Framers' intent was that election day registration should be available as long as it was workable in Montana. *See*, *e.g.*, Convention Transcript, p. 437 (discussing that the long debate the Framers had about whether the Legislature "may" or "must" enact election day registration had already accomplished their purpose because the Legislature will "take it as a clear mandate that they better do something about [election day registration]."); Convention Transcript, p. 406 ("[We are] saying to government, to the Legislature, we consider

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the right to vote so precious and so cherished that you shall not limit it by the artificial barrier of registration."); *see generally* Convention Transcript, pp. 400-13, 428-452; *Mont. Democratic Party*, ¶ 35. This does not mean that election day registration is forevermore baked into our Constitution, but it does dispose of the Secretary's argument that the decision to eliminate it is not subject to judicial scrutiny.

¶69 HB 176 is subject to constitutional limitations. *See Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219 ("'Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.'" (quoting *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S. Ct. 525, 530, 148 L.Ed.2d 388 (2000))). Thus, we apply our framework for constitutional analysis of the right to vote and first determine whether § 13-2-304, MCA, impermissibly interferes with the right.

¶70 We hold that § 13-2-304, MCA, impermissibly interferes with the right to vote.[12] The record shows that

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12. The Secretary's reliance on *Barilla v. Ervin*, 886 F.2d 1514 (9th Cir. 1989), is inapposite. *Barilla* held that an Oregon constitutional provision adopted by initiative creating a registration deadline 20 days before an election was not in violation of the right to vote under the United States Constitution. *Barilla*, 886 F.2d at 1516-17. As discussed above, the Montana Constitution's right to vote is more protective than the United States Constitution's, and we evaluate § 13-2-304, MCA, (and the other laws at issue) on independent state grounds only under the Montana Constitution. Any citations to federal cases are useful

more than 70,000 Montanans have utilized election day registration to vote since 2005, and that many electors would be disenfranchised without the availability of election day registration. The Secretary argues that these 70,000 Montanans will simply conform to the new law and register at another time. But this ignores voluminous record evidence that shows that a vast majority of these Montanans will in fact be disenfranchised.

¶71 Montanans can "late register" at a county election office any time during the 30 days prior to the election.[13] Nevertheless, election day registration is so popular that the number of people registering on election day alone is nearly equal to the number of people who register in the 29 days leading up to election day combined. Record evidence shows that election day registration typically increases voter turnout by 2-7% compared to not having it. This is due to a number of factors, including: it is some people's habit to register and vote on election day; many people cannot take work off to register and then again to vote; election offices are open late on election day, allowing some who are not able to take off work during regular business hours to register and vote; people who thought they were registered do not recognize there is a problem until

only to add to our discussion of the Montana Constitution and are not an analysis under the United States Constitution.

13. Montana has two registration periods: regular registration and late registration. *See* §§ 13-2-301, -304, MCA. During regular registration, a voter can register to vote by mail, at the DMV, at the county election office, and by other methods. During late registration, the only way a voter may register is by going in-person to the county election office.

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they show up to vote on election day; some voters were inactivated from the voter rolls without their knowledge; and election day is by far the most energizing day that gets people excited to register and vote. The Secretary's contention that it is otherwise easy to register before election day does nothing to dispel these conclusions—these people will be disenfranchised without the "final safeguard" of election day registration.

¶72 The Secretary argues that because no one testified at trial that they were unable to register during the late registration period, this law did not burden anyone. But the Secretary's argument ignores the testimony of Thomas Bogle and Sarah Denson. Both were unable to vote in the November 2021 election due to administrative issues with their registration—which could have been easily resolved if election day registration was still in place. It also ignores testimony from Kendra Miller regarding the 59 Montanans who were prevented from voting due to HB 176 in the November 2021 municipal elections.[14]

¶73 Further, record evidence shows that HB 176 will disproportionately affect two groups of voters more than others: first-time voters and Native Americans. More than 60% of Montanans that utilize election day registration are under the age of 34. Many Native Americans also rely on election day registration because of numerous issues they face in voting, including lack of access to mail,

14. The effect of HB 176 on general elections will likely be proportionally higher as only 268 Montanans attempted to register in that election on election day compared to 8,053 who registered on general election day in 2018.

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transportation, and the long distances to county seats where they can register. Many of these barriers cannot be overcome, or become too costly to overcome, and thus disenfranchise these voters.

¶74 The record clearly shows, and the Secretary does not present evidence to the contrary, that many of these 70,000 Montanans would be disenfranchised without election day registration. The Dissent argues that because the registration deadline used to be 40 days before the election, it does not interfere with the right to vote to push it back here. Dissent, ¶ 133. This is like arguing that because absentee voting was once not allowed, it would not interfere with the electorate's right to vote to eliminate it today—even though three-quarters of voters in Montana now utilize it to vote. Once the right to vote is granted, lines may not be drawn that are inconsistent with Article II, Section 13, of the Montana Constitution. *Cf. Harper*, 383 U.S. at 665, 86 S. Ct. at 1081; *Big Spring*, ¶ 18; *Finke*, ¶¶ 17-19. Additionally, our holding does not mean that once the Legislature has expanded the right to vote it may never backtrack if the expansion was unwise. Rather, the State must show—depending on if plaintiffs first show the law minimally burdens the right to vote or interferes with it—that the new law meets the correct level of scrutiny. Here, Appellees met their burden: record evidence undeniably shows that the rollback of election day registration will disenfranchise many voters, interfering with their right to vote. The State must therefore overcome strict scrutiny.

¶75 Because § 13-2-304, MCA, interferes with the right to vote, it must overcome strict scrutiny from the courts.

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Under strict scrutiny, the government must show that the law is the least onerous path to a compelling government interest. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174. The Secretary argues the Legislature had two compelling interests in enacting HB 176: reducing administrative burdens on election workers and imposing reasonable procedural requirements to ensure the integrity and reliability of the election process.

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¶76 We initially note that the cases the Secretary cites to regarding the State's interest in reducing the administrative burden on election workers hold that this is an "important" rather than "compelling" state interest, which is required for middle-tier analysis rather than strict scrutiny. *See Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1181 (9th Cir. 2021); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016). But even assuming its reasons were compelling, the record shows that eliminating election day registration at best shifts the work election workers must do on election day with work they do on the days leading up to the election and vice versa.

¶77 The record shows that regardless of when registration ends, election workers still have the same amount of work. Election day and the days leading up to election day are some of the busiest days of the year for election officials. The only thing that changes is when they do this work. For example, the election administrator of Missoula County testified that in the days leading up to election day, they are busy with early ballot preparation so that they can conduct a quicker count on election day.

When HB 176 ended election day registration, Missoula County opened extended registration hours before the new deadline to make sure voters could still register. This shifted some of the work they were doing before election day to election day—indeed, the days leading up to the election can be even more stressful. In any event, the process for registering voters is the same. And because administrative duties that were prepared prior to election day now must be done that day, it can take more time on election day.

¶78 Further, the record shows several ways in which the elimination of election day registration may increase administrative burdens. First, otherwise qualified voters who show up ready to vote may respond poorly to election workers who explain the new law to them and why they cannot vote in that election—this takes time and increases stress. Second, HB 176 did not eliminate election day registration for all groups of voters, so election workers must now identify whether the voter is still eligible to register under § 13-2-304, MCA. For example, if a voter asserts they had previously registered, the election worker will have to spend time verifying whether there was in fact an administrative error, which would allow the voter to register and vote on that day. Further, some of these voters may be offered a provisional ballot, which requires additional follow-up work for election administrators.[15] *See*

15. At trial, the Secretary argued that Thomas Bogle and Sarah Denson should have been given a provisional ballot because their registration had failed due to administrative error, and it was error for the election judge to not offer one to them. *See* 2022 Election Judge Handbook, Mont. Sec'y of State 62 (Feb. 11,

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§ 13-15-107, MCA. With election day registration in place, the election worker does not have to ask any questions or spend any time investigating whether an individual may still register. Rather, any qualified voter may register and vote on election day without determining why they had not previously registered. Third, some counties still registered voters who came in on election day so that they could vote in the next election. Thus, the administrative burden was the same or higher, the law just had the net result of decreasing voters.

¶79 The record is replete with evidence that eliminating election day registration decreases election administrators' work only if voters are disenfranchised. Witnesses testified that the best way to decrease administrative

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2022) (providing for provisional voting if a voter's name had been erroneously omitted from precinct register or they had registered at the DMV but the paperwork was never finalized at the election administrator's office). If anything, these stories show the increased administrative burden on election judges. With election day registration, Bogle and Denson would be able to register and vote on election day no matter the reason, and the election official could move on to the next person in line. Without election day registration, the election official needs to explore the reason that each person trying to register on election day is not registered, and either (1) offer a provisional ballot to those who meet one of the qualifications to still register and vote (i.e., administrative error), and follow up on the provisional ballot to determine whether the voter is actually qualified under one of these circumstances before counting the vote, or (2) spend time explaining to frustrated voters why they are not allowed to register and vote on that day while others can. Either way, this is more work for election judges, and, as seen with Denson and Bogle, rife with opportunities for election judges to err and further disenfranchise voters.

burdens—besides disenfranchising voters—is with better training, better equipment, streamlined protocols, and more election workers.[16] Record evidence comports with the Secretary's admission that election day registration was an improvement in Montana's election processes. Eliminating election day registration is far from the least onerous path to the State's interest in reducing administrative burdens on election workers.

¶80 The Secretary also has not met her burden to show eliminating election day registration is the least onerous path to her compelling interest of ensuring the integrity, reliability, and fairness of the election process. *See Larson*, ¶ 40.

¶81 The Secretary asserts that election day registration causes a "substantial delay" in tabulating votes, which decreases voter confidence in election results. The Secretary relies on testimony from Doug Ellis for support. But this argument misstates the effect of the evidence in the record.

¶82 Ellis testified that he was always able to finish tabulating Broadwater County's votes by the end of the

16. As the District Court found, Doug Ellis's (retired election administrator of Broadwater County) testimony that he was limited in his staff by County budgetary constraints should be considered in light of his admission that the County only spent 53% of the amount it budgeted for election salaries and wages in 2020. Further, Ellis's testimony showed that there were additional election judges willing to work in the 2020 election, that he could have increased their pay to recruit more with their budget, and that after he retired his job was split into two positions to further reduce stress.

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night and he was never criticized for being late with election results. This was true with the other election administrators who testified: the Yellowstone County election administrator testified that he would not have had to stay any later on election night if election day registration was in place; the retired Rosebud County election administrator testified that election day registration had no ultimate impact on their election day schedule. The trial court found that the Secretary had not provided any evidence that election day registration had ever delayed vote tabulation past statutory deadlines for tabulating votes. We find no clear error in its finding of fact.

¶83 Additionally, there are a number of other factors that lead to delays in tabulation, which have nothing to do with election day registration and are not affected by its elimination. For example, provisional ballots and military-overseas ballots are not counted until after 3 p.m. six days after the election. *See* §§ 13-15-107(8), 13-21-226, MCA. Further, it can take up to 27 days after the election to conduct the canvass to finally determine the vote. Section 13-15-502, MCA. Eliminating election day registration will not change these timelines.[17]

17. Indeed, as can be seen with the Secretary's argument regarding Thomas Bogle and Sarah Denson, eliminating election day registration will only increase the number of provisional ballots cast, causing higher numbers of votes to be tabulated later. The Secretary asserts that the longer tabulation goes on, the more voter confidence decreases. If the Secretary's argument is correct, eliminating election day registration will only exacerbate this issue by increasing the number of provisional ballots counted six days after the election.

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¶84 The record clearly demonstrates that eliminating election day registration interferes with the fundamental right to vote.[18] The elimination is far from the least onerous path the State could have chosen for its asserted interests. We therefore hold § 13-2-304, MCA (2021), does not survive strict scrutiny and is therefore unconstitutional on its face.

¶85 Because we find § 13-2-304, MCA, unconstitutional under the Montana Constitution's strong protection of the right to vote, we need not evaluate the parties' equal protection arguments.

¶86 *Issue Three: Did the District Court err in finding HB 530, § 2, unconstitutional?*

¶87 HB 530[19] instructed the Secretary to adopt an administrative rule in "substantially" the same form as to

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18. The Dissent's citations to *Crawford* (besides being analyzed under a test we explicitly reject) are unavailing because "the evidence in the record [in *Crawford* was] not sufficient to support a facial attack" on the statute. *Crawford*, 553 U.S. at 189, 128 S. Ct. at 1615. Appellees here, and for HB 530, presented multitude evidence of the number of voters affected and the burden the laws would place on the groups affected. *See Crawford*, 553 U.S. at 200-02, 128 S. Ct. at 1622-23.

19. All references to HB 530 herein are to HB 530, § 2, chaptered at 2021 Mont. Laws ch. 534, § 2. This is the only section of HB 530 that Appellees challenge and the only section we evaluate in this Opinion. Chapter 534 has not been codified as statute.

prohibit "a person"[20] from receiving "a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots." 2021 Mont. Laws ch. 534, § 2. HB 530 included a $100 civil fine for every ballot distributed, ordered, requested, collected, or delivered in violation of the law. 2021 Mont. Laws ch. 534, § 2.

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¶88 Ballot collection is a service provided by many of the Appellees here—all of whom fall under the prohibition in HB 530. For example, Western Native Voice and Montana Native Vote hire and train local organizers for Get Out the Vote (GOTV) work within Native American reservations. One of the services these groups offer during their GOTV activities is to return absentee ballots to election offices for those who desire it. These organizers are paid for their GOTV work, but in no case are they paid per ballot that they collect. Another group, Disability Rights Montana (not a party to this litigation), has special access to overnight care and treatment facilities. Their paid staff also help return ballots for people with disabilities that request it.

¶89 We note that HB 530 comes on the heels of a similar law which was held unconstitutional in 2020. In 2017, the Ballot Interference Prevention Act (BIPA) was enacted. *See* §§ 13-35-701, -705, MCA (2017). It prohibited all but a select few people from returning other people's ballots for them. Section 13-35-703, MCA. This law was challenged, and we upheld a preliminary injunction of BIPA in *Driscoll*

20. The definition of "person" excluded governmental entities, election administrators and their agents, and mail services. 2021 Mont. Laws ch. 534, § 2.

v. Stapleton, 2020 MT 247, 401 Mont. 405, 473 P.3d 386. Two trial courts then found BIPA unconstitutional and permanently enjoined it. *See Driscoll v. Stapleton*, No. DV-20-408 (Mont. Thirteenth Judicial Dist. Sept. 25, 2020); *see also Western Native Voice v. Stapleton*, No. DV-20-0377, 2020 WL 8970685, 2020 Mont. Dist. LEXIS 3 (Mont. Thirteenth Judicial Dist. Sept. 25, 2020). The permanent injunction in *Driscoll v. Stapleton* was appealed to this Court by then Secretary of State Corey Stapleton. However, current Secretary of State Christi Jacobsen dismissed the appeal. *See Driscoll v. Jacobsen*, No. DA 20-0477, Order (Mont. March 8, 2021).

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¶90 As an initial matter, the Secretary argues that this case is not yet ripe for judicial review because the Secretary has not gone through the administrative rulemaking process, and thus we cannot determine what is or is not prohibited by the law. The Secretary argues that until the rulemaking is finished, Appellees will not know whether their groups' activities are prohibited by the law or will be harmed by it. The Secretary cites *Qwest Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2007 MT 350, 340 Mont. 309, 174 P.3d 496, asserting that *Qwest* prevents our constitutional review of a statute until any administrative rulemaking process is complete.

¶91 Ripeness concerns whether a case presents an actual, present controversy. *Reichert v. State*, 2012 MT 111, ¶ 54, 365 Mont. 92, 278 P.3d 455. The parties must point to actual, concrete conflicts rather than hypothetical, speculative, or illusory disputes. *Reichert*, ¶ 54. Ripeness asks whether an injury that has not yet happened is

sufficiently likely to happen or whether it is too contingent or remote to support deciding it presently. *Reichert*, ¶ 55.

¶92 *Qwest* is not on point here. *Qwest* dealt with a potential agency action. Here, on the other hand, plaintiffs challenge the constitutionality of a statute on its face. Qwest sought review of an agency's request for information and was trying to challenge what the agency *might* do with the information in the future. We held that the case was not ripe for review because there was no hardship to Qwest, we did not know what the agency was going to do, and thus there were no facts before the Court. *Qwest*, ¶¶ 21-25.

¶93 This case addresses a present controversy. The Secretary ignores Appellees' unrebutted testimony at trial that shows they have already been harmed by HB 530. Once HB 530 was enacted, Appellees stopped collecting ballots because they were fearful of the $100 penalty they would incur for every ballot they collected, which was effective upon passage and approval. *See* 2021 Mont. Laws ch. 534, § 5. This is not a hypothetical dispute on whether Appellees might be harmed in the future but a current, concrete dispute about the statute that is preventing them from collecting ballots.

¶94 The Secretary argues that its eventual rulemaking would "likely" only focus on a cash-per-ballot exchange ban. However, the challenge here is to the broader language of the statute itself and not a rule that might be adopted in the future. If the administrative rule narrowed the statute such that it only prohibited cash-per-ballot situations, it would conflict with the plain language of the

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statute as well as the provisions directing the Secretary to adopt a rule in "substantially" the same form as enacted. *See Michels v. Dep't of Soc. & Rehab. Servs.*, 187 Mont. 173, 177-78, 609 P.2d 271, 273 (1980) ("[U]nless regulations effectively effectuate the purpose of the statute, they are invalid.").

¶95 Thus, because the statute is clear on its face as to what is prohibited and includes a civil fine for this prohibited behavior, and because Appellees are already harmed by it, this case is not a hypothetical dispute and is ripe for review.

¶96 Under our analysis, the first step is to determine whether HB 530 impermissibly interferes with the right to vote. We hold that it does.

¶97 Based on the extensive record before us, the District Court found that Native Americans disproportionately rely on ballot collection to vote, in part due to a history of discrimination around voting, *see*, *e.g.*, *United States v. Blaine County*, 157 F. Supp. 2d 1145, 1152 (D. Mont. 2001), and also the unique circumstances in Indian country[21] that make it much more difficult to access polling places or post offices. Many electors reside in remote areas and have long distances to polling places or post offices. Many do not have mail service to their homes. All these factors, and more,[22] combine to make it much more difficult on

21. *See* 18 U.S.C. § 1151 (defining "Indian country").

22. The District Court found numerous factors that make voting excessively challenging to Native Americans in Montana.

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average for people living on reservations to either get to a polling place on or before election day, or to mail an absentee ballot prior to election day. *See also Driscoll*, ¶ 6 (describing barriers that Native Americans face accessing the right to vote).

¶98 As a result, Native Americans disproportionately rely on ballot-collection services. Appellees collected at least 2,500 ballots in the 2016 and 2018 elections—or roughly 5% of the registered voters living on reservations in Montana each year. However, because BIPA was enjoined just days before the 2020 election, Western Native Voice was unable to fully prepare its collection activities and therefore collected only 400 ballots. Appellees' expert, Alex Street, conducted a statistical analysis between the 2020 primary and the 2016 primary to measure the effect BIPA had on those living on-reservation versus those living off-reservation. His analysis focused only on voters who had already registered to vote absentee in 2016 to maintain a control group. He found that turnout between 2016 and 2020 was steady for those voters who lived off-reservation, with only a 0.2% decline. However, turnout fell for those living on-reservation by 3.5%—a statistically significant negative impact for on-reservation voters. Further, rejection rates of ballots for people living on-reservation increased substantially compared to those living off-reservation in the 2020 election. Thus, Street concluded that HB 530 would have a statistically significant negative impact on voting for Native Americans

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The Secretary does not dispute these findings as clearly erroneous, and they are entitled to deference. M. R. Civ. P. 52(a)(1), (6).

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living on reservations in Montana. The District Court agreed.

¶99 HB 530 takes away the only option to vote for a significant number of Native Americans living on reservations. Thus, it impermissibly interferes with the right to vote, which requires us to review with strict scrutiny.

¶100 The Secretary relies on *Brnovich*, regarding an Arizona ballot-collection law similar to HB 530. *Brnovich*, 141 S. Ct. at 2330. However, *Brnovich* is distinguishable in two major ways. First, the case was brought under the federal Voting Rights Act of 1965, 79 Stat. 437 (codified as 52 U.S.C. §§ 10301 et seq.). Here, HB 530 was challenged, among other things, under the Montana Constitution's right of suffrage. Mont. Const. art. II, § 13. Further, unlike here, the *Brnovich* "plaintiffs had presented no records showing how many voters had previously relied on now-prohibited third-party ballot collectors and . . . had provided no quantitative or statistical evidence of the percentage of minority and non-minority voters in this group," nor even claimed that the restriction would make it significantly harder to vote. *Brnovich*, 141 S. Ct. at 2335 (internal quotation omitted). *Brnovich* looked at the totality of the circumstances and balanced the burden imposed against the State's interests. *Brnovich*, 141 S. Ct. at 2338-40. But this is distinct from the test we use under the right to vote.

¶101 The first step under our right-to-vote analysis is to determine whether the law impermissibly interferes

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with the right to vote, and then to apply the correct level of scrutiny. Under this provision, plaintiffs must first show that the law interferes with the right to vote, and, if it does, the burden shifts to the State to satisfy strict scrutiny. Because Appellees here have shown that HB 530 impermissibly interferes with the right to vote, the Secretary must satisfy strict scrutiny.

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¶102 Under strict scrutiny, the Secretary must show that HB 530 is the least onerous path to a compelling state interest. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174. The Secretary argues the State has a compelling interest in preserving the integrity of its election process. We have acknowledged such a compelling interest. *Larson*, ¶ 40 ("Montana has a compelling interest in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes."). However, this law is not narrowly tailored to achieve this goal. The Secretary argues that this law is essential to regulate the potentially corrupting influence of money paid in exchange for ballot collection on a per-ballot basis. We agree that someone paid per ballot could be motivated to interfere with the integrity of our elections by coercing and intimidating voters to give them their ballots for their own monetary gain.[23] Although, as the Secretary argues, the Legislature may take preventative steps to "insure the purity of elections," Mont. Const. art.

23. *See* Attachment 10 to Docket 102 Joint Notice of Filing at 10, 12, 15-16, 22, *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. 2020) (describing Leslie McCrea Dowless' pay-per-ballot scheme to defraud the 2018 general election in North Carolina).

IV, § 3, it must do so in a way that does not interfere with the right to vote or by narrowly tailoring the law to its compelling interest. In that regard, the Legislature could have enacted a narrower law that prohibits only nefarious activity rather than the overly broad law it enacted which also proscribed Appellees' lawful activity. But we note that this type of nefarious activity is already illegal under, among other things, § 13-35-218, MCA.

¶103 Significantly, the Secretary failed to introduce any evidence of fraud related to ballot collection in Montana. The one instance the Secretary cites to, a newspaper article recounting several people who were worried about where their ballots went after they were collected, was merely that—worry. Those complaints were investigated by election officials, and, in every case, the voters' ballot had been delivered on time and without issue. *Driscoll*, ¶ 3 n.1.

¶104 The Secretary also argues that the State has a compelling interest in preventing mail-in-ballot fraud. Notably, the Secretary of State conducted a post-election audit of the 2020 general election. Because of the COVID-19 pandemic, that election was conducted entirely by mail. That audit identified no significant problems.

¶105 We also note that the parties found two cases in the last several decades regarding voter fraud in Montana. None of the cases had anything to do with election day registration, ballot collection, student ID, or any of the laws at issue in this case. In the first, a man pled guilty in 2011 for signing his ex-wife's absentee ballot without her

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permission. The other involved a man trying to register under a fake name. Montana law already criminalizes this behavior, and both were sentenced under § 13-35-207, MCA, which carries a maximum sentence of up to ten years in prison and up to a $50,000 fine. *See also*, *e.g.*, § 13-35-103, MCA (criminalizing a knowing violation of Montana election laws); § 13-35-201, MCA (criminalizing, among other things, showing someone a marked ballot and soliciting someone to show their ballot); § 13-35-205, MCA (criminalizing changing someone else's ballot); § 13-35-207, MCA (criminalizing numerous acts regarding falsification or deception in elections); § 13-35-209, MCA (criminalizing fraudulent registration); § 13-35-210, MCA (criminalizing voting multiple times); §§ 13-35-214, -215, -218, MCA (criminalizing certain acts to influence voters).[24]

¶106 The State does not demonstrate that HB 530, § 2 is narrowly tailored to address the State's compelling interests, and it is thus unconstitutional under the Montana Constitution's right to vote. Mont. Const. art. II, § 13. Therefore, we need not discuss the parties' arguments under equal protection, freedom of speech, or due process.

¶107 *Issue Four: Did the District Court err in finding § 13-13-114, MCA, unconstitutional? (SB 169)*

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24. Federal law also criminalizes such fraudulent acts. *See, e.g.*, 52 U.S.C. §§ 10307, 20511; *see also United States v. Hill*, (D. Mont. 2023) (No. 9:23-cr-0021) (charging man with violating federal election laws).

¶108 SB 169 updated several statutes. Section 1 updated the ID requirements for registering to vote under § 13-2-110, MCA. Section 2 updated the ID required to show an election judge at the polls to vote under § 13-13-114, MCA. Section 3 updated ID requirements for provisional voters voting by mail under § 13-13-602, MCA. And section 4 added a failsafe for voters who were unable to meet the ID requirements in § 13-13-114, MCA, under § 13-15-107, MCA. We read Appellees' complaint as only challenging § 13-13-114, MCA (Section 2). *See*, *e.g.*, Montana Democratic Party First Amended Complaint ¶¶ 3, 59, 61, 63, 67, 70, 72 (challenging only the ID requirements under § 13-13-114, MCA). Further, the parties' briefing and evidence at trial only pertained to showing ID at the polls rather than matters pertaining to the other sections. Thus, we only analyze the constitutionality of § 13-13-114, MCA.

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¶109 Prior to SB 169, a Montanan already *registered* to vote was required to present a current photo ID with their name on it to an election judge *or* "a current utility bill, bank statement, paycheck, . . . confirmation of voter registration . . . , or other government document" with their name and address on it. Section 13-13-114(1)(a), MCA (2019). If they were not yet registered, a voter would have to comply with §§ 13-2-109, -110(3), and -208, MCA, which verify that the voter is actually eligible to vote in Montana. The purpose of showing an ID at the polls is to confirm that you are the person that has registered to vote.[25] Outside of election day registration, election

25. *See* 2 Mont. Admin. Reg. 170 (Jan. 28, 2022) (explaining that the requirements found in § 13-13-114, MCA, do not address proof of citizenship or Montana residency, which is instead attested

judges at a polling place do not determine again that an elector is eligible to vote in Montana. The Secretary's own policies specify:

> Since **only** an elector's name and photo are checked when an elector submits photo identification, election judges do not check photo IDs to see whether the address on the identification is current. For example, an out-of-state Driver's License is a valid form of **<u>photo</u>** identification, even if the license is expired or suspended, as long as it has the person's name and photo and is issued by a government agency.

2022 Election Judge Handbook, Mont. Sec'y of State 96 (Feb. 11, 2022) (emphases in original).[26]

¶110 The record reflects that some legislators amended § 13-13-114, MCA, to discourage students from voting. As introduced, SB 169, Section 2, did not include a Montana college student ID as a primary form of identification. It was amended in committee to clarify that a photo identification card issued by a Montana college or university is a primary form of

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to under penalty of perjury by Montana law when registering to vote).

26. Identification is required at the polls to verify you are who you say you are, but other checks are performed when someone mails in an absentee ballot, such as checking to make sure their signature matches that on file. *See* § 13-13-241(1)(a); *see also* Docket 27 Trial Brief, *United States v. Hill*, (D. Mont. 2023) (No. 9:23-cr-0021) (addressing evidentiary issues of handwriting comparison on voter affidavit).

identification.[27] *See* S.B. 169.3, 67th Leg., Reg. Sess. (Mont. 2021). However, the Speaker of the House offered an amendment on the House floor during the second reading of SB 169 to strike Montana university photo ID from a primary form of identification and move it down to the secondary form of identification because "if you're a college student in Montana and you don't have a registration, bank statement, or a W2, makes me kind of wonder why you're voting in this election anyway. So this just clears it up that [students] have a little stake in the game." *See also Mont. Democratic Party*, ¶ 31 n.21. Representative Custer spoke in opposition to this amendment, calling it discriminatory and explaining the purpose of showing ID at the polls is simply to verify you are who you say you are, not to verify your eligibility to vote, as is done during registration.[28] Representative Custer, a former Republican member of the House and former county clerk and recorder and election administrator, testified at trial that she believed the amendment was discriminatory because of the perception that students tend to be more liberal and vote accordingly.

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¶111 We first determine whether § 13-13-114, MCA, impermissibly interferes with the right to vote. We

27. Prior to SB 169, § 13-13-114, MCA, included "a school district or postsecondary education photo identification" as an example of proper photo identification.

28. The Legislature also passed legislation that made student registration more difficult. *See* § 13-35-242, MCA (2021 Mont. Laws ch. 494, § 21) (held unconstitutional *Forward Montana v. State*, No. ADV-2021-611 (Mont. First Judicial Dist. filed Feb. 3, 2022)).

conclude that it does not. The District Court found that plaintiffs had not identified a single individual who was unable to vote due to the new ID requirements.[29] Further, SB 169, Section 4, allows a voter who cannot provide photo identification to provide a government document along with a declaration of reasonable impediment that allows them to vote. *See* § 13-15-107(3)-(4), MCA. Appellees point to statistical evidence presented at trial that shows a lower likelihood of students having other forms of ID compared to the general population, which they argue shows that students would be denied the right to vote. The District Court found that students are generally less likely to have a form of primary identification. Further, they "often do not receive utility bills, have bank statements addressed to their school addresses, have any reason to have a government issued check, or have a job for which they receive paychecks," which are the secondary documents required if they wish to vote using their student IDs. Although these findings show that the ID law imposes a minimal burden on their right to vote, we do not find it persuasive enough to determine that the right to vote has been impermissibly interfered with in light of other evidence presented at trial. We conclude that the record demonstrates the legislation imposes a minimal burden on student voting.[30]

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29. Although Montana Youth Action testified that one of its board members had communicated that they would be relying on their student ID at the polls, there was no testimony that their student ID was their only option and that they could not provide other acceptable forms of ID.

30. Student groups facially challenge the Legislature's amendment of § 13-13-114, MCA, because of the burden it

¶112 Because § 13-13-114, MCA, does not impermissibly interfere with the right to vote but minimally burdens it, middle-tier analysis is appropriate. The first step under our middle-tier analysis is to determine whether the Secretary has shown that the law is reasonable. We determine that she has not. The Secretary first posits that § 13-13-114, MCA, helps ensure that voters meet the Constitution's qualifications for voting. However, the record reflects, and the Secretary's own procedures show, that the purpose of showing ID at the polls is not to check a voter's eligibility to vote, but to verify that they are who they say they are. The Secretary asserts that a student ID is not indicative of a person's Montana residency. But the Secretary admitted that a U.S. passport (which is a primary form of ID) is not either because it does not preprint a person's address.[31] Neither is a military

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imposes on all student voters, not as applied to the particular circumstances of certain named student parties. *See Citizens for a Better Flathead v. Bd. of Cnty. Comm'rs*, 2016 MT 325, ¶ 45, 385 Mont. 505, 386 P.3d 567 (explaining the difference between an "as applied" constitutional challenge and a "facial" constitutional challenge). If we could sever the invalid part of § 13-13-114, MCA, we would. *See Greely*, 193 Mont. at 399, 632 P.2d at 311. But we cannot sever the unconstitutional portion of the amended statute in this case because it would not place student ID back into a primary form of identification as it existed before. Thus, the whole statute must fail and revert to § 13-13-114, MCA, as it was before the unconstitutional enactment. *See Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶¶ 39-40, 384 Mont. 503, 380 P.3d 771.

31. *Mont. Democratic Party*, ¶ 30, is abrogated to the extent it states that Montana concealed-carry permits are not required by Montana statute to bear a photograph. *See* § 45-8-322(3), MCA ("The permit and each renewal must . . . at a minimum, include

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identification card indicative of Montana residency, though—like a student ID card—it is persuasive evidence of such.[32] *See* § 13-1-112(3)(a), MCA ("An individual in the armed forces of the United States may not become a resident solely as a result of being stationed at a military facility in the state.").

¶113 The Secretary asserts that § 13-13-114, MCA, eases administrative burdens by providing a clear list of primary IDs. We agree that having a list of acceptable primary IDs might help ease administrative burdens for poll workers. Thus, the person (often talked about at trial) who tries to use their Costco membership card or frequent flyer card at the polls will no longer confuse election judges as to whether that is an acceptable form of ID. But eliminating student IDs from the list of primary IDs did not ease administrative burdens as the Secretary asserts.

¶114 The Secretary argues that it was reasonable for the Legislature to draw a line between governmental and non-governmental IDs, suggesting at trial that student IDs from the Montana university system are "quasi-governmental IDs." The Montana university system is created by Article X, Section 9, of the Montana Constitution through the Board of Regents (Board)

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. . . a picture of the permittee."). So although they are not uniform from county to county, each county must at a minimum include a picture of the applicant on the permit.

32. We do not address in this Opinion whether a student identification card is sufficient evidence by itself of Montana residency to register to vote. *See* § 13-1-112, MCA.

and governed by them. As such it is an entity of State government. Moreover, the Board's constitutional authority extends to rulemaking for administrative matters concerning the Montana university system. *Bd. of Regents*, ¶ 20. And the record shows that Montana university system schools all require a government photo ID to obtain a student ID, ensuring they are reliable. The record presents no evidence on student ID cards from private universities in Montana, nor are there facts cited to that are appropriate for judicial notice that suggests any standards less rigorous for other student IDs that used to be acceptable. Dissent, ¶ 168. Thus, although it is reasonable to draw a line between governmental ID and a Costco card, it was not reasonable to remove student IDs from the list.[33]

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33. We do not inexplicably ignore that the purpose of the ID law is to provide reliable proof of identity at the polls. Dissent, ¶ 168. Rather, that is a basis to conclude that the Secretary's argument that § 13-13-114, MCA, was necessary because it "ensur[ed] voters meet the Constitution's qualifications for voting" is arbitrary and unreasonable. *See* Opinion, ¶¶ 109, 112. What we also cannot ignore is that there was no evidence presented at trial that postsecondary education photo IDs are unreliable as a proof of identity. The only basis the State has to support that argument are citations to inapposite federal district court cases that upheld dissimilar laws under rational basis review—which is not the appropriate standard under the Montana Constitution's right to vote. Nor do we dispute the general wisdom of showing photo ID at the polls to verify identity. *Accord Crawford*, 553 U.S. 181, 128 S. Ct. 1610. Indeed, Montana has long required photo identification at the polls. *See* § 13-13-114, MCA (2003 Mont. Laws ch. 475, § 21). But, as with the other laws at issue here, when the Legislature amended § 13-13-114, MCA, to eliminate postsecondary education

¶115 The Secretary also argues that voter ID laws improve voter confidence, and it was therefore reasonable to enact this law. This again misstates the limited scope of our review of SB 169, which is to determine whether the removal of student IDs as primary forms of identification was reasonable. The record contains mixed evidence including a generalized conclusion from a State expert that voter ID laws improve confidence in elections. However, he later admitted that other research shows these types of laws have no effect on voter confidence or perceived rates of fraud. Appellees' experts concluded that the research shows these laws have no effect on voter confidence. The District Court found Appellees' experts persuasive and credible on this point. *See Marias Healthcare Servs. v. Turenne*, 2001 MT 127, ¶ 25, 305 Mont. 419, 28 P.3d 491 ("[A] district court is in a better position to observe witnesses and judge their credibility than this Court. We will not second guess a district court's determination regarding the strength and weight of conflicting testimony nor substitute our judgment for that of the trial court when the issue relates to the credibility of the witness or the weight given to certain evidence.").

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¶116 Under middle-tier analysis, the State must show that the law is reasonable—i.e., not arbitrary. *Butte Cmty. Union*, 219 Mont. at 434, 712 P.2d at 1314. In *Bartmess*, the State showed that its rule was reasonable because it both (1) acted as an incentive for students wishing to

photo IDs as an acceptable form of primary photo identification, it was subject to constitutional constraints—here, under middle-tier analysis, that the law was reasonable and that the State's interests outweighed any burden the law created.

participate in extracurricular activities to study and (2) provided adequate study time to those who did not meet the average. *Bartmess*, 223 Mont. at 276, 726 P.2d at 805. In *Deaconess*, the State showed that its welfare rule was reasonable because those with an income 300% above that needed for general assistance could reasonably be expected to obtain their own insurance. *Deaconess Medical Ctr.*, 222 Mont. at 132-33, 720 P.2d at 1169.

¶117 Here, the State has not shown that, after almost two decades of allowing student IDs as primary forms of ID, its classification between student IDs and other primary forms of ID is reasonable. The classification did not ensure electors were qualified voters, ease administrative burdens, nor improve voter confidence.

¶118 Moreover, the Secretary has not demonstrated that the State's asserted interest is more important than the burden on the right to vote, which is required under the second step of middle-tier analysis. The above reasonableness analysis demonstrates that the Secretary's purported purposes carry little, if any, weight. The exclusion of a student ID as a primary form of identification for purposes of voting is unnecessary. As noted, evaluation of whether a person is a qualified elector is conducted in a separate registration process. As long as that person has been registered under Montana law, all they need to do at the polls is to show that they are the person who has been duly registered. Although some forms of previously used identification may not be good indicators of someone's identity, a student ID issued by a postsecondary institution is.

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¶119 Excluding student IDs from the list of acceptable photo IDs imposes a burden on student voting and the Secretary has not established that it is necessary for any legitimate government purpose, much less that it is more important than the right to vote. Nor is it a reasonable restriction of voter's rights. We hold that § 13-13-114, MCA, is unconstitutional.

CONCLUSION

¶120 We affirm the District Court and hold that §§ 13-2-205(2), 13-2-304, and 13-13-114, MCA (2021), are unconstitutional. We also affirm the District Court and hold that 2021 Mont. Laws ch. 534, § 2, is unconstitutional.

/s/ MIKE McGRATH

We Concur:

/s/ LAURIE McKINNON, J.
/s/ JAMES JEREMIAH SHEA, J.
/s/ INGRID GUSTAFSON, J.

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Justice Ingrid Gustafson, concurring.

¶121 While I join in the Opinion and concur with its conclusion affirming the District Court and holding §§ 13-2-205(2), 13-2-304, and 13-13-114, MCA (2021), are unconstitutional, I do not agree with the application of middle-tier scrutiny with regard to issue one—restricting a voter from receiving or submitting an absentee ballot if the voter would be eligible to vote on or before election day but were not yet eligible to vote.

¶122 As the Opinion underscores, under the Montana Constitution, "the right to vote is a clear and unequivocal fundamental right," Opinion, ¶ 13, and "when a law impermissibly interferes with a fundamental right, we apply a strict scrutiny analysis." Opinion, ¶ 34, citing *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173-74 (1996). As pointed out by the Opinion, absentee voting has become the predominate voting by electors in Montana—accounting for nearly 75% of the voting in 2018 and the *only* means of voting in 2020. Opinion, ¶ 52. I would conclude § 13-2-205(2), MCA—that precludes the predominate voting option, and at times precludes all voting options, eliminating voting for the subclass it effects—is more than a mere burden on voting. I would conclude the total or near total elimination of voting options for the subclass it effects impermissibly interferes with the right to vote and is thus subject to strict scrutiny.

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Appendix A

¶123 As § 13-2-205(2), MCA, does not pass the lessor middle-tier analysis, it clearly does not pass strict scrutiny.

/S/ INGRID GUSTAFSON

Justice Laurie McKinnon joins in the concurring Opinion of Justice Gustafson.

/S/ LAURIE McKINNON

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Justice Beth Baker, concurring in part and dissenting in part.

¶124 I join all but ¶¶ 48-61 of the Court's Opinion. In my view, the Plaintiffs did not meet their burden to establish the facial invalidity of HB 506, amending § 13-2-205, MCA. That amendment makes clear that, although a person may register to vote if they will be 18 on or before election day, they may not receive or cast a ballot until they meet "residence and age requirements[.]" Section 13-2-205(2), MCA. The Court acknowledges that this law does not interfere with the right to vote, as by its terms it prevents no one from voting and by its operation did not—according to any record evidence—prevent anyone from voting. Opinion, ¶ 51. It concludes nonetheless that because the law removes the option of absentee voting for this subclass of eligible voters, it burdens their right, for which the State has not shown an important government interest. Opinion, ¶¶ 51, 59. Applying middle-tier scrutiny to HB 506 and measuring the nature of the intrusion against the government interest served by the amendment, I disagree.

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¶125 Under Article IV, § 2 of the Montana Constitution, a person is not a qualified elector until age 18. The new law affects a very narrow subset of potential voters—those who turn 18 within the month before an election—and removes their absentee-voting option for the single election for which the voter is not qualified to cast a ballot prior to the mailing of absentee ballots (twenty-five days before election day). This brings the Plaintiffs' constitutional challenge closer to an as-applied than a facial challenge, as the law plainly is constitutional in most of its applications.

Beyond that, it imposes an extremely minimal burden to the extent it impacts a voter only on the first election for which they are eligible.

¶126 As the Secretary points out, before its enactment, Montana law lacked uniformity for when absentee ballots could be distributed to those who had not yet reached voting age. The State presented evidence that county election administrators made their own individual decisions and treated prospective voters differently on a county-by-county basis. This led to inconsistency among different communities in how voters were being treated and in how ballots were being handled before a voter was qualified. Some counties mailed absentee ballots to these voters, and some did not. If the ballots were returned, some would hold them until election day; other counties cautioned the voters not to return them until they were eligible to vote. Of all the laws challenged, this one is a modest time, place, and manner regulation for which the State has shown a legitimate interest. *See Butte Cmty. Union*, 219 Mont. at 434, 712 P.2d at 1314. Because the regulation does not interfere with the fundamental right to vote, the State was not required to show that it was narrowly tailored or that the government's interests could have been achieved by less restrictive means. By establishing a uniform, statewide regulation effecting a one-time limitation on a narrow class of electors, the Legislature acted within its constitutional authority to provide by law for registration and absentee voting. Mont. Const. art. IV, § 3.

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¶127 Were it not for the "final safeguard" of election-day registration (Opinion, ¶ 71), § 13-2-205(2), MCA, could impose a more substantial burden on this narrow group of first-time voters, and the Plaintiffs' case would be stronger. But the Court's Opinion today removes that concern. Accordingly, I would not disturb the Legislature's choice on this issue.

/S/ BETH BAKER

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Appendix A

Justice Dirk Sanderfur concurring in part, dissenting in part.

¶128 I concur that § 13-2-205(2), MCA (2021) (barring preliminary issuance of absentee ballots to voters who will be 18 years old on or before election day), is facially unconstitutional. Whether under rational basis scrutiny or the correct standard of intermediate scrutiny, it is not rationally related to the Legislature's stated purpose under Mont. Const. art. IV, § 3 (legislature duty to regulate voting residence/registration, absentee voting, and election administration to "insure the purity of elections and guard against abuses of the electoral process"), of providing for efficient election administration, preventing voter fraud, and otherwise ensuring the integrity of the election process.

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¶129 I dissent, however, from the Court's analysis and resulting conclusions that the Legislature's push-back of the voter registration deadline from election day to noon the day before (§ 13-2-304, MCA (2021)), prohibition of paid third-party absentee ballot collectors (2021 Mont. Laws ch. 534, § 2),[1] and elimination of university student IDs as an acceptable form of "primary" voter identification (§ 1-13-114, MCA (2021)) are facially unconstitutional. Legislative enactments are facially unconstitutional only if there are no conceivable circumstances under which the enactment may constitutionally apply under the applicable

1. As a technical matter, 2021 Mont. Laws ch. 534, § 2 does not directly prohibit paid absentee ballot collectors, but nonetheless does so indirectly by directing administrative prohibition of paid absentee ballot collectors.

level of constitutional scrutiny. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶¶ 14 and 73, 382 Mont. 256, 368 P.3d 1131 (*inter alia* citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190, 170 L.Ed.2d 151 (2008) (citing *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L.Ed.2d 697 (1987))).[2] Without reference to that critical threshold principle, the Court erroneously avoids the correct level of intermediate constitutional scrutiny for time, place, and manner voting and election administration regulations that do not substantially interfere with the right to vote, as recognized in *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L.Ed.2d 245 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 786-98, 103 S. Ct. 1564, 1569-75, 75 L.Ed.2d 547 (1983)), and as applied in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610, 170 L.Ed.2d 574 (2008). The Court does so based on:

(1) a demonstrably false assertion that the Montana Constitution "affords greater protection of the right to vote than the United States Constitution," *inter alia* because the fundamental right to vote protected under the United States Constitution was "much stronger" in 1972 "than it is today";

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2. A legislative enactment may alternatively be facially unconstitutional upon a challenging party showing that it is overbroad because a "substantial number of its applications" fail the applicable level of constitutional scrutiny with no "plainly legitimate sweep." *See Wash. State Grange*, 552 U.S. at 449 n.6, 128 S. Ct. at 1190 (citing *New York v. Ferber*, 458 U.S. 747, 769-71, 102 S. Ct. 3348, 3361-62, 73 L.Ed.2d 1113 (1982), internal punctuation omitted).

(2) the resulting misleading assertion that the Supreme Court's *Burdick/Anderson* intermediate scrutiny standard does not apply here due to the greater protection of the right provided by Mont. Const. art. II, § 13;

(3) the equally unsupported and thus misleading assertions that the *Burdick/Anderson* standard also does not apply here because it is *not as* "*meaningful*" as it once was and "now provides less protection" of the right to vote;

(4) erroneous application of strict scrutiny to the Legislature's push-back of the voter registration deadline from election day to noon the day before (§ 13-2-304, MCA (2021)), and prohibition of paid third-party ballot collectors (2021 Mont. Laws ch. 534, § 2), based on clearly erroneous findings of fact that those measures *substantially interfere* with, rather than merely reasonably burden, the exercise of the right to vote; and

(5) amorphous ad hoc application of an analytically incompatible standard of intermediate constitutional scrutiny to the elimination of state university student ID cards as an authorized form of primary voter ID, instead of the manifestly applicable *Burdick/Anderson* standard of intermediate scrutiny specifically tailored to voting/election administration regulations that do not substantially interfere with the exercise of the right to vote.

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See Opinion, ¶¶ 15, 17-19, 21-28, 32, 62-75, 95-96, 101, and 109-119 (emphasis added); *compare Crawford*, 553 U.S. at 185-204, 128 S. Ct. at 1613-24 (applying *Burdick/Anderson* intermediate scrutiny in rejecting state Democratic Party assertion that Indiana statute requiring photo ID at the polls "substantially burdens the right to vote" in violation of U.S. Const. amend. XIV because it was "[un]necessary" to "avoid[] election fraud," would "arbitrarily disfranchise qualified voters who do not" have the required photo ID, and would "place an unjustified burden on those who cannot readily obtain such identification").

1. Demonstrably False Assertion that Montana Constitution "Affords Greater Protection of the Right to Vote" than United States Constitution.

¶130 The lynchpin to the Court's cascading analytical sleight of hand is the erroneous assertion that the fundamental right to vote guaranteed by Mont. Const. art. II, § 13 ("no power . . . shall at any time interfere to prevent the free exercise of the right of suffrage"), "affords greater protection of the right to vote than the United States Constitution." Opinion, ¶¶ 17 and 19-20. As a threshold matter, it is hard to imagine how the Framers of our 1972 Constitution intended to provide greater protection of voting rights than provided under the United States Constitution when they did nothing more than carry forward, verbatim, the same language from our 1889 Constitution without discussion, or controversy. *See* Mont. Const. art. II, § 13; *compare* 1889 Mont. Const. art. III, § 5. *See also* Montana Constitutional Convention, Committee Proposals, Feb. 18, 1972, Vol. II, p. 634 (Bill

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of Rights Committee), and Verbatim Transcript, March 8, 1972, Vol. V, p. 1745 (final approval). Unlike the various individual rights uniquely enshrined in a federal or state constitution for the first time in our 1972 Constitution, e.g., Mont. Const. art. II, §§ 3-4, 8-10, and 15 (rights to clean and healthful environment, individual dignity, participation in governmental activities, examine documents and observe deliberations of public bodies or agencies, individual privacy, and fundamental rights of minors), the right to vote was already a broad-scope implicit fundamental right under the United States Constitution in 1972, and neither the express language of Mont. Const. art. II, § 13, nor its constitutional history, manifests any intent of the Framers to provide a broader or more protective right to vote under the Montana Constitution.

¶131 Straining to support its cursory assertion that Mont. Const. art. II, § 13, provides "greater protection" of the right to vote than the federal constitution, the Court cites isolated statements made by a few individual Delegates to the 1972 Constitutional Convention. Opinion, ¶ 27 (quoting Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, Vol. III, pp. 401-02, 409, and 445 ("the act of voting is not a privilege that the state merely hands out, but it is a basic right . . . that in no way should be infringed unless for very good reasons"; the "right to vote is so sacred and . . . important that it deserves constitutional treatment"; the "only way to preserve the rights of the public is to preserve their vote" because its "the only power the public has"; and "the right to vote is certainly the most sacred right of them all")). The Court selectively cherry-picked each of

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those isolated statements, along with others,[3] out of the distinct context in which they were made—the midst of a significant running debate as to whether Mont. Const. art. IV, § 3, should enshrine an explicit right to "poll booth" registration (election day voter registration) into the new Constitution, or alternatively, leave that issue to the *discretion of the Legislature* as was ultimately decided. *See* Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, Vol. III, pp. 400-14 and 428-53.[4] Even on that narrow subject, the isolated statements cited in Opinion, ¶¶ 27 and 68, came from individual Delegates who originally advocated in favor of the minority proposal *before* ultimately *joining the majority vote against it. See* Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, Vol. III, pp. 401-02, 406, 409, 412-13, 437, and 445 (individual statements and votes of Delegates Vermillion, Campbell, Choate, Dahood, Holland, and McKeon initially in support of minority proposal to make election day registration a constitutional right); *compare* Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, Vol. III, pp. 451-52 (76-22 final vote approving ultimately adopted language of Mont. Const. art. IV, § 3, and thus rejecting minority proposal to make election day registration a constitutional right). While many, but

3. Opinion, ¶ 68 (citing various other statements made by individual Delegates in support of *ultimately-rejected minority proposal* to enshrine election day registration as a constitutional right in contravention of then-prevailing 40-day statutory election deadline).

4. *See also* Montana Constitutional Convention, Verbatim Transcript, March 1, 1972, Vol. IV, p. 1185 (Mont. Const. art. IV, § 3, in current form).

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certainly not all, of the Delegates who participated in the debate favored election day registration as a means to increase voter turnout, *see* Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, Vol. III, pp. 400-14 and 428-53, an overwhelming 76-22 majority of the Delegates as a whole could have, but squarely chose *not* to make election day registration a Montana constitutional right, even in the face of the then prevailing 40-day statutory voter registration deadline. Read objectively as a whole, rather than through the distorted lens of isolated statements of individual Delegates regarding an only tangentially related matter, nothing in the pertinent history of the Montana Constitutional Convention supports the Majority's naked assertion here that the Framers intended to have the Montana Constitution provide greater protection of the right to vote than the already broad protection then provided under the United States Constitution.

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¶132 Moreover, we have long recognized that Constitutional Convention transcripts are not necessarily "indicative of" the Framers' intent regarding the interpretive matter at issue because statements of individual Delegates do not necessarily reflect the "collective intent" of the majority of the body. *Keller v. Smith*, 170 Mont. 399, 408-09, 553 P.2d 1002, 1008 (1976); *Columbia Falls Elem. Sch. Dist. v. State*, 2005 MT 69, ¶ 64, 326 Mont. 304, 109 P.3d 257 (Rice, J., specially concurring). As manifest by the Majority's selective cherry-picking here, the isolated "excerpted" statements of individual Delegates "can often be used to support almost any position," *State ex rel. Racicot v. First Judicial Dist. Ct.*, 243 Mont. 379, 387, 794 P.2d 1180, 1184 (1990),

whether a majority of the body acted to "address the specific problem involved in [a particular] case" or not. *Keller*, 170 Mont. at 408-09, 553 P.2d at 1008.

¶133 In historical context, it bears further note that the voter registration deadline left in place when the Framers rejected enshrining election day registration in the Constitution was 40 days before election day[5]—a far cry from the 32-hour deadline the Court declares unconstitutional today. The then-prevailing 40-day registration deadline was *left in place by the Framers*, the *very same body* the *Court today cursorily alleges* intended greater protection of the right to vote than provided under the United States Constitution. Even in the ensuing 35 years before enactment of election day registration in 2005,[6] the voter registration deadline was still 30 days before election day[7]—a deadline thus *clearly constitutional*, at least *in the minds and resulting acts of the Framers*.

¶134 Though the federal right is manifestly implied primarily from the First Amendment, there simply can be no doubt that our Framers' were aware of the United States Supreme Court's clear, unequivocal, and consistently broad and strong protection of the fundamental right of all citizens to vote under the United States Constitution, to wit:

5. Section 23-3016(1)(a), RCM (1947) (1969 Mont. Laws ch. 368, § 35).

6. 2005 Mont. Laws ch. 286, § 1.

7. *See* § 13-2-301(1)(a), MCA (2003).

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Appendix A

> The right to vote freely for the candidate of one's choice is of the *essence of a democratic society*, and any restrictions on that right strike *at the heart of representative government*. . . . Undoubtedly, the right of suffrage is a *fundamental matter* in a free and democratic society. *Especially since* the right to exercise the franchise in a free and unimpaired manner is *preservative of other basic civil and political rights*, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 555 and 561-62, 84 S. Ct. 1362, 1378 and 1381, 12 L.Ed.2d 506 (1964) (emphasis added); *Wesberry v. Sanders*, 376 U.S. 1, 17-18, 84 S. Ct. 526, 535, 11 L.Ed.2d 481 (1964) ("[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live"—"[o]ther rights, even the most basic, are illusory if the right to vote is undermined"); *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 1071, 30 L.Ed. 220 (1886) ("political franchise of voting" is "*a fundamental political right*" because it is "*preservative of all rights*"—emphasis added). *See similarly Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 990, 59 L.Ed.2d 230 (1979) ("voting is of the most fundamental significance under our constitutional structure").[8]

8. Further manifesting the strong, broad, and consistent protection of the implicit fundamental right to vote under the United States Constitution are those related express protections

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¶135 Obviously aware that the legitimacy of its ensuing analyses of the Legislature's disputed time, place, and manner voting regulations critically and precariously depends on its unsupported assertion that the Montana Constitution provides greater protection of the right to vote than the United States Constitution, the Majority strains hard to undermine this Dissent demonstration to the contrary. Opinion, ¶¶ 15, 17, and 19-27. Upon close examination, however, the Majority analysis actually bolsters this Dissent analysis. Most importantly, the Court's Opinion ultimately fatally wounds itself when forced to acknowledge that the protection of the fundamental right to vote manifestly implicit in the United States Constitution was every bit as broad and strong in 1889 and 1972 as the protection of the right similarly expressed in both our original and current Montana Constitutions. *See* Opinion, ¶ 22. Having acknowledged the indisputable, the Majority then cites to a slew of U.S. Supreme Court cases, including those cited *supra*, for the proposition that the fundamental right to vote protected by the United States Constitution "was viewed much stronger in the 1800s through the 1970s than . . . today." Opinion, ¶ 22. The Majority conspicuously fails, however, to cite a single instance, not one, where the Supreme Court has expressly or implicitly given *any* indication that it views the protection of the right to vote under the United States

provided long before 1972. *See* U.S. Const. amends. XIV, XV, and XIX (expressly guaranteeing the right to "equal protection of the laws" and expressly providing that the right of United States citizens "to vote shall not be denied or abridged by" the federal or any state government based on "race, color, . . . previous condition of servitude," or gender).

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Constitution to be narrower or weaker today than in the 1800s through the 1970s. Opinion, ¶¶ 15, 22, 27, and 30.

¶136 The Majority punctuates its unsupported assertion of stronger protection of the right to vote under Mont. Const. art. II, § 13, by concluding that the Framers "clearly intended to strongly protect the right to vote as seen through" its plain language and history, "the Constitution as a whole, and the Framers' discussion" regarding Mont. Const. art. IV, § 3.[9] Opinion, ¶¶ 26-27. Unquestionably, our Framers clearly intended Mont. Const. art. II, § 13, as carried forward verbatim from our 1889 Constitution, to "retain" and "maintain" a "strong and protective" right to vote.[10] But, again, conspicuously absent from the Majority's repeated reliance on that point is citation to *any* non-speculative manifestation of our Framers' intent, whether collectively or even based on isolated statements of *any* individual Delegate, to provide greater or broader protection than already provided by the United States Constitution.

¶137 Faced with that vexing analytical shortcoming, the Court cites *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022) (overruling *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973)), for the proposition that implicit rights

9. Mont. Const. art. IV, § 3 ("[t]he legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections . . . and shall insure the purity of elections and guard against abuses of the electoral process).

10. *Accord* Opinion, ¶¶ 27, 27 n.5, 33, and 35.

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protected by the United States Constitution "are subject to expansion [and] contraction." Opinion, ¶ 21. However, without laying out the complexities of the debate as to whether the Fourteenth and Tenth Amendments to the United States Constitution imply a privacy right inclusive of a woman's right to choose a pre-viability abortion, suffice it to say that the Majority puts forth here no more than an intentionally over-simplified characterization of those federal bodily/reproductive privacy rights cases to support an unrelated and otherwise unsupported construction of Mont. Const. art. II, §13.[11] Moreover, even if the Majority's proposition regarding the elasticity of implicit federal constitutional rights is taken *arguendo* as accurate, its pivotal point still fails because, in contrast to the historical debate over abortion rights, the United States Supreme Court has steadfastly recognized and protected the fundamental right to vote in a consistent, clear, and unequivocal manner throughout the entirety of our tumultuous national history. *See*, *e.g.*, *supra, Ill. Bd. of Elections*, 440 U.S. at 184, 99 S. Ct. at 990; *Reynolds*, 377 U.S. at 555 and 561-62, 84 S. Ct. at 1378 and 1381; *Wesberry*, 376 U.S. at 17-18, 84 S. Ct. at 535;

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11. Rather than a demonstrably broad legal point, the Majority's overly-simplistic *Dobbs-Roe* elasticity assertion is seemingly more of an opportunistic political comment made to overcome an inconvenient analytical obstacle to a desired end. What future implication it may portend regarding the similar hot-button question of whether Mont. Const. art. II, § 10 (individual right to privacy) is or will remain implicitly or necessarily inclusive of a woman's right to choose a previability abortion remains to be seen.

Yick Wo, 118 U.S. at 370, 6 S. Ct. at 1071.[12] The Majority cites no Supreme Court authority to the contrary, and the suggestion of any future likelihood of such a United States Supreme Court holding in the voting rights context is, in a word, preposterous given the Court's unwavering protection of the federal right. Nor has the Majority cited even a single shred of Montana Constitutional Convention history indicating that even a single Delegate, much less the body as whole, intended or even contemplated that inclusion of Mont. Const. art. II, § 13, as carried forward verbatim from our 1889 Constitution, was necessary to protect against any future elasticity in Supreme Court interpretation of the fundamental right to vote so long protected under the United States Constitution. Over a half century later, the Majority simply conjures that speculative justification from thin air.

¶138 Under these circumstances, there can be no doubt that the Framers of our new Constitution expressed no concern, need, or intent to provide greater protection of the right to vote than that already provided under the United States Constitution. The Majority's disregard of our own state constitutional history, the express language of the United States Constitution, and the Supreme Court's well-settled recognition of a clearly implied and broad fundamental federal constitutional right to vote is not only

12. *See also Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1966) (holding that state poll tax substantially interfered with the fundamental U.S. constitutional right to vote and further failed strict scrutiny in violation of Fourteenth Amendment equal protection because it was irrelevant to a voter's qualification to vote).

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the result of faulty constitutional analysis, but shocking to say the least. Clearly, neither the text nor history of Mont. Const. art. II, § 13, support the Court's pivotal unsupported assertion here that the Montana Constitution provides greater protection of the fundamental right to vote than the United States Constitution.

¶139 Equally of no avail, the Court attempts to further support its pivotal cursory assertion of a more protective Montana constitutional right by pointing out that, unlike the United States Constitution, the Montana Constitution expressly protects the right to vote. Opinion, ¶¶ 16-20. The Court then cites the well settled but non-dispositive point of law that nothing in the United States Constitution prevents states, *through their adopting citizenry*, from providing even greater protection of individual rights than provided under the United States Constitution. *See* Opinion, ¶ 16. However, conspicuously absent from the Court's analysis is any explanation how, on what basis, or even to what extent Mont. Const. art. II, § 13, *merely by express statement* of a fundamental right to vote, provides any greater protection than the above-noted broad protection provided under the United States Constitution. Of course state courts are "entirely free to read [their] own State's constitution more broadly than [the Supreme] Court reads the [United States] Constitution, or to reject the mode of analysis used by [the Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293, 102 S. Ct. 1070, 1077, 71 L.Ed.2d 152 (1982). We have thus often recognized that:

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> [we are not] compelled to "march lock-step" with federal courts. *States* are free to grant citizens greater protections *based on state constitutional provisions* than the United States Supreme Court divines from the United States Constitution. As long as we guarantee the minimum rights established by the United States Constitution, we are not compelled to march lock-step with pronouncements of the United States Supreme Court *if our own constitutional provisions call for more* individual . . . *protection* than that guaranteed by the United States Constitution.

State v. Hardaway, 2001 MT 252, ¶ 31, 307 Mont. 139, 36 P.3d 900 (internal citations omitted, emphasis added). However, as manifest in our own above-emphasized *Hardaway* language, we are free to interpret the Montana Constitution to provide greater protection than similar protections provided by the United States Constitution, but *only if* the express language or interpretive constitutional history *clearly* manifests a *Framers' intent* to provide greater protection. *See Hardaway*, ¶ 31. In other words, we are free of federal constitutional constraint to interpret our state constitutional protections more expansively than the lower federal constitutional floor, *but only when* the subject Montana constitutional provision has a *discernably different meaning or greater scope* based on *its unique language or constitutional history. See, e.g.*, *State v. Staker*, 2021 MT 151, ¶ 23, 404 Mont. 307, 489 P.3d 489 (noting heightened privacy protection provided by Mont. Const. art. II, §§ 10-11 (right to privacy and

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freedom from unreasonable searches and seizure) based on express right to privacy *and particular discernable concern of Framers* with government intrusion through modern electronic surveillance); *State v. Zeimer*, 2022 MT 96, ¶ 23 n.13, 408 Mont. 433, 510 P.3d 100 ("[a]part from the implicit privacy protection provided by the Fourth Amendment and similar language of Mont. Const. art. II, § 11," Mont. Const. art. II, § 10 expressly protects right to "individual privacy" against government intrusion and thus provides "broader privacy protection, where implicated, than the Fourth Amendment" based on Framers' "special privacy concerns"); *State v. Peoples*, 2022 MT 4, ¶¶ 12-14, 407 Mont. 84, 502 P.3d 129 (noting recognition of certain more limited warrantless search and seizure exceptions under Mont. Const. art. II, §§ 10-11 than under U.S. Const. amends. IV and XIV); *Yellowstone Cty. v. Billings Gazette*, 2006 MT 218, ¶ 39, 333 Mont. 390, 143 P.3d 135 (noting broad scope of rights to know and public participation expressed in Mont. Const. art. II. §§ 8-9, predicated on special concern of Framers to ensure "openness of government documents and operations"); *Engrav v. Cragun*, 236 Mont. 260, 262, 769 P.2d 1224, 1226 (1989) (noting Framers' concern and intent, embodied in Mont. Const. art. II, §§ 9-10, to strike a balance between right to individual privacy and public right to know in re government and government officer activities); *Nelson v. City of Billings*, 2018 MT 36, ¶¶ 14-15, 390 Mont. 290, 412 P.3d 1058 ("[o]ven in the context of clear and unambiguous language" we must construe the meaning and application of Montana constitutional provisions "not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under

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which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve" with recognition that *our Constitution was not developed and adopted in a vacuum on a blank slate but* "*assume*[*d*] *the existence of a well understood system of law* which is still to remain in force and to be administered" within the parameters of the new constitution—we must thus "examine[] [those] concepts in the context of the [prior] history of this [State] and the well-understood system" of laws that predated the new constitution—internal punctuation and citations omitted, emphasis added). Certainly, the explicit provision of new fundamental rights, not previously expressed in our prior 1889 Constitution, or clearly recognized under the United States Constitution, may alone manifest the Framers' intent to explicitly provide greater protection than provided under the United States Constitution. *See*, *e.g.*, Mont. Const. art. II, §§ 3-4, 8-10, and 15 (rights to clean and healthful environment, individual dignity, participation in governmental activities, examine documents and observe deliberations of public bodies or agencies, individual privacy, and fundamental rights of minors). Not so, however, when, as here, a right explicit in the new Montana Constitution was no more than a verbatim carry-over from our 1889 Constitution, which was in turn developed and drafted against the backdrop of long-established rights protected under the United States Constitution without any manifestation of a different Framers' intent in 1889, much less in 1972. *See Nelson*, ¶¶ 14-15, *supra.*

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¶140 Moreover, neither our exclusive grant of judicial power under Mont. Const. art. VII, §§ 1-2, nor our included exclusive constitutional power and duty to review legislative enactments for constitutional conformance, gives us unfettered discretion, as exercised by the Majority here in the absence of any distinct supporting Montana constitutional language or history, to construe a Montana constitutional right to provide broader protection than a corresponding federal constitutional right *based on no more than our unsupported declaration. See Larson v. State*, 2019 MT 28, ¶ 42, 394 Mont. 167, 434 P.3d 241 ("[*w*]*ithin constitutional limits*" this Court has "exclusive authority and duty to adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law and to render appropriate judgments thereon in the context of cognizable claims of relief"—emphasis added). More plainly, explicit Montana constitutional rights are *not merely empty vessels to be filled by this Court at our unrestrained whim* over a half century later, in the absence of a supporting textual basis or supporting basis in constitutional history clearly manifesting the collective intent of the Framers as a whole. Thus, the Majority's assertion that the Montana Constitution provides greater protection of the right to vote than the United States Constitution is demonstrably false as a matter of law.

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2. Erroneous Application of Strict Scrutiny and Fallacious Disregard of Clearly Applicable *Burdick/Anderson* Intermediate Scrutiny of Non-Discriminatory Time, Place, and Manner Voting Regulations Under Mont. Const. art. II, § 13.

¶141 Even in the absence of a fundamental Montana constitutional right that provides greater protection than the United States Constitution, the Court apparently asserts here that we are still free at our whim to independently interpret Montana constitutional rights to provide broader protection than corresponding federal constitutional rights. *See* Opinion, ¶ 16 (citing *State v. Guillaume*, 1999 MT 29, ¶ 15, 293 Mont. 224, 975 P.2d 312). *Guillaume* and a few other similar decisions of this Court over the years seemingly support that proposition. *See*, *e.g.*, *Guillaume*, ¶ 15. However, *Guillaume* and similar decisions are distinguishable, if not anomalously erroneous, insofar that they were based on nothing more than our unsupported declaration of such greater protection, and because the constitutional bases for those unsupported declarations was simply not at issue in those cases. *See*, *e.g.*, *Guillaume*, ¶ 15.

¶142 Anomalies aside, we *are* free, as noted *supra*, to interpret Montana constitutional rights to provide greater protection than corresponding protections provided under the United States Constitution, but we clearly have done so, despite repeated invitation, *only when* based on a textual or historical manifestation of such Framers' intent. Absent a clearly discernible manifestation of the Framers' *collective intent* to provide greater state protection, we

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have generally construed Montana constitutional rights to be coextensive with similar rights provided or protected under the United States Constitution. *See City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 14 n.4, 397 Mont. 134, 447 P.3d 1048 (noting that our interpretations of a criminally "accused's due process and confrontation rights" under Mont. Const. art. II, §§ 17 and 24 are "in substantial accord with federal due process standards" under U.S. Const. amend. XIV); *State v. Covington*, 2012 MT 31, ¶¶ 15-25, 364 Mont. 118, 272 P.3d 43 (rejecting assertion that distinct language of Mont. Const. art. II, §§ 24 and 26 (right to jury trial) provides broader protection than Sixth Amendment right to jury trial insofar that it "requires that any fact used to enhance a sentence beyond a statutory maximum, including prior convictions, must be submitted to the jury"—defendant "failed to articulate how his claim implicate[d] any enhanced right afforded under the Montana Constitution" and "cite[d] nothing in" Constitutional Convention transcripts indicating that Framers "contemplated some enhanced protection" regarding the issue); *Buhmann v. State*, 2008 MT 465, ¶ 64, 348 Mont. 205, 201 P.3d 70 (construing Mont. Const. art. II, § 29 "taking" of private property protection to be "coextensive with" the Fifth Amendment "taking" protection and thus Fifth Amendment "takings analysis . . . is to be applied to takings claims whether brought under the U.S. or Montana constitutions"); *State v. Schneider*, 2008 MT 408, ¶¶ 11-23, 347 Mont. 215, 197 P.3d 1020 (Mont. Const. art. II, § 24 (right to counsel in "criminal prosecutions") provides no broader protection than Sixth Amendment right to counsel as interpreted by Supreme Court and is thus similarly an offense-

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specific trial right that attaches only at "critical" stage of a prosecution—no textual basis or manifestation in Convention Transcripts provided any basis upon which to conclude that Framers intended to provide broader protection under Montana Constitution); *State v. Goetz*, 2008 MT 296, ¶¶ 33-35, 345 Mont. 421, 191 P.3d 489 (Mont. Const. art. II, §§ 10-11 provide enhanced protection against electronic monitoring due to Framers' articulated concerns regarding technological infringement of individual privacy); *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 30, 348 Mont. 80, 201 P.3d 8 (Fifth Amendment "Takings Clause" (private property shall not "be taken for public use without just compensation") and Mont. Const. art. II, § 29 ("[p]rivate property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court") differ slightly but we "generally look[] to federal case law for guidance when considering a [Mont. Const. art. II, § 29] takings claim" as do "other jurisdictions which have" state constitutions with "similar or identical" provisions—noting that "plain language of Article II, Section 29 is not unique among state constitutions"—citations omitted); *Walker v. State*, 2003 MT 134, ¶¶ 52-56, 73-75, 81, and 84, 316 Mont. 103, 68 P.3d 872 (Mont. Const. art. II, § 22 (protection against cruel and unusual punishment) is coextensive with Eighth Amendment right against cruel and unusual punishment except to the extent that Montana-unique Mont. Const. art. II, § 4 (right to human dignity), in tandem with art. II, § 22, affords greater protection than Eighth Amendment alone); *State v. Bassett*, 1999 MT 109, ¶ 42, 294 Mont. 327, 982 P.2d 410 ("Montana's unique constitutional scheme"

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under Mont. Const. art. II, §§ 10-11 "affords citizens broader protection of their right to privacy than does the Fourth Amendment to the United States Constitution"); *City of Helena v. Danichek*, 277 Mont. 461, 463-68, 922 P.2d 1170, 1172-75 (1996) (Mont. Const. art. II, § 25 (double jeopardy protection) is coextensive with Fifth Amendment double jeopardy protection under interpretive Supreme Court authority); *City of Helena v. Krautter*, 258 Mont. 361, 363-66, 852 P.2d 636, 638-40 (1993) (Mont. Const. art. II, § 7 (right to free speech and expression) "provides no greater protection for free expression than does" First Amendment—"if [Montana] trespass statute is constitutional under the First Amendment" jurisprudence as applied to abortion clinic protesters it is then similarly "constitutional under Art. II, § 7"); *City of Billings v. Laedeke*, 247 Mont. 151, 155-58, 805 P.2d 1348, 1351-52 (1991) (Mont. Const. art. II, § 7 (right to free expression) provides no "greater state protection of nude and semi-nude dancing" in licensed establishments than the First Amendment); *State v. Jackson*, 206 Mont. 338, 341-48, 672 P.2d 255, 256-60 (1983) (Mont. Const. art. II, § 25 (right against self-incrimination in "criminal proceedings") provides no greater protection than U.S. Const. amend. V (right against self-incrimination in criminal cases) because substantively similar language and no distinct constitutional history "affords no basis for interpreting" Montana right "more broadly than its federal counterpart"—admission of blood-alcohol test refusal against DUI defendant under implied consent statute thus not violative of Montana constitutional right against self-incrimination); *State v. Armstrong*, 170 Mont. 256, 260-61, 552 P.2d 616, 618-19 (1976) (Mont. Const.

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art. II, § 25 (Montana right against self-incrimination in "criminal proceedings") provides "no greater protection" than Fifth Amendment right against self-incrimination); *State v. Anderson*, 156 Mont. 122, 125, 476 P.2d 780, 781-82 (1970) (1889 Mont. Const. art. III, § 18 (right against self-incrimination) "affords . . . no greater protection than" Fifth Amendment). We do so not because the United States Constitution controls or limits our interpretation of independent state grounds for more expansive state law protection, but because the absence of any clear manifestation of contrary Framers' intent indicates that the Framers understood and intended that our state constitution would similarly provide coextensive protection as an independent matter of state law *as persuasively guided by* Supreme Court interpretation of those coextensive rights and protections under the United States Constitution.

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¶143 Viewed in context of those principles and our prior decisions, the Majority's cursory dismissal of the *Burdick/Anderson* standard of intermediate scrutiny as one that "often gives undue deference to state legislatures so as not to 'transfer . . . authority to regulate [state] election procedures . . . to the *federal* courts,'" is puzzlingly non sequitur and misleading. *See* Opinion, ¶ 15 (citing *Brnovich v. Democratic Nat'l Committee*, ___ U.S. ___, ___, 141 S. Ct. 2321, 2341, 210 L.Ed.2d 753 (2021), and *Crawford*, 553 U.S. at 204-05, 128 S. Ct. at 1624-25 (Scalia, J., concurring)). In context, nothing in *Brnovich* states or even suggests that the Supreme Court now views, or has ever viewed, the *Burdick/Anderson* standard of immediate scrutiny to be diluted-down, less meaningful,

more deferential to state courts, or an effective transfer of voting or election administration authority from States to federal courts. The isolated statement cherry-picked here by the Majority out of context from *Brnovich* appears in the midst of a recent Supreme Court holding that Arizona statutes requiring voters to cast personal votes at polling places located in their county of residence, and prohibiting all but a narrow few third parties from collecting and returning absentee ballots, did not violate § 2 of the federal Voting Rights Act of 1965, as amended in 1982 to ensure that "the political processes leading to nomination or election in [a] State or political subdivision are . . . equally open to participation by members of . . . protected class[es]" and so those have equal "opportunity" with "other members of the electorate to participate in the political process and to elect representatives of their choice." *Brnovich*, ___ U.S. ___, 141 S. Ct. at 2330-33, 2340-41, and 2350 (in re 52 U.S.C. § 10301(b)) (internal punctuation and emphasis omitted). In context, the Supreme Court made the isolated statement, cited by the Majority to support an entirely different proposition here, *to refute* a *dissent-proposed* construction of the Voting Rights Act which would not only "transfer much of the authority to regulate election procedures from the States to the federal courts," but would also "have the potential to invalidate just about any voting rule a State adopts" including "even facially neutral voting rules with long pedigrees that reasonably pursue important state interests." *Brnovich*, ___ U.S. at ___, 141 S. Ct. at 2340-43 (noting that "[n]othing about [§ 2's requirements of] equal openness and equal opportunity dictates such a [dissent-proposed] high bar for States to pursue their legitimate

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interests"—nor was there anything "democratic about the dissent's attempt to bring about a wholesale transfer of the authority to set voting rules from the States to the federal courts").

¶144 Likewise the isolated statement seized on by the Majority in Opinion, ¶ 15, from Justice Scalia's *Crawford* concurrence with the Supreme Court's holding that an Indiana statute requiring in-person voters to show a government-issued photo ID was a reasonable, non-discriminatory time, place, and manner voting regulation under the *Burdick/Anderson* intermediate scrutiny standard. *Crawford*, 553 U.S. at 204-09, 128 S. Ct. at 1624-27 (Scalia, J., concurring). Though cited in support of an entirely different proposition here, Justice Scalia's statement was merely explanatory of the *Burdick/Anderson* intermediate scrutiny standard in the context of stating his preference to have "decide[d]" the issue "on the grounds that" the challenging parties' assertion (that the subject government photo ID requirement substantially interfered with the right to vote and was thus subject to strict scrutiny) was "irrelevant" because the resulting burden was "minimal and justified." *Crawford*, 553 U.S. at 204-09, 128 S. Ct. at 1624-27 (Scalia, J., concurring). The Scalia concurrence thus merely points out, correctly, what the Majority so desperately strains to avoid recognizing here:

> [*s*]*trict scrutiny* is appropriate *only if* the *burden is severe* . . . Ordinary and widespread burdens, such as those requiring nominal effort of everyone, are not severe. Burdens

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> are *severe* [*only*] *if* they *go beyond* the *merely inconvenient.*

Crawford, 553 U.S. at 204-05, 128 S. Ct. at 1624-25 (Scalia, J., concurring) (internal punctuation and citations omitted, emphasis added). The "virtually impossible" bogeyman, seized upon by the Majority out of context in Opinion, ¶¶ 15 and 31-32, to denigrate the *Burdick/Anderson* standard, was not a statement even made by Justice Scalia in his *Crawford* concurrence—it appears only in a secondary citation to *Williams v. Rhodes*, 393 U.S. 23, 24-25 and 32-34, 89 S. Ct. 5, 7-8 and 11-12, 21 L.Ed.2d 24 (1968) (holding that the subject state election laws were *subject to strict scrutiny* as "invidious discrimination" in violation of Fourteenth Amendment equal protection because they *severely burdened* "voting and associational rights" by "mak[ing] it virtually impossible for any [*new political*] *party* to qualify on the ballot"—emphasis added). *See Crawford*, 553 U.S. at 204-05, 128 S. Ct. at 1624-25 (Scalia, J., concurring) (citing *Storer v. Brown*, 415 U.S. 724, 728-29, 94 S. Ct. 1274, 1278, 39 L.Ed.2d 714 (1974) (discussing *Rhodes*)); *compare* Opinion, ¶¶ 15 and 31-32. Doubling down, the Majority punctuates its cascading analytical sleight of hand with the similarly false and misleading straw man that:

> [the Montana] Constitution affords no suggestion that a person should have to [sur]mount all but the "virtually impossible" hurdle simply to participate in the most elemental characteristic of citizenship. . . . Given the textual strength and history of Montana's explicit constitutional

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> protection, and its independent analysis from the equal protection clause, we should not put its independent force at risk of dilution by later federal precedents.

Opinion, ¶¶ 31-32. Neither its demonstrably false mischaracterization of isolated snippets from *Brnovich* and the Scalia *Crawford* concurrence, nor any other cited authority, supports the Majority's assertions here that the *Burdick/Anderson* intermediate scrutiny standard is now weaker or less "meaningful," now "provides less protection" of the right to vote than "four decades ago," or will somehow provide less protection of the right to vote than intended by the Framers of the Montana Constitution in 1972.[13]

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¶145 The critical analytical issue here is not whether this Court is bound by the *Burdick/Anderson* intermediate scrutiny "balancing test" as a matter of federal constitutional law (we clearly are not), but rather, whether we should apply it as a *persuasive non-binding* interpretive framework for judicial review of the subject time, place, and manner voting regulations at issue here because the right to vote expressed in Mont. Const. art. II, § 13, is *substantively coextensive* with the fundamental right to vote protected under the United States Constitution, both

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13. Like its *Dobbs-Roe* elasticity assertion, see Dissent n.11 *supra*, the Court's unsupported assertions denigrating the *Burdick/Anderson* standard are not demonstrable or otherwise supported legal points, but rather, more of a statement manifesting the Majority's disdain for that standard as an inconvenient obstacle to a desired end.

at the time of framing in 1972 and now. Why the Court tries to avoid the logically inescapable answer to that question, by emphasizing the isolated out-of-context reference to "*federal* courts" in Opinion, ¶ 15, is thus baffling at first glance. The Majority knows full well that application of the so clearly applicable *Burdick/Anderson* intermediate scrutiny standard to time, place, and manner voting regulations that merely burden, but do not substantially interfere with, the right to vote would not in any way involve "federal courts," or allow federal courts to exercise review over any of the voting regulations at issue under the Montana Constitution here. Nor would it diminish the voting and election administration regulation exclusively granted to the Legislature by the Montana Constitution. The only apparent problem posed by application of the *Burdick/Anderson* intermediate scrutiny standard is that it would require the Majority to give due deference to the Legislature's asserted rationale for enacting the time, place, and manner voting regulations at issue in the exercise of its express constitutional authority and duty. In the wake of its false-pretenses dismissal of the *Burdick/Anderson* intermediate scrutiny standard, equally baffling is how or on what basis the Court can then *credibly* pluck a manifestly incompatible intermediate scrutiny standard, specifically developed for a narrow class of Montana equal protection claims[14] involving

14. *See* Mont. Const. art. II, § 4 ("[n]o person shall be denied the equal protection of the laws," nor shall "the state [or] any person, firm, corporation, or institution . . . discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas").

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legislation that discriminates in the availability or exercise of a *non-fundamental* Montana constitutional *right*, for non-equal-protection application to non-discriminatory time, place, and manner regulations that may slightly burden but do no substantially interfere with the exercise of a *fundamental* Montana constitutional right.

¶146 After falsely declaring that the Montana Constitution provides greater protection of the right to vote than the United States Constitution, and that the voting regulation specific *Burdick/Anderson* intermediate scrutiny standard is now weaker and no longer "meaningful," Opinion, ¶¶ 15 and 17, the Majority continues its cascading analytical sleight of hand by declaring that the standard of constitutional scrutiny for regulations that may burden without substantially interfering with the right to vote is the intermediate scrutiny standard previously applied in *Butte Community Union v. Lewis*, 219 Mont. 426, 712 P.2d 1309 (1986); *Billings Deaconess Med. Ctr. v. Mont. Dep't of Soc. & Rehab. Servs.*, 222 Mont. 127, 720 P.2d 1165 (1986); and *State ex rel. Bartmess v. School Bd.*, 223 Mont. 269, 726 P.2d 801 (1986). Opinion, ¶¶ 33, 36, 38-46, 111-12, and 116. The Court conveniently neglects to mention, however, that:

(1) the *Butte Community* standard is an intermediate standard of constitutional scrutiny *uniquely* developed for *equal protection claims* under Mont. Const. art. II, § 4;

(2) by its terms the *Butte Community* standard further uniquely applies only to a narrow class

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of equal protection claims involving legislation that discriminates in the availability or exercise of a Montana constitutional *right or benefit* that this Court has deemed *not fundamental* because not listed with the fundamental rights listed in Mont. Const. art. II; and

(3) the cases cited in support of the Majority assertion that the *Butte Community* standard applies to voting regulations not subject to strict scrutiny were equal protection cases involving a non-fundamental right rather than non-discriminatory time, place, and manner regulations of the fundamental right to vote as at issue here.

See Opinion, ¶¶ 36, 38-46, 111-12, and 116; *compare Butte Community*, 219 Mont. at 429-31 and 433-34, 712 P.2d at 1311-14; *Billings Deaconess*, 222 Mont. at 131-32, 720 P.2d at 1168; and *Bartmess*, 223 Mont. at 274-75, 726 P.2d at 804-05. Unlike *Butte Community, Billings Deaconess*, and *Bartmess*, this case is neither an equal protection claim case, Opinion, ¶¶ 10, 20, 32, 60, 85, and 106, nor does it involve legislation that facially discriminates between distinct classes of people in the exercise or availability of *non-fundamental* Montana constitutional rights or benefits. Thus, the *Butte Community* standard of intermediate scrutiny, narrowly applicable in certain types of Montana equal protection challenges involving Montana constitutional rights which are *not fundamental*, is as a matter of law, simply analytically incompatible by its terms for application to voting regulations that

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may burden, but do not substantially interfere with, the *fundamental* right to vote. *See Butte Community*, 219 Mont. at 429-31 and 433-34, 712 P.2d at 1311-14; *Billings Deaconess*, 222 Mont. at 131-32, 720 P.2d at 1168; *Bartmess*, 223 Mont. at 274-75, 726 P.2d at 804-05.

¶147 Desperate to denigrate the *Burdick/Anderson* standard in favor of a patently incompatible Montana-specific equal protection standard of intermediate scrutiny, the Majority dismisses the analytical model presented by *Crawford* on the pretense that it applied the *Burdick/Anderson* intermediate scrutiny standard in the context of a Fourteenth Amendment equal protection claim. *See* Opinion, ¶ 32. Close examination reveals, however, that the Majority's assertion is yet another analytical straw man concocted to avoid the undesirable outcome that would result from application of the *Burdick/Anderson* standard to the evidentiary record here. Putting aside for the moment the clearly erroneous findings of fact used to trigger strict constitutional scrutiny here, *see infra*, the Court disclaims equal protection as a constitutional basis for its decision here, Opinion, ¶¶ 20, 32, 60, 85, and 106, but then amorphously applies a Montana-specific equal protection standard of intermediate scrutiny to a "disparate impact" theory selectively snipped out of the equal protection context in which such claims are uniquely cognizable. *See* Opinion, ¶¶ 32 and 69 (referencing "disparate impact" and "disparate treatment"); *compare Hernandez v. New York*, 500 U.S. 352, 362, 111 S. Ct. 1859, 1867-68, 114 L.Ed.2d 395 (1991) (disparate impact resulting from a "classification does not alone show its purpose" because "[e]qual protection analysis turns on the

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intended consequences of government classifications"—unless adopted "with the intent of causing the impact asserted" the "impact itself does not violate [equal protection]").[15] The isolated language from the Scalia *Crawford* concurrence in Opinion, ¶ 32—that generally applicable and *facially non-discriminatory* legislative classifications do not violate equal protection absent a showing of intentional discriminatory impact—is a manifestly correct statement of well-settled, black-letter equal protection law.[16] With the obvious reason for why

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15. *Accord, e.g.*, *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶¶ 15-24, 392 Mont. 1, 420 P.3d 528; *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421 (quoting John E. Nowak, et al., *Constitutional Law* 600 (2d ed. 1983)).

16. Additional context from the *Scalia* concurrence further illustrates the Majority's desperate need to avoid application of the *Crawford* analytical model, to wit:

> The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class. A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even [constitutionally] protected [suspect classes]. . . . The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a [widely available government-issued] photo identification is simply not severe, because it does not even represent a significant increase over the usual burdens of voting[,] [a]nd the State's [asserted] interests are sufficient to sustain that minimal burden. That should end the matter. That the State accommodates some voters by permitting (not requiring) the casting of

the Majority sidesteps the challenging parties' equal protection claims thus exposed, a key component of its analytical sleight of hand in this case comes into clear focus, i.e., erroneous conflation of an equal protection specific "disparate impact" theory, under a Montana-specific equal protection standard of intermediate scrutiny, *in the analytical context of* a purported *non-*equal-protection-based constitutional conformance review of facially neutral and non-discriminatory voting regulations.[17]

> absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is [constitutionally] required.

Crawford, 553 U.S. at 207-09, 128 S. Ct. at 1626-27 (Scalia, J., concurring) (internal punctuation and citations omitted, emphasis added). *Accord Crawford*, 553 U.S. at 202-04, 128 S. Ct. at 1623 (majority holding).

17. Illustrating my point, in rejecting the *Burdick/Anderson* intermediate scrutiny standard, the Majority posits:

> [I]f the Legislature passes a measure that *impacts* the free exercise of the right of suffrage, it must be held to demonstrate that it did not choose the way of greater interference. This standard should govern equally when a facially neutral restriction *disproportionately impacts identifiable groups* of voters. *Accord Crawford*, 553 U.S. at 236, 128 S. Ct. at 1643 (Souter, J., dissenting) (expressing the view that the challenged statute "crosses a line when it *targets the poor and the weak*").

Opinion ¶ 33 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343, 92 S. Ct. 995, 1003, 31 L.Ed.2d 274 (1972), internal punctuation and citation omitted, emphasis added). *Dunn* was a Fourteenth

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¶148 With the Opinion's cascading analytical sleight of hand uncovered, the resulting mischief becomes clear. However well intentioned, the Court's faulty constitutional analysis provides analytical cover, under the guise of constitutional conformance review, to second-guess the facially non-discriminatory public policy determinations of the Legislature under Mont. Const. art. IV, § 3. The erroneous application of strict scrutiny, based on clearly erroneous findings of fact, to the prohibition of paid ballot collectors and 32-hour push-back of the voter registration

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Amendment equal protection claim case involving a state durational residence requirement that was subject to and failed strict scrutiny because it "*absolutely denied,*" rather than merely burdened, the right to vote of a subclass of voters by forcing them to trade their right to vote for exercise of their fundamental right to travel. *Dunn*, 405 U.S. at 336-38 and 343, 92 S. Ct. at 999-1003 (emphasis added). Thus, in the same breath the Majority attempts to denigrate *Crawford* as a model application of the *Burdick/Anderson* standard because it was an application of the *Burdick/Anderson* standard in the equal protection context, *see* Opinion, ¶ 32, but then relies on a case involving an equal-protection-specific "disparate impact" theory regarding a challenged voting regulation that was clearly subject to strict scrutiny under the right to equal protection of law. Opinion, ¶ 33. The Court attempts to bolster its unmistakable equal protection disparate impact theory, in the context of its purported *non*-equal-protection analysis here, by citation to yet another equal protection principle. Opinion, ¶ 33 (citing *Crawford*, 553 U.S. at 236, 128 S. Ct. at 1643 (Souter, J., dissenting)). Aside from the analytical incongruity in its conflated non-equal-protection equal protection analysis, not a shred of record evidence supports the manifest innuendo in the Majority's supplemental citation parenthetical, i.e., that the Legislature intended any of the legislative regulations at issue here to intentionally "target[] the poor and the weak."

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deadline, as well as the erroneous application of an anomalous intermediate scrutiny formulation lacking any objective standard to the elimination of student IDs as a primary form of voter ID, clears the analytical way for the Majority to subjectively second-guess the Legislature, with *no deference* to legislative policy determinations, as to whether the methods chosen by the Legislature to carry out its express and exclusive duty under Mont. Const. art. IV, § 3 (duty to regulate voter "registration, absentee voting, and administration of elections," and to "insure the purity of elections and guard against abuses of the electoral process"), are the "least onerous" or most "reasonable" in the eyes of this Court. *See* Opinion, ¶¶ 48, 58-59, 63, 79-80, 102, 112, 114, 117-19.[18]

18. Even in the Montana equal protection context regarding *facially discriminatory* legislation involving *non-fundamental* Montana constitutional rights, the *Butte Community* standard of intermediate scrutiny is a highly subjective balancing standard lacking the objective standards embodied in the general standard of intermediate scrutiny applicable under the Equal Protection Clause of U.S. Const. amend. XIV. *See Butte Community*, 219 Mont. at 434, 712 P.2d at 1313-14 (requiring that subject legislative discrimination be "reasonable" and "more important than" the non-fundamental Montana constitutional right at issue); *compare Butte Community*, 219 Mont. at 431-33, 712 P.2d at 1312-13 (noting limited application of general standard of intermediate scrutiny—subject legislative discrimination must be "substantially related to an important government interest"—applicable to Fourteenth Amendment equal protection claims not subject to strict scrutiny and variants of that standard *applied to* "*limitations on the right to vote*"—internal punctuation and citations omitted, emphasis added); *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 1914, 100 L.Ed.2d 465 (1988) (to withstand equal protection intermediate scrutiny the subject legislative "classification must be substantially

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¶149 Both this Court and the United States Supreme Court similarly recognize three distinct standards of scrutiny for judicial review of challenged legislation for constitutional conformance—strict scrutiny, intermediate scrutiny, and rational basis scrutiny. *See, e.g.*, *State v. Ellis*, 2007 MT 210, ¶ 11, 339 Mont. 14, 167 P.3d 896; *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶¶ 17-20, 325 Mont. 148, 104 P.3d 445; *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641-62, 114 S. Ct. 2445, 2458-69, 129 L.Ed.2d

related to an important governmental objective"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441, 105 S. Ct. 3249, 3255, 87 L.Ed.2d 313 (1985) (discriminatory gender and parental illegitimacy classifications "fail[ ] unless . . . substantially related to" an "important governmental interest"—citing *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331, 73 L.Ed.2d 1090 (1982), and *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976)). *See also Cleburne*, 473 U.S. at 441-42, 105 S. Ct. at 3255 (declining to extend "heightened" intermediate scrutiny to age discrimination despite that "treatment of the aged in this Nation has not been wholly free of discrimination" because, unlike those that have faced racial and other suspect class discrimination, older people "have not" been subject to "a history of purposeful unequal treatment or . . . unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"—"where individuals in [a] group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, . . . courts have been very reluctant, as they should be . . . with . . . respect for . . . separation of [constitutional] powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued," and thus "the Equal Protection Clause requires only a rational means to serve a legitimate end" "[i]n such cases"—citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S. Ct. 2562, 2567, 49 L.Ed.2d 520 (1976)).

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497 (1994) (discussing levels of applicable constitutional scrutiny in First Amendment and substantive due process contexts); *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 1914, 100 L.Ed.2d 465 (1988) (discussing levels of applicable constitutional scrutiny in the context of Fourteenth Amendment equal protection challenges). Whether as a matter of substantive due process or equal protection under U.S. Const. amend. XIV, or direct application on review of a legislative enactment affecting a fundamental Montana constitutional right, strict constitutional scrutiny applies only if the enactment substantially interferes "with the exercise of a fundamental right." *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996) (*inter alia* citing *Arneson v. Mont. Dep't of Admin.*, 262 Mont. 269, 272, 864 P.2d 1245, 1247 (1993)). Strict scrutiny is thus triggered only if the challenging party satisfies the initial burden of affirmatively demonstrating that the enactment at issue substantially *interferes with* the exercise of a fundamental constitutional right. *See Cooper v. Harris*, 581 U.S. 285, 291-93, 137 S. Ct. 1455, 1463-64, 197 L.Ed.2d 837 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193, 137 S. Ct. 788, 800-01, 197 L.Ed.2d 85 (2017); *Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006). *See also McDermott v. Mont. Dep't of Corr.*, 2001 MT 134, ¶ 34, 305 Mont. 462, 29 P.3d 992. Only then does the burden shift to the state or other defending party to demonstrate that the challenged enactment survives strict scrutiny. *See Cooper*, 581 U.S. at 292, 137 S. Ct. at 1464; *Bethune-Hill*, 580 U.S. at 193, 137 S. Ct. at 801; *Jana-Rock Const.*, 438 F.3d at 205. *Accord McDermott*, ¶¶ 31-32. The question of whether a challenged statute substantially interferes with that right

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is ultimately a question of law for judicial determination. *Wadsworth*, 275 Mont. at 295-98, 911 P.2d at 1170-71.

¶150 Here, based on various District Court findings of fact, the Majority holds that the Legislature's push-back of the voter registration deadline from election day to noon the day before (§ 13-2-304, MCA (2021)) substantially interferes with the exercise of the right to vote in Montana because it disparately *burdens* the exercise of the right to vote by "*many of*" the "70,000 Montanans" that have used same-day registration "*since 2005*, and that many" voters, particularly including working voters, "first-time voters[,] and Native Americans," would "be disenfranchised without the availability of election day registration." Opinion, ¶¶ 70-74 and 84. The Court concludes that substantial evidence manifests that "[m]any Native American voters . . . rely on election day registration because of numerous . . . issues," including "lack of access to mail" service, transportation, and the long distances to county seats where they can register," "[m]any of . . . [which] cannot be overcome, or become too costly to overcome, and thus disenfranchise [those] voters." Opinion, ¶ 73.

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¶ 151 The Court holds that the Legislature's prohibition of paid third-party ballot collectors (2021 Mont. Laws ch. 534, § 2) thus substantially interferes with the exercise of the right to vote in Montana because it disparately *burdens* "Native Americans [who] disproportionately rely on [third-party] ballot collect[ors] to vote, in part due to a history of discrimination around voting" and "unique circumstances in Indian Country that make it much more difficult to access polling places or post offices" due to the

"remote areas" in which "[m]any" live, that "[m]any" do not have "mail service to their homes," and "numerous [other] factors" not challenged by the State on appeal. Opinion, ¶ 97. The Majority concludes that substantial evidence supports the ultimate District Court finding that the prohibition of paid third-party ballot collectors will "take[] away the only option to vote for a significant number of Native Americans living on reservations," and thus substantially "interferes with the right to vote" in Montana. Opinion, ¶ 99.

¶ 152 Upon close examination, however, those ultimate findings are primarily based on no more than 2016 and 2018 voter turnout data, social and economic data and witness testimony regarding general economic and living conditions on Montanan Reservations, and "voting cost" modeling *projections* of litigation-retained political scientists. The speculative "voting cost" projections are then the primary basis for the corresponding District Court finding that prohibition of paid ballot collectors will in fact *unduly and disparately burden* a wide swath of Montana's electorate by requiring them to either *timely mail their absentee ballots, arrange for a trusted 'unpaid family member or friend* to timely return their absentee ballots, or *personally deliver their own ballots to a polling place.* However, despite cursory assertion of a causal link, the modeling projections, underlying data, and various other anecdotal witness observations, opinions, and characterizations in the end *proves no more than a correlation, based on* various *general assumptions and statistical data*, between the prohibition *and speculative projection regarding anticipated voter turn-out.* Without

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more, evidence of a mere 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. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 800, 131 S. Ct. 2729, 2739, 180 L.Ed.2d 708 (2011) (rejecting California assertion that psychological studies correlating exposure to violent video games to asserted harmful effects on children was competent evidence of a causal link sufficient to manifest a compelling state interest for purposes of strict scrutiny).

¶ 153 As a threshold matter, moreover, it is beyond dispute that the as-yet implemented prohibition of paid ballot collectors did not, nor will not, cause the noted "obstacles" faced by Native American voters on Montana Reservations. Nor is the fact that overall Reservation voter turnout has significantly increased due to the extensive registration, canvassing, and voter assistance efforts of political organizations involved in paid third-party ballot collection efforts evidence that the prohibition of paid ballot collectors will prevent proportionally significant numbers of Montanans from exercising their right to vote.[19] For example, as to Reservation Native Americans, the Plaintiffs' central factual assertion is that barring paid ballot collectors will likely make it more difficult for Reservation Native Americans who want to

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19. Of course, prohibition of *paid* ballot collectors will not prohibit any of the Plaintiffs or other political organizations in Montana from continuing to engage in the extensive voter registration assistance, repetitive canvassing, and other voter assistance efforts that have undoubtedly resulted in significantly higher voter turnout in Montana.

vote absentee, which will in turn be the likely cause of some unknown quantum of them *to decide* not to vote at all. At bottom, there is simply no particularized evidence that prohibition of paid ballot collectors will likely cause any significant decrease in absentee voting *for any quantifiable segment* of the Native American population on Montana Reservations.

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¶154 Plaintiffs' generalized voting-cost theory, and accompanying anecdotal observations and concerns, proves no more than a highly speculative *possibility* that some *unquantifiable segment* of prior absentee voters, who previously benefitted from paid ballot collection services, *might choose* not to vote rather than timely mail their absentee ballot or use a qualified unpaid family or friend collector like other Montana absentee voters, or even travel to the polls on election *day.* Regardless of any disproportionate nature of the independently-caused circumstances that may hamper voter turnout in Montana, the evidentiary record in this case is devoid of any substantial non-speculative evidence that prohibition of paid ballot collectors will likely be a cause of any significant decrease in voter turnout, even in any narrow subclass of Montana voters identified by the Plaintiffs. The District Court's ultimate finding of fact that prohibition of paid ballot collectors will substantially interfere with, rather than cause some disparate burden on, a relatively small percentage of those who vote in Montana is clearly erroneous.

¶155 Further troubling, the Majority's undiscerning gloss-over of the manifest deficiency of pertinent evidence

in this case makes much ado about the fact that the State failed to present any contrary evidence, and does not dispute on appeal the factual evidence presented by the Plaintiffs below. However, the lack of evidence rebutting the Plaintiffs' evidence does not change or remedy the manifest deficiency of the evidence presented as support for the ultimate District Court finding that the prohibition of paid absentee ballot collectors will *substantially interfere* with voting, rather than merely make it *less convenient* for a disproportionately select few to vote absentee.

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¶156 As to the Legislature's push-back of the voter registration deadline from election day to noon the day before, the District Court's ultimate finding of fact that it will substantially interfere with the right to vote by "disenfranchis[ing]" voters, particularly Reservation Native Americans, working voters, and first-time voters, is *exclusively based* on no more than that: (1) election day registration "has become wildly popular" based on the fact that "over 70,000 Montanans" have "utilize[ed] it since 2006" following enactment in 2005; (2) a majority of Montanans who voted "rejected eliminat[ion of] election day registration by a 14-point margin" in 2014; (3) "election day registration typically increases voter turnout by 2-7% compared to not having it" due to "some people's habit" and that "many people cannot take work off to register and then again to vote"; (4) "election offices are open late on election day"; (5) some "people who thought they were registered do not recognize there is a problem until they show up to vote on election day"; and (6) "election day is by far the most energizing day that gets people excited to register and vote" Opinion, ¶¶ 6 and 71. The Majority

goes so far to add its own policy justification in support of election day registration, to wit:

> Election day registration is a failsafe that allows eligible voters to vote on election day if they would otherwise [be unable] due to registration issues . . . [which] may occur on election day due to our sometimes confusing labyrinth of elections laws. For example, voters who have moved from one county to another since the last election and *who have not updated their voter registration* would be prevented from voting without election day registration unless they could make it back to their old county before polls closed.

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Opinion, ¶ 64 n.11 (emphasis added). The Court, of course, identifies not a single election law it views as confusing.

¶ 157 While most of the above-noted facts and justifications found by the District Court and the Majority here are no doubt true, they are at most *good public policy justifications* for election day registration as a means *to make it more convenient for more people to vote.* However, they *simply do not prove* that the *absence of such conveniences*, granted in the discretion of the Legislature in the first place only 19 years ago, will necessarily "disenfranchise" voters or prevent people from voting in this state and country as they have for over 100 hundred years before enactment of election day voter registration in 2005. Nor have Plaintiffs, the District Court, or the Majority cited any legal authority, or articulated any

other credible support, for the *legal proposition* that the fundamental right to vote necessarily includes the *most convenient or most preferable way to vote*, particularly in light of the fact that a clear majority of the Framers refused to enshrine election day registration into our new Constitution, even in the face of a then-prevailing 40-day voter registration deadline.[20] Nor are the isolated comments of a few individual Constitutional Convention Delegates, cherry-picked out of context by the Majority, sufficient to support such a novel legal proposition for the first time here.

¶158 Manifesting its significantly flawed constitutional analysis, the Court retorts that:

> argu[ing] that because the registration deadline used to be 40 days before the election, it does not interfere with the right to vote to push it back here . . . [is] like arguing that because absentee voting was once not allowed, it would not interfere with the . . . right to vote to eliminate it today—even though three-quarters of [Montana] voters . . . now utilize it.

Opinion, ¶ 74. The Court's retort would be an interesting legal point, if it was actually a supported legal proposition.

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20. While voting is a fundamental constitutional right, "[i]t does not follow, however, that the right to vote in any manner and [the related] right to associate for political purposes through the ballot are absolute." *Burdick*, 504 U.S. at 433, 112 S. Ct. at 2063 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S. Ct. 533, 536, 93 L.Ed.2d 499 (1986)).

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It is not. The Court's retort is classic apples-to-oranges misdirection. The constitutionality of the Legislature's 32-hour push-back of the registration deadline neither has anything to do with the modern preference of Montanans for *absentee voting*, nor is there any evidence, even if of constitutional import *arguendo*, of such a proportionally significant preference of an overwhelming super-majority of Montana voters for election day registration, even now. The sum total of the "undeniabl[e]" evidence upon which the Court relies to strike-down a mere 32-hour push-back of the voter registration deadline, Opinion, ¶ 74, is no more than, since 2005, "election day registration was an improvement in Montana's election processes." Opinion, ¶ 79. So says the Court from on high. The Majority inconsistently disclaims, moreover, that:

> our holding does not mean that once the Legislature has . . . [liberalized the voter registration deadline] it may never backtrack *if the expansion was unwise.* Rather, the [Legislature] must show—depending on if plaintiffs first show the [later push-back of the deadline] minimally burdens the right to vote or interferes with it—that the [later push-back of the deadline] meets the correct level of scrutiny.

Opinion, ¶ 74. Not true. The flawed constitutional reasoning applied here by the Court manifests *exactly that.* Despite its attempt to couch its disclaimer in terms of constitutional scrutiny, the Court exposes its view that once the Legislature grants a statutory right or benefit as a matter of legislative discretion, it may later retract it

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only if the grant was "unwise." The Court's flawed analysis clearly manifests that it is and will be for this Court in its infinite wisdom—not the Legislature in accordance with its express constitutional authority—to decide whether any later legislative push-back of the voter registration deadline is wise or "unwise," just as here, without any deference to the Legislature. *See*, *e.g.*, Opinion, ¶ 59 ("[w]e need not balance the State's [asserted] interests against the burden imposed because the State has not demonstrated that its interests are reasonable"). The Court's attempted disclaimer follows its earlier assertion that its holding today "does not mean that election day registration is forevermore baked into our Constitution." Opinion, ¶ 68. Maybe not, but the Court has now certainly "baked" election day registration into our Constitution for now, a feat which an overwhelming 76-22 majority of *the actual Framers* of our Constitution *squarely refused to do.*

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¶ 159 District court findings of fact are clearly erroneous if not supported by substantial evidence or, upon our independent review of the record, we are definitely and firmly convinced that the "court misapprehended the effect of the evidence" or was otherwise mistaken. *Larson*, ¶ 16. Consequently, even when otherwise supported by substantial record evidence, lower court findings of fact are still clearly erroneous if the record clearly manifests that the "court misapprehended the effect of the evidence" for the purpose offered. *Larson*, ¶ 16. For the foregoing reasons, the District Court's ultimate findings of fact that the Legislature's push-back of the statutory voter registration deadline from election day to noon the day before, and prohibition of paid ballot collectors, will *substantially interfere* with the exercise of the right to

vote by Reservation Native Americans, working voters, and first-time voters were clearly erroneous because the District Court clearly misapprehended the effect of the evidence as proof for those points.

¶ 160 Based on the Plaintiffs' evidentiary showing, and the fact that the State failed to present any contrary evidence of any history of absentee ballot collection fraud, the District Court made the additional sweeping finding and conclusion that the Legislature's prohibition of paid ballot collectors serves no legitimate purpose because it neither enhances the security or integrity of absentee voting, nor substantially reduces or contains the costs or burdens of conducting elections. Under strict scrutiny, the District Court and the Majority thus further conclude that the State failed to present evidentiary proof of any compelling state interest warranting the disparate burdens that Reservation Native Americans, working voters, and first-time voters will allegedly face upon prohibition of paid ballot collectors and push-back of the voter registration deadline from election day to noon the day before.

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¶ 161 However, even if triggered upon satisfaction of the challenging party's initial burden, a burden clearly not satisfied here, strict scrutiny does not necessarily require the State to make an *evidentiary showing* of a compelling state interest or that the subject statute is narrowly tailored to further that interest. *Mont. Auto. Ass'n v. Greely*, 193 Mont. 378, 383-84, 632 P.2d 300, 303-04 (1981). As a threshold matter, the questions of whether an asserted government interest is constitutionally compelling and whether a challenged statute is narrowly

tailored to further that interest are questions of law. *W. Tradition P'ship, Inc. v. State*, 2011 MT 328, ¶ 35, 363 Mont. 220, 271 P.3d 1 (citing *State v. Pastos*, 269 Mont. 43, 47, 887 P.2d 199, 202 (1994)), *cert. granted, judgment rev'd sub nom. on other grounds by Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 132 S. Ct. 2490, 183 L.Ed.2d 448 (2012); *Wadsworth*, 275 Mont. at 295-98, 911 P.2d at 1170-71; *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 93 (1st Cir. 2013); *Garner v. Kennedy*, 713 F.3d 237, 242 (5th Cir. 2013); *Lomack v. City of Newark*, 463 F.3d 303, 307 (3d Cir. 2006); *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002).[21] A compelling government interest may be manifestly implied, moreover, from the language and effect of an enactment; judicial notice of precedent from other jurisdictions recognizing a compelling government interest in similar legislation; or judicial notice of a related manifest government interest in preventing corruption of the political process, preserving the integrity of essential government processes, or furthering the protection or

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21. Whether a statute satisfies strict scrutiny remains a question of law even if dependent on mixed questions of fact and law in a particular case. *See Barrus v. Mont. First Jud. Dist. Ct.*, 2020 MT 14, ¶ 15, 398 Mont. 353, 456 P.3d 577 (mixed questions of fact and law are questions of law reviewed de novo for correctness); *BNSF Ry. Co. v. Cringle*, 2012 MT 143, ¶ 16, 365 Mont. 304, 281 P.3d 203 (de novo review of mixed questions of fact and law); *Farmers Union Cent. Exch., Inc. v. Mont. Dep't of Rev.*, 272 Mont. 471, 474, 901 P.2d 561, 563 (1995) (clearly erroneous standard applies only to "'pure' findings of fact"); *Maguire v. State*, 254 Mont. 178, 181-82, 835 P.2d 755, 757-58 (1992) (conclusions of law, questions of law, and legal components of ultimate facts or mixed questions of law and fact reviewed de novo for correctness).

exercise of individual rights. *Greely*, 193 Mont. at 383-84, 632 P.2d at 303-04; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S. Ct. 925, 931, 89 L.Ed.2d 29 (1986); *State v. Hardesty*, 222 Ariz. 363, 214 P.3d 1004, 1007-10 (2009) (federal citations omitted); *State v. Balzer*, 91 Wash.App. 44, 954 P.2d 931, 938, 54 P.2d 931, 938 (1998); *State v. Patzer*, 382 N.W.2d 631, 638 n.4 (N.D. 1986) (citing *Greely* and 1 Weinstein's Evidence ¶ 200 [04] at pp. 200-20 through 200-21 (1985) (quoting Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 84)). *See also W. Tradition P'ship*, ¶¶ 16-36 (judicial notice of published sources of Montana history); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 92 S. Ct. 1526, 1532, 32 L.Ed.2d 15 (1972) (judicial notice of compelling state interest in imposing reasonable regulations for control and duration of public education); *United States v. Israel*, 317 F.3d 768, 771-72 (7th Cir. 2003). Nor does satisfaction of strict scrutiny necessarily require *evidentiary proof* that the disputed means chosen by the legislature to further an asserted government interest was in fact "actually necessary" to achieve that interest, *Bethune-Hill*, 580 U.S. at 194, 137 S. Ct. at 801 (citation and punctuation omitted), or that *no other* feasible and less restrictive means was available to further the asserted government interest. *N.Y. State Univ. Bd. of Trs. v. Fox*, 492 U.S. 469, 476-78, 109 S. Ct. 3028, 3032-33 106 L.Ed.2d 388 (1989).[22]

¶162 Though cursorily marginalized by the Court here in Opinion, ¶¶ 28 and 40 ("we must decide whether

22. *Accord State v. Demontiney*, 2014 MT 66, ¶¶ 16-22, 374 Mont. 211, 324 P.3d 344.

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the responsibility regarding elections given to the Legislature" by Mont. Const. art. IV "is important enough" to require a "deferential balancing" approach under *Burdick/Anderson* intermediate scrutiny, but, "[g] iven the importance of the right to vote in our Constitution, we think it improper for us to imagine possible reasons the Legislature has enacted a law that burdens the right to vote"), we have squarely similarly recognized, without requirement for evidentiary support, that "Montana has a compelling interest in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes." *Larson*, ¶ 40. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 432-35, 112 S. Ct. at 2062-64 (citation and internal punctuation omitted). Eliminating any doubt about the compelling nature of its stated justifications for the three enactments at issue here, the Legislature has an express, clear, and unequivocal constitutional duty to:

> provide by law the requirements for residence, registration, absentee voting, and administration of elections . . . and *shall* insure the purity of elections and guard against abuses of the electoral process.

Mont. Const. art. IV, § 3 (emphasis added). Thus, in Mont. Const. art. IV, § 3, *the Framers provided* the compelling

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interest required to justify the legislative enactments at issue in this case without requirement for evidentiary proof. Contrary to the Court's incredible assertion in Opinion, ¶ 40 ("the burden is on the State to show that the law is reasonable rather than us" trying to "conceive of any possible purpose" justifying the challenged legislation—internal punctuation omitted), there is no need for the Court "to imagine possible reasons" why the Legislature acted to push back the voter registration deadline from election day to noon the day before, prohibit paid ballot collectors, or eliminate university student IDs as permissible primary voter identification because those reasons have already been clearly and unequivocally provided *by the Framers* in the express language of Mont. Const. art. IV, § 3, and even our own language in *Larson*, ¶ 40. Thus, it is far from "improper" as asserted in Opinion, ¶ 40, for us to recognize and give due constitutional deference to those compelling government interests, whether under strict scrutiny or the proper standard of intermediate scrutiny. The heretofore novel idea that has now been sold to this Court that legislative acts, and thus the alleged ulterior motives of the Legislature, can now be *put on trial* requiring evidentiary proof upon every constitutional challenge is, frankly, ludicrous and a serious affront to the delicate balance of constitutional separation of powers upon which our precious form of distributed-powers government so critically depends.[23]

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23. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 977, 116 S. Ct. 1941, 1960, 135 L.Ed.2d 248 (1996) (racial discrimination requires justifying evidentiary basis under strict scrutiny); *Burson v. Freeman*, 504 U.S. 191, 206-11, 112 S. Ct. 1846, 1855-58, 119 L.Ed.2d 5 (1992) (time, place, and manner speech restrictions

¶163 The rationale put forth by the Plaintiffs, District Court, and now the Majority here is strikingly similar to the rationale we rejected in *Greely* when a district court similarly concluded that a voter-approved ballot initiative did not pass strict scrutiny because it included no declaration of a compelling state interest and the State

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subject to strict scrutiny justified based solely on pertinent historical experience, consensus, and "simple common sense"); *Silvester v. Becerra*, 583 U.S. 1139, 1145-46, 138 S. Ct. 945, 949, 200 L.Ed.2d 293 (2018) (under intermediate scrutiny state must show "more than speculation or conjecture" such as relevant supporting "evidence or anecdotes" to "substantiate its concern"—internal punctuation omitted); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628-29, 115 S. Ct. 2371, 2378, 132 L.Ed.2d 541 (1995) (time, place, and manner speech/association restrictions subject to intermediate scrutiny do not necessarily require supporting "empirical data" and may be justified based on "reference to studies," pertinent "anecdot[al]" information, or notice of historical experience); *Heller v. Doe*, 509 U.S. 312, 320-21, 113 S. Ct. 2637, 2643, 125 L.Ed.2d 257 (1993) (state "has no obligation" under rational basis scrutiny "to produce evidence to sustain" legislation because "legislative choice[s] [are] not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data"—the "burden is on the [challenging party] to negat[e] every conceivable basis which might support it" and legislation does not "fail rational-basis review because . . . not made with mathematical nicety or . . . [without] some inequality" because the "problems of government are practical ones and . . . [often involve] rough accommodations," as "illogical" or "unscientific" as they may be—internal punctuation and citations omitted). Here, the "first step" of the Montana standard of intermediate scrutiny applied by the Majority "is similar to rational basis review," except for requiring the reviewing court to "conceive of " any possible justification. Opinion, ¶ 40.

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"offered no proof to establish such a need" in its defense. *Greely*, 193 Mont. at 383, 632 P.2d at 303 (citation omitted). Upon recognition that the "mere recitation of a compelling state interest" in the enactment would not necessarily have been conclusive in any event, we acknowledged that the State presented no "evidence to establish a compelling state interest," but nonetheless cited the district court to various authorities from other jurisdictions recognizing a compelling government interest in similar legislation. *Greely*, 193 Mont. at 383, 632 P.2d at 303. We explained that:

> Laws regulating or monitoring the raising and spending of money in the political arena have been enacted throughout the country as well as by the Congress. When these laws have been challenged, the courts have not had difficulty finding a compelling interest as a basis for enactment. *United States v. Harris, [Harriss]*, 347 U.S. 612, 625, 74 S. Ct. 808, 816, [98 L.Ed. 989] (1954) (maintaining the integrity of a basic governmental process); *Young Americans for Freedom, Inc. v. Gorton*, [83 Wash.2d 728,] 522 P.2d 189, 192 (Wash. 1974) (informing public officials and the electorate of the sponsors of efforts to influence governmental decision-making); *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978) (protecting citizens from abuse of the trust placed in the hands of elected officials); *Montgomery Cty. v. Walsh*, [274 Md. 502,] 336 A.2d 97, 106 (Md. Ct. App. 1975) (fostering a climate of honesty perceptible by the public at large).

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Greely, 193 Mont. at 383-84, 632 P.2d at 303 (citations altered). We noted further that:

> Political corruption is a matter of common popular perception, which may or may not reflect the actualities of political life. *Judicial notice may be taken of the compelling need for disclosure laws which have as their purpose the deterrence of actual corruption and the avoidance of appearances of corruption. Buckley v. Valeo*, 424 U.S. 1, 67, 96 S. Ct. 612, 657 [46 L.Ed.2d 659] (1976).

Greely, 193 Mont. at 384, 632 P.2d at 303 (emphasis added, citation altered). We thus held that:

> The absence of fact-finding capabilities in the initiative process is not proof of the absence of a compelling state interest in the enactment of I-85. To so hold would result in the emasculation of the initiative process in Montana with a result that no initiative could withstand a First Amendment challenge.

Greely, 193 Mont. at 384, 632 P.2d at 303. Likewise the unprecedented requirement recognized by the Majority today that the Legislature must in every case put on *factual proof* justifying the exercise of its constitutional authority upon challenge.[24] The rationale put forth by

24. When strict or intermediate scrutiny *properly* applies upon actual satisfaction of the challenging party's initial

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the Plaintiffs, District Court, and now the Majority here is also strikingly similar to the arguments rejected by the Supreme Court in applying *Burdick/Anderson* intermediate scrutiny, not strict scrutiny, in rejecting a similar political party assertion that an Indiana statute requiring voters to present a government-issued photo ID at the polls "substantially burdens the right to vote" because it was: (1) "[un]necessary" to "avoid[ ] election fraud"; (2) would "arbitrarily disenfranchise qualified voters who do not" have the required photo ID; and (3) would "place an unjustified burden on those who cannot readily obtain such identification." *See Crawford*, 553 U.S. at 185-87 and 189-204, 128 S. Ct. at 1613-24. Whether under the United States Constitution or the Montana Constitution, the unassailable fact remains that:

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triggering burden, the Legislature of course must satisfy its responsive burden of demonstrating the requisite relationship of the challenged legislation to a compelling or important government interest, as applicable under the applicable level of scrutiny. Of course that responsive burden requires more than mere reference to a pertinent compelling or important government interest. However, despite the Majority's attempt to marginalize the clearly pertinent principle recognized in *Greely*, not to mention as at issue here the specifically applicable and indisputable compelling state interest and power expressly stated and exclusively granted to the Legislature in Mont. Const. art. IV, § 3, the mere fact that the Legislature, or defending state entity, fails to rebut a purported contrary evidentiary showing made by a challenging party does not as a matter of law or fact, as the Majority's analysis implies, necessarily support a judicial finding or conclusion that the Legislature or defending state entity has failed to meet its responsive burden under the applicable level of constitutional scrutiny.

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Appendix A

> Election laws will *invariably impose some burden upon individual voters.* Each provision of a code, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—*at least to some degree*—the individual's right to vote and his right to associate with others for political ends.
>
> Consequently, *to subject every voting regulation to strict scrutiny* and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, *would tie the hands of States seeking to assure that elections are operated equitably and efficiently.* Accordingly, the *mere fact* that a State's [election law] creates barriers tending to [regulate elections and the process of voting for those purposes] *does not of itself compel* [*strict*] *scrutiny.*

Burdick, 504 U.S. at 433, 112 S. Ct. at 2063 (internal punctuation and citations omitted, emphasis added).[25]

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25. *See also Yick Wo*, 118 U.S. at 370-71, 6 S. Ct. at 1071 ("where the constitution has conferred a political right or privilege and . . . has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations in regard to the time and mode of exercising that right which are designed to secure and facilitate the exercise of such right in a prompt, orderly, and convenient manner" without "subvert[ing] or injuriously restrain[ing] the right itself "—internal punctuation and citation omitted).

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Appendix A

Accordingly, to evaluate a state legislative enaction that merely *burdens* the exercise of the right to vote, rather than *substantially interferes* with it, "a more flexible standard" of constitutional review is necessary. *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063. Therefore, upon challenge of a state election law, the reviewing court:

> must weigh the *character and magnitude of* the [*alleged burden* upon the right to vote] . . . *against the precise interests put forward by the State* as justifications for the burden imposed by its rule, . . . *consider*[*ing*] the *extent to which* those interests make it *necessary to burden.* the plaintiff's rights.
>
> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens [the right to vote]. Thus, . . . when those rights are subjected to *severe restrictions*, the regulation [is subject to *strict scrutiny* and] must be narrowly drawn to advance a state interest of compelling importance.
>
> But when a state [voting or] election law [regulation] imposes only *reasonable, non-discriminatory* [*burdens*] upon the [fundamental right to vote], the *State's important regulatory interests* are *generally sufficient* to justify the restrictions.

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Burdick, 504 U.S. at 434, 112 S. Ct. at 2063 (internal punctuation and citations omitted, emphasis added). Thus, *Burdick/Anderson* intermediate scrutiny

> calls for . . . *deferen*[*ce*] [to] important regulatory interests . . . for *nonsevere, nondiscriminatory* restrictions, reserving *strict scrutiny* [*only*] *for* laws that *severely restrict* the right to vote. . . . Strict scrutiny is appropriate *only if* the *burden is severe*. . . . [T]he *first step* is to decide whether a challenged law *severely burdens the right to vote.* Ordinary and widespread burdens, such as those requiring nominal effort of everyone, are not severe. Burdens are *severe* [*only*] *if* they *go beyond* the *merely inconvenient.*

Crawford, 553 U.S. at 204-05, 128 S. Ct. at 1624-25 (Scalia, J., concurring) (internal punctuation and citations omitted).

¶164 In *Crawford*, the Supreme Court further explained that *Burdick/Anderson* intermediate scrutiny requires that,

> after identifying the burden . . . imposed[,] . . . we call[] for the demonstration of a corresponding [government] interest sufficiently weighty to justify . . . reasonable, nondiscriminatory restrictions [of the right to vote or ballot access]. . . . [A] court evaluating a constitutional challenge to an election regulation [must then] weigh the asserted [burden upon] the right to

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> vote against the precise interests put forward by the State as justifications for the burden imposed by [the restrictions]. . . . [There is no] litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.

Crawford, 553 U.S. at 190-91, 128 S. Ct. at 1616 (internal punctuation and citations omitted). As here, "[w]hile petitioners argue[d] that the statute was actually motivated by partisan concerns and dispute[d] both the significance of the State's interests and the magnitude of any real threat to those interests," the State asserted several state interests justifying the burdens imposed on voters and potential voters which were "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process" including, *inter alia*,

> [the state] interest in deterring and detecting voter fraud. The State [also] has a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient. . . . Finally, the State relies[,] [*inter alia,*] on its interest in safeguarding voter confidence.

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Crawford, 553 U.S. at 191-92, 128 S. Ct. at 1616-17 (*inter alia* citing the "National Commission on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process 18 (2002) (with honorary cochairs former Presidents Gerald Ford and Jimmy Carter)," and the National Voter Registration Act of 1993, 107 Stat. 77, 42 U.S.C. § 1973, in which "Congress established procedures that would both increase the number of registered voters and protect the integrity of the electoral process" including "requir[ing] state motor vehicle driver's license applications to serve as voter registration applications"). The Court further noted that:

> [though] [t]he record contains no evidence of any [voter impersonation] fraud actually occurring in Indiana at any time in its history[,] [and] petitioners argue that provisions of the Indiana Criminal Code punishing such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future[,] [i]t remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, [and] that occasional examples have surfaced in recent years, . . . demonstrat[ing] that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

Crawford, 553 U.S. at 194-96, 128 S. Ct. at 1619.

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> Both evidence in the record and facts of which we may take judicial notice, however, indicate that a *somewhat heavier burden may* be placed on *a limited number of persons*[,] . . . includ[ing] elderly persons born out of State[] who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when [the subject statute] was enacted, the new identification requirement *may have imposed a special burden on their right to vote*. . . . [But] *even assuming* that the burden *may not be justified as to a few voters*, that conclusion is *by no means sufficient to establish* [the facial unconstitutionality of the statute].

Crawford, 553 U.S. at 199-200, 128 S. Ct. at 1621 (emphasis added).

¶ 165 As here, the Supreme Court noted that:

> *Petitioners ask* this Court, in effect, to . . . *look*[] *specifically at a small number of voters who may experience a special burden under the statute* and weigh[] their burdens against the

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State's broad interests in protecting election integrity. . . . [They] urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But *on the basis of the evidence* in the record it *is not possible to quantify either* the magnitude of the burden on this *narrow class of voters or the portion of the burden imposed on them that is fully justified.*

First, the evidence in the record does not provide us with the number of registered voters [that would be affected]. . . . Further, the . . . evidence presented . . . *does not provide any concrete evidence of the burden* [that would be] imposed on [the affected] voters. . . . From th[e] limited evidence we do not know the magnitude of the impact [the enactment] will [actually] have. . . . The record does contain the [testimony] of one homeless woman who has a copy of her birth certificate, but was denied a photo identification card because she did not have an address. But [such testimony] gives no indication of how common the problem is.

In sum, on the basis of the record that has been made . . . , *we cannot conclude* that the statute imposes *excessively burdensome requirements on any class of voters.* A facial challenge must fail where the statute has a plainly legitimate

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> sweep. *When we consider* only the *statute's broad application to all Indiana voters* we conclude that it *imposes only a limited burden on voters' rights.* The precise *interests advanced by the State* are *therefore sufficient* to defeat petitioners' *facial challenge* to [the enactment].
>
> Finally we note that petitioners have not demonstrated that the proper remedy—*even assuming an unjustified burden on some voters*—would be to invalidate the entire statute. When evaluating a *neutral, nondiscriminatory regulation of voting procedure*, we must keep in mind that *a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.*

Crawford, 553 U.S. at 200-03, 128 S. Ct. at 1622-23 (internal punctuation and citations omitted, emphasis added). The Court thus ultimately noted and held:

> [P]etitioners stress . . . that all of the Republicans in the [legislature] voted in favor of [the government issued photo ID requirement] and the Democrats were unanimous in opposing it. . . . [The trial court] noted that the litigation was the result of a partisan dispute that had "spilled out of the state house into the courts." [While] [i]t is fair to infer that partisan considerations may have played a significant role in the decision to enact [the subject

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> legislation, even if] such considerations [were] the only justification . . . , we may also assume that [the legislation] would suffer the same fate as the poll tax at issue *in Harper* [*v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L.Ed.2d 169 (1966) (holding that state poll tax substantially interfered with the fundamental U.S. constitutional right to vote and further failed strict scrutiny in violation of Fourteenth Amendment equal protection because it was irrelevant to a voter's qualification to vote)].
>
> But, if a *nondiscriminatory law* is *supported by valid neutral justifications*, those justifications *should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. The state interests* identified as justifications for [the Indiana photo ID requirement] are *both neutral and sufficiently strong* to require [rejection of] petitioners' *facial attack* on the statute. The *application* of the statute *to the vast majority of Indiana voters is amply justified by the valid interest in protecting* "*the integrity and reliability of the electoral process.*"

Crawford, 553 U.S. at 203-04, 128 S. Ct. at 1623-24 (internal punctuation and citations omitted, emphasis added).

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¶166 To be clear, the import of *Crawford* here is *not* to analogously compare the factual evidence presented by the challenging parties here with the opposition evidence presented in *Crawford.* Rather, the purpose of *Crawford*, and similarly *Burdick*, is merely as analytical models, *inter alia*, clearly demonstrating the constitutional soundness of the *Burdick/Anderson* standard of intermediate scrutiny, free of any *undue* legislative deference, to non-discriminatory time, place, and manner voting and election administration regulations that may reasonably burden, but do not substantially interfere with, the exercise of the right to vote. As analytical models not dependent upon the opposition evidence presented in any particular case, *Crawford* and *Burdick* stand in stark contrast to the faulty constitutional analysis put forth by the Court here in its erroneous application of strict constitutional scrutiny to the Legislature's mere 32-hour push-back of the voter registration deadline from election day to noon the day before and prohibition of paid absentee ballot collectors. Side-by-side analytical comparison of *Crawford*'s application of the *Burdick/Anderson* standard, with the analytically incompatible intermediate scrutiny standard amorphously applied by the Court here, shines needed light on the faulty constitutional analysis applied here.[26]

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26. With narrow focus on the evidence presented here, the Majority dismissively ignores and avoids the analytical import of *Crawford* in a sentence. Opinion, ¶ 84 n.18. (in contrast to the evidence presented in *Crawford* the "multitude evidence" presented here as to "the number of voters affected and the burden the laws would place *on the groups affected*" is more than sufficient to support the Court's non-equal-protection holding that

3. Erroneous Application of an Ad-Hoc Montana-Specific Standard of Intermediate Scrutiny to Elimination of University Student ID Cards as One of Many Previously Permissible Primary Forms of Required Voter ID.

¶167 As a threshold matter, the Majority correctly recognizes that the Plaintiffs failed to satisfy their strict scrutiny burden of showing that § 13-13-114, MCA (2021) (*inter alia* eliminating state university student ID cards as one of the many previously permissible primary forms of required voter ID), will substantially interfere with the fundamental right to vote of resident Montana university students under Mont. Const. art. II, § 13. Opinion, ¶ 111. The Court further accurately disclaims equal protection as the basis of decision for the disparate burden analyses it applies to the subject legislative enactments in this case. Opinion, ¶¶ 20, 32, 60, 85, and 106. However, the

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the voting regulations at issue here are facially unconstitutional). Aside from its reliance on clearly erroneous findings of fact, conspicuously absent from the Court's analysis is any recognition, much less reconciliation, of the well-settled principle that a legislative enactment his facially unconstitutional *only if* there are *no conceivable circumstances* under which the enactment *may constitutionally apply* under the applicable level of constitutional scrutiny. *See Mont. Cannabis Indus. Ass'n*, ¶¶ 14 and 73 (*inter alia* citing *Wash. State Grange*, 552 U.S. at 449, 128 S. Ct. at 1190 (citing *Salerno*, 481 U.S. at 745, 107 S. Ct. at 2100)). *See also Wash. State Grange*, 552 U.S. at 449 n.6, 128 S. Ct. at 1190 (legislative enactment may alternatively be facially unconstitutional if a "substantial number of its applications" fail the applicable level of scrutiny with *no* "*plainly legitimate sweep*"—internal punctuation and citation omitted, emphasis added).

Court's analysis and holding that the university student ID restriction is nevertheless *facially* unconstitutional because it disparately impacts resident university students is thus based on grounds that are manifestly erroneous and faulty to say the least. As shown *supra*, the Court first sidesteps application of the clearly applicable *Burdick/Anderson* standard of intermediate constitutional scrutiny for an amorphous ad hoc application of an analytically incompatible equal protection standard, and then further erroneously interjects an incompatible equal protection "disparate impact" theory into its claimed non-equal-protection analysis. It next illogically concludes that the elimination of university student IDs, which do not include student addresses, as a primary form of voter identification is arbitrary and unreasonable because certain other acceptable forms of primary voter ID (i.e., military IDs and U.S. passports) similarly do not list the subject's address, and that university student IDs are just as reliable forms of voter identification because the state university system issues them only on exhibit of a more primary form of personal identification. Opinion, ¶¶ 112, 114, and 117.

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¶168 The sole purpose of the statutory voter identification requirement is to ensure *reliable* proof of the true identity of the person who shows up to vote at the polls—not to serve as proof of citizenship or Montana residency for purposes of voter registration. *See* § 13-13-114, MCA ("before an elector is permitted to receive a ballot or vote, the elector shall present to an election judge one of the following forms of identification showing the elector's name"). Choosing instead to narrowly focus on the evidentiary showing made by the challenging parties

in this case, the Court's reasoning ignores the State's indisputable factual assertion, with supporting citation to *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636-37 (W.D. Wisc. 2021) ("unlike other [government-issued] IDs" authorized as primary proof of voter identity, "student IDs [are not] otherwise regulated by federal, state, or tribal law, so any school's ID may be different from another's" and thus it is "rational for the legislature," for the purpose of "statutorily imposed uniformity," to require more proof of identity than "student IDs" alone "to discourage use of fake IDs and assist election workers in recognizing valid IDs"),[27] that university student IDs are not subject to the same rigorous identification verification standards as other authorized forms of primary voter ID (i.e., Montana driver's licenses, state-issued ID cards, military ID cards, and U.S. passports), which thus provide more reliable proof of the true identity of the person who shows up to vote at the polls than student IDs. Moreover, as correctly noted by the State, there

> is no [record] evidence of any student ever using or needing a student ID to vote, [and the trial testimony of . . . Plaintiff] Mitch Bohn acknowledged that it would be "weird" if a college student did not have a driver's license, and he was [unaware] of any college student who did not.

Opening Brief, pp. 44-45. Further undermining the Court's reasoning is its own candid acknowledgement

27. State's Opening Brief, p. 44.

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that, in accordance with the express language of § 13-13-114, MCA, a state administrative rule furthers manifests that the limited purpose of the required primary forms of voter ID is as reliable proof of the true identity of the person who shows up to vote at the polls—not to serve as proof of citizenship or Montana residency for purposes of voter registration "which is instead" proven by sworn voter attestation "under penalty of perjury . . . when registering to vote." Opinion, ¶ 109 n.25 (citing 2 Mont. Admin. Reg. 170 (Jan 28, 2022)).[28]

¶169 Further of no avail, the Court rejects out-of-hand the State's perfectly valid, unrebutted, and indisputable assertion that the other authorized forms of primary voter ID (i.e., Montana driver's licenses, state-issued ID cards, military ID cards, and U.S. passports) are subject to more rigorous identification verification standards, and are thus more reliable forms of voter identification than university student IDs, because the record reflects that *state* universities issue student IDs only upon exhibit of a primary form of government-issued ID. Opinion, ¶ 114. The Court's reasoning of course overlooks that there are also a number of private universities or colleges in Montana which are not governed by the state university

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28. *See also* § 13-2-110(3)-(4), MCA ("voter registration [applicant] shall provide" a "Montana driver's license number[,] Montana state identification card number," "the last four digits of the applicant's social security number," or if "unable," an authorized "alternative form of identification"). There is no dispute that the prescribed uniform voter registration application form requires the applicant to specify his or her current Montana address.

system.[29] Even more logically incongruous, the Court's reasoning recognizes that even the state university system requires a *primary* form of government-issued ID for issuance of a student ID, but then concludes that it is arbitrary and unreasonable for the Legislature to require a *primary* form of government-issued ID for purposes of voter identification verification. The Court's incongruent reasoning is simply mystifying.

¶170 The Court's cited justifications for concluding that the Legislature's elimination of university student IDs as a primary form of voter ID is not rationally related to the stated purpose of ensuring more reliable and uniform forms of primary voter identification manifest that,

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29. Incredibly, the Court dismisses this inconvenient but indisputable fact. Opinion, ¶ 114 ("[t]he record presents no evidence on student ID cards from private universities in Montana"). Montana unquestionably has a number of private universities (e.g., Carroll College/Helena, University of Providence/Great Falls, and Rocky Mountain College/Billings) with significant resident students, an indisputable fact clearly subject to judicial notice without proof under M. R. Evid. 201(b), (c), and (f). The Court further asserts, "nor are there facts cited to that are appropriate for judicial notice that suggests any standards less rigorous for other forms of student ID that used to be acceptable." Opinion, ¶ 114. So what. The Court simply cannot credibly deny the common knowledge that those private institutions issue student IDs, and that they do so for the same reasons that Montana's public institutions and every other university in this country do the same. It is simply ridiculous to suggest that Montana's private universities issue student IDs based on any standard more rigorous than the same primary forms of government-issued identification upon which our state universities issue student IDs.

rather than trying to conceive of a possible reasonable justification for the legislative restriction, as deemed "improper" in Opinion, ¶ 40, the Majority is instead conceiving of possible justifications, however flimsy and thin, upon which to invalidate a perfectly reasonable voter ID restriction, however imperfect. Again, the State's failure to present any evidence countering the plaintiffs' evidence certainly does not justify the Majority's unsupported and specious reasoning here. The fact that an enactment does not serve the Legislature's stated purpose as perfectly as the Majority would like is certainly not a sufficient basis upon which to logically or legally conclude that the enactment is either arbitrary or will not reasonably further a legitimate government purpose. The Majority's reasoning erroneously gives no deference or credence whatsoever to the Legislature's authority and duty under Mont. Const. art. IV, § 3, or the perfectly reasonable manner, however imperfect, in which it chose to exercise that authority and carry out that duty here.[30] The general rationale put forth by the Majority to strike down the challenged legislation eliminating university student IDs as a primary form of voter ID is patently fallacious, illogical, and thus improperly interferes with the Legislature's exercise of its exclusive constitutional prerogative.

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30. *See*, *e.g.*, Opinion, ¶ 59 ("[w]e need not balance the State's [asserted] interests against the burden imposed because the State has not demonstrated that its interests are reasonable").

4. Conclusion.

¶171 For the foregoing reasons, the Majority erroneously concludes that the Legislature's push-back of the voter registration deadline from election day to noon the day before, prohibition of paid absentee ballot collectors, and eliminating the Montana university student ID as an acceptable primary form of required voter identification are *facially* unconstitutional in violation of Mont. Const. art. II, § 13. Courts have no constitutional power or authority to act as a "super-legislature" second-guessing "the wisdom, need, and propriety" of legislative enactments that may "touch" upon "economic problems, business affairs, or social conditions," or that merely regulate the time, place, and manner of exercise of the right to vote in furtherance of important state regulatory interests and without substantially interfering with exercise of the right. *See Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S. Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); *Cutone v. Anaconda Deer Lodge*, 187 Mont. 515, 524, 610 P.2d 691, 697 (1980) (this Court is not "a super-legislature" and thus generally has no authority to overturn non-arbitrary public policy determinations of the Legislature within the bounds of its constitutional power"); *Wash. State Grange*, 552 U.S. at 451-52, 128 S. Ct. at 1191-92 (noting broad state power to regulate the "election process . . . subject to the limitation that it may not be exercised in a way that violates specific provisions of the Constitution," particularly "First Amendment rights . . . including the freedom of political association"—if only "modest burdens" are imposed, "important [state] regulatory interests are generally sufficient to justify reasonable,

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nondiscriminatory restrictions"—internal punctuation and citations omitted). However, in an unprecedented exercise of unrestrained judicial power overriding public policy determinations made by the Legislature in the exercise of its constitutional discretion, however ill-advised to some, the Majority today strikes down three distinct legislative enactments on the most dubiously transparent of constitutional grounds.

¶ 172 As we must in the proper exercise of our own exclusive constitutional authority, this Court no doubt will continue to whistle-down legislative enactments that exceed the clear constitutional limitations on the exclusive power and authority of the Legislature. In doing so, however, it is imperative to the preservation of the sacrosanct separation of powers dictated by the Montana Constitution that we consistently recognize, however distasteful in the political firestorm of the day, that the broad legislative authority, and resulting public policy prerogative *exclusively granted to the Legislature* by the Montana Constitution, necessarily includes the power and discretion *within constitutional limits*, to enact legislation that many may view as, and occasionally may in fact be, bad public policy contrary to the public interest. Only recently, this Court has correctly chided the Legislature to stay in its own well-defined lane of constitutional authority. *See McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶¶ 5-52, 405 Mont. 1, 493 P.3d 980; *McLaughlin*, ¶¶ 58-78 (McKinnon, J., concurring); *McLaughlin*, ¶¶ 79-83 (Sandefur, J., concurring). The precious distributed-powers constitutional form of government that the good citizens of this State have

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chosen to live under since 1889 will survive and be well-served only if we do the same.[31] Unfortunately, that did not occur here regarding three of the four legislative enactments at issue. I dissent.

/S/ DIRK M. SANDEFUR

Justice Jim Rice joins in the concurring and dissenting Opinion of Justice Sandefur.

/S/ JIM RICE

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31. *Accord State v. Hunt*, 91 N.J. 338, 450 A.2d 952, 963-64 (1982) (Handler, J., concurring) ("uncritical" state court reliance on "their state constitutions for convenient solutions to problems not readily or obviously found elsewhere" is fraught with danger of eventual "erosion or dilution of constitutional doctrine").

APPENDIX B — Findings of Fact, Conclusions of Law and Order, Montana Thirteenth Judicial District Court, Yellowstone County, Filed September 30, 2022

MONTANA THIRTEENTH
JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

Consolidated Case No.: DV 21-0451

MONTANA DEMOCRATIC PARTY, MITCH BOHN,

Plaintiffs,

WESTERN NATIVE VOICE, MONTANA NATIVE VOTE, BLACKFEET NATION, CONFEDERATED SALISH AND KOOTENAI TRIBES, FORT BELKNAP INDIAN COMMUNITY, AND NORTHERN CHEYENNE TRIBE,

Plaintiffs,

MONTANA YOUTH ACTION, FORWARD MONTANA FOUNDATION, AND MONTANA PUBLIC INTEREST RESEARCH GROUP,

Plaintiffs,

v.

CHRISTI JACOBSEN, IN HER OFFICIAL CAPACITY AS MONTANA SECRETARY OF STATE,

Defendant.

Filed September 30, 2022

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Appendix B

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Judge Michael G. Moses

This matter came before the Court on a non-jury trial beginning on August 15, 2022 and concluding on August 25, 2022. (Dkt. 248, Dkt. 244, Dkt. 243, Dkt. 242, Dkt. 240, Dkt. 238, Dkt. 237, Dkt. 235, Dkt. 233). Plaintiffs Montana Democratic Party and Mitch Bohn ("MDP Plaintiffs"); Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe ("WNV Plaintiffs"); and Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group ("Youth Plaintiffs") (collectively, "Consolidated Plaintiffs") filed Complaints on April 20, 2021 (Dkt. 1), May 17, 2021 (Dkt. 1 DV 21-0560), and September 9, 2021 (Dkt. 1 DV 21-1097) requesting declaratory judgments concerning laws passed by the Montana Legislature during its 2021 session.

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Plaintiffs Montana Democratic Party and Mitch Bohn appeared and were represented by Matthew Gordon, Stephanie Command, and Jessica Frenkel of Perkins Coie, LLP, Peter M. Meloy of the Meloy Law Firm, and Henry J. Brewster and Marilyn Robb of Elias Law Group, LLP. Plaintiffs Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Northern Cheyenne Tribe and Fort Belknap Indian Community appeared and were represented by Jacqueline De León and Samantha Kelty of the Native American Rights Fund, Alora Thomas and Jonathan

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Topaz of ACLU's Voting Rights Project, Theresa J. Lee of Harvard Law School's Election Law Clinic, and Alex Rate and Akilah Lane of the ACLU of Montana.

Plaintiffs Montana Youth Action, Forward Montana Foundation and Montana Public Interest Research Group appeared and were represented by Rylee Sommers-Flanagan and Niki Zupanic of Upper Seven Law.

Defendant Christi Jacobsen appeared and was represented by William "Mac" Morris, Dale Schowengerdt, David Knobel, Lars Phillips, and Leonard H. Smith of Crowley Fleck, PLLP and David Dewhirst with the State of Montana's Office of the Attorney General. Numerous exhibits were offered and admitted.

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All parties have submitted proposed findings of fact and conclusions of law. The issues at trial were the following:

1) Whether House Bill 176 ("HB 176") violates Consolidated Plaintiffs' and other Montanans' constitutional right to vote and right to equal protection;

2) Whether Senate Bill 169 ("SB 169") violates MDP and Youth Plaintiffs' and other Montanans' right to vote and right to equal protection;

3) Whether House Bill 530 ("HB 530"), § 2, violates the MDP and WNV Plaintiffs' and other Montanans' constitutional right to vote, right to freedom of

speech, right to equal protection and right to due process;

4) Whether HB 530, § 2 is an unconstitutional delegation of power.

The Court has considered the evidence presented, arguments of counsel, and the proposed findings of fact and conclusions of law of all parties. The Court hereby makes the following:

FINDINGS OF FACT

I. Parties

A. Montana Democratic Party

1. Plaintiff Montana Democratic Party ("MDP") is a political party established pursuant to § 13-38-101, MCA *et seq*.

2. Plaintiff MDP's mission and purpose are to elect Democratic Party candidates in local, county, state, and federal elections. It works to accomplish that mission by educating, mobilizing, assisting, and turning out voters throughout the state. Aug. 19, 2022, Trial Tr. 1182:2-14 (Hopkins); MDP 30(b)(6) Dep.[1] 11:22-14:3. These activities

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1. Defendant's Deposition Designations with Associated Exhibits (Aug. 11, 2022), Ex. 7 (Deposition of Jacob Hopkins as 30(b)(6) designee for the Montana Democratic Party) ("MDP 30(b)(6) Dep.").

include supporting Democratic Party candidates in national, state, and local elections through fundraising and organizing; protecting the legal rights of voters; monitoring and educating voters about election laws; and ensuring that all Montana voters have a meaningful opportunity to exercise their right to vote. Aug. 19, 2022, Trial Tr. 1181:20-1182:14 (Hopkins); MDP 30(b)(6) Dep. 48:24-49:19.

3. MDP has a large number of members and constituents from across the state, including Montanans who regularly support candidates affiliated with the Democratic Party, legislators, members of the central committee, volunteers, and people affiliated with specific outside political organizations such as a labor movement. Aug. 19, 2022, Trial Tr. 1195:22-1196:5 (Hopkins); MDP 30(b)(6) Dep. 64:24-65:17.

4. MDP also has a platform that describes MDP's position as it relates to voting rights. Aug. 19, 2022, Trial Tr. 1182:15-1183:2 (Hopkins). Specifically, in the preamble, the platform discusses MDP's "commitment to making sure that everyone in Montana can have their voice heard, including those with little influence, money[,] or acceptance." Aug. 19, 2022, Trial Tr. 1183:3-12 (Hopkins). MDP supports organized outreach to all Montanans, and particularly to Montana's Native Americans, on issues central to the advancement of Native Americans in Montana. MDP supports and advocates for equitable access for Native Americans registering to vote and voting. Aug. 19, 2022, Trial Tr. 1183:13-23 (Hopkins). MDP also works to support the assurance of voting rights to all

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citizens and supports expanded participation in voting, especially among historically disenfranchised populations. *Id*.

5. To advance this platform, MDP has "a voter protection hotline" that individuals can call into and ask questions concerning "Montana's voting regulations and what [those] mean[] for their life." Aug. 19, 2022, Trial Tr. 1183:24-1184:8 (Hopkins). Moreover, MDP helps voters with issues encountered with their ballots such as curing a rejected ballot or requesting a new ballot. Aug. 19, 2022, Trial Tr. 1184:9-12 (Hopkins). MDP "offer[s] ballot collection services to Montanans who want to take advantage of those services, who might not otherwise be able to cast their ballot in an election without assistance from the [MDP] to turn in that ballot to the county elections office." Aug. 19, 2022, Trial Tr. 1184:13-17 (Hopkins).

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6. A key part of MDP's mission is its extensive get-out-the-vote ("GOTV") efforts. Together, MDP's employees, members, organizers, and volunteers reach out to voters through text messages, phone calls, and door-to-door canvassing to encourage Montanans to vote and provide them with information about how to successfully cast their ballots. Aug. 19, 2022, Trial Tr. 1185:12-20 (Hopkins); PTX048; PTX051; PTX055. MDP's employees, members, organizers, and volunteers encourage unregistered voters to go to their county election administrator's office or other designated location to register to vote and vote. MDP 30(b)(6) Dep. 113:12-114:3; PTX048; PTX051; PTX055. They encourage registered voters to go to their polling location

to cast their ballots, and they ensure that those voters know exactly what they need to bring with them to do so. *Id.* They also encourage absentee voters to return their absentee ballots. And when absentee voters are unable to return their ballots on their own, MDP's employees, members, organizers, and volunteers offer to return that person's ballot promptly to the county election office. MDP 30(b)(6) Dep. 27:13-28:13; PTX048; PTX051; PTX055.

7. In 2020, MDP hired several staffers whose primary job was to collect ballots on reservations during the GOTV period. Aug. 19, 2022, Trial Tr. 1201:14-1202:7 (Hopkins); PTX050. Each staff member or volunteer collecting ballots had to sign MDP's Ballot Collection Pledge, which indicates that they have completed the party's training, read the party's guidance on commonly asked questions, and committed to certain security protocols about the retention and return of ballots. *Id.* at 1202:8-15, 1205:16-1207:9 (Hopkins); PTX051. MDP maintains records of every individual hired to collect ballots. *Id.* at 1203:7-9. MDP also attempts to hire ballot collectors from within the communities they are collecting ballots, especially on reservations, to help ensure community members' familiarity with the people they are entrusting with their ballots. *Id.* at 1202:16-1203:6 (Hopkins); PTX055. MDP additionally receives and responds to specific voter requests for absentee ballot assistance. *See, e.g.*, PTX054.

8. Ballot collection allows MDP and its members to express their values of increasing voter participation in historically disenfranchised communities such as Native American reservations. Aug. 19, 2022, Trial Tr. 1219:11-

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24, 1231:23-1232:3, 1268:12-22 (Hopkins).

9. Plaintiff MDP has made substantial expenditures in each election cycle to mobilize voters through its voter education, registration, and ballot collection initiatives. Aug. 19, 2022, Trial Tr. 1186:10-1187:4 (Hopkins). MDP intends to make additional expenditures to support Democratic candidates and mobilize and educate voters in the 2022 general election and in future elections. *Id.*; MDP 30(b)(6) Dep. 114:12-115:2.

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10. Because HB 176 ended Election Day Registration ("EDR"), MDP can no longer encourage unregistered voters to register and vote on Election Day. Instead, it must expend additional resources to contact unregistered voters earlier in the election cycle and encourage them to register earlier when voters are less activated. MDP 30(b)(6) Dep. 31:16-32:17. Conducting a turnout program in advance of Election Day requires more resources. *Id.* Because the election is not at the forefront of voters' minds, MDP must contact each voter more frequently in order to motivate them to register, and then must contact that voter again to encourage them to turn out and vote. Aug. 19, 2022, Trial Tr. 1196:25-1197:13 (Hopkins).

11. Additionally, because HB 176 also prohibits voters from changing their address to a new county on Election Day, MDP must now inform voters that they may not be able to update their voter registration information and vote on Election Day. MDP 30(b)(6) Dep. 96:3-21. And because HB 176 eliminated the failsafe EDR provided for voters who encountered problems with their registration,

MDP must now inform voters of the potential that any problems with their registration may not be fixable on Election Day in a manner that will allow them to vote that same day. Aug. 19, 2022, Trial Tr. 1197:2-13 (Hopkins); MDP 30(b)(6) Dep. 113:18-114:3.

12. Because of SB 169, MDP will "have to have more conversations with students earlier and help them plan ahead if they're planning to vote [at] the polls on Election Day." Aug. 19, 2022, Trial Tr. 1198:24-1199:5 (Hopkins). Students that were planning to use a student ID to vote will need to provide additional documentation, such as a utility bill, which may be difficult to provide if they live in the dormitories. *Id*. 1199:6-14.

13. Because of both HB 176 and SB 169, MDP has to expend significant resources on an information campaign to help ensure that its members and constituents understand the changes in the law and have access to sufficient information in order to avoid disenfranchisement, which requires MDP to reallocate resources from other efforts, such as hosting events for Democratic candidates to better inform the electorate about their candidacy and help them raise the resources to be competitive. Aug. 19, 2022, Trial Tr. 1196:6-1200:4 (Hopkins); MDP 30(b)(6) Dep. 114:12-115:2.

14. Because of HB 530, § 2, MDP and other civic organizations will no longer be able to engage paid employees or others who receive a pecuniary benefit to help voters request, receive, and return their absentee ballots. Aug. 19, 2022, Trial Tr. 1220:5-1221:14, 1222:7-12 (Hopkins).

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15. MDP has incurred, and will continue to incur, distinct injuries directly traceable to HB 176, SB 169, and HB 530, § 2. These laws directly harm MDP by limiting the effectiveness of its GOTV program, making it harder for Montanans who would vote for MDP candidates to successfully register to vote or return their ballots, and thereby making it more difficult for MDP to accomplish its mission of electing members of the Democratic Party in Montana. *Id.* at 1200:5-1197:13 (Hopkins). Because of SB 169, HB 176, and HB 530, § 2, MDP will be forced to expend more resources, and divert more funds from its other critical priorities, in order to educate and turn out voters. *Id.*

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B. Mitchell Bohn

16. Plaintiff Mitchell Bohn is a Montana citizen and voter who resides in Billings. Aug. 15, 2022, Trial Tr. 174:12; 177:9-16 (Bohn).

17. Mr. Bohn was born with spina bifida, which confines him to a wheelchair and causes him to endure numerous health complications. *Id.* at 176:3-11 (Bohn). Mr. Bohn has been hospitalized frequently because of his disability, sometimes for months on end, and he cannot predict when he will be hospitalized. *Id.* at 179:7-12 (Bohn). He lives with his parents because his spina bifida can make everyday tasks difficult for him. *Id.* at 176:12-24 (Bohn).

18. Mr. Bohn registered to vote sometime around his 18th birthday. *Id.* at 177:1-3 (Bohn). He has voted in almost every election since then. *Id.* at 177:10-179:2 (Bohn). Voting is extremely important to Mr. Bohn. *Id.* at 177:5-8 (Bohn).

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19. Mr. Bohn votes by absentee ballot because his spina bifida and attendant complications makes it difficult to get to the polling place. *Id.* at 179:3-20 (Bohn). He also votes by absentee ballot because doing so would allow him to vote before going to the hospital if he needed to be hospitalized close to an election. *Id.*

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20. Although voting by absentee ballot provides Mr. Bohn flexibility in when he returns his ballot, he is unable to cast his ballot without assistance. *Id.* at 179:21-180:13 (Bohn). He is physically unable to reach the mailbox at his house, and his parents must put his ballot in the mailbox for him. *Id.* at 179:23-180:4 (Bohn). On the one occasion Mr. Bohn did not mail in his absentee ballot, his parents dropped off his ballot at the courthouse for him in part because it is difficult for Mr. Bohn to find accessible parking near the courthouse. *Id.* at 180:6-14 (Bohn).

21. Mr. Bohn has not yet had to rely on third-party ballot assistance to return his ballot, but only because his parents are currently able and willing to help him do so. *Id.* at 180:17-181:15 (Bohn). But Mr. Bohn's parents are getting older and when his parents are no longer able to assist him in returning his ballot, he will likely need to rely on third party ballot assistance in order to vote. *Id.* (Bohn). Although Mr. Bohn typically—though not always—returns his absentee ballot shortly after receiving it, it is uncertain whether he will be able to do so in all future elections. *Id.* at 179:22-180:9, 193:20-25 (Bohn).

22. Mr. Bohn strongly believes that third-party ballot assistance should remain available to ensure that people with disabilities can vote. *Id.* at 181:5-15 (Bohn).

23. Mr. Bohn has never availed himself of EDR nor does he know anyone who used EDR to register to vote in Montana. Aug. 15, 2022, Trial Tr. 185:8-14 (Bohn).

24. Even though Mr. Bohn votes by absentee ballot, he has personally witnessed long lines in Yellowstone County on Election Day at the Metra. Aug. 15, 2022, Trial Tr. 187:4-13 (Bohn).

25. Mr. Bohn believes that he used his driver's license to vote and has had one since he was 18 years old. Aug. 15, 2022, Trial Tr. 187:17-19; 186:15-17 (Bohn). Mr. Bohn does not know any Montana adults over the age of 18 who do not have a Montana Driver's license. Aug. 15, 2022, Trial Tr. 187:20-24 (Bohn).

26. While Mr. Bohn was attending college at Montana State University, Billings (MSU Billings), he used his student ID to get into basketball games and to use the dorm meal plan. Aug. 15, 2022, Trial Tr. 188:24-189:2 (Bohn). Mr. Bohn never used his MSU Billings student ID to vote. Aug. 15, 2022, Trial Tr. 189:10-11 (Bohn).

C. Western Native Voice

27. Western Native Voice ("WNV") is a Native American-led organization that organizes and advocates in order to build Native American leadership within Montana. PTX262; Aug. 17, 2022, Trial Tr. 818:1-16 (Horse).

28. WNV is a domestic non-profit, non-partisan organization in good standing with the Montana Secretary

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of State with Yellowstone County as its primary place of business. PTX257; Aug. 17, 2022, Trial Tr. 818:1-16 (Horse).

29. WNV is a membership organization. WNV has approximately 10,000 members across the state of Montana. Aug. 17, 2022, Trial Tr. 819:14-20 (Horse). Its members are majority-Native American. *Id.* at 819:21-820:2 (Horse).

30. WNV is not a partisan organization. Its mission is not to promote one party or another, but rather to increase Native American participation and engagement in voting and self-determination. PTX262; Aug. 17, 2022, Trial Tr. 815:15-18 (Horse).

31. Civic engagement is a crucial part of WNV's activities, especially its GOTV programs. Aug. 17, 2022, Trial Tr. 813:9-12 (Horse); PTX271; PTX273. It conducts GOTV efforts on all seven reservations and in the Native American community in the three urban centers in Montana. PTX262; Aug. 17, 2022, Trial Tr. 835:14-18 (Horse). WNV's GOTV efforts include canvassing reservations and urban Indian centers and discussing the importance of voting and civic participation and how and why to engage in the civic process. PTX271; PTX273. Voter education and facilitation of voter registration are core to WNV's GOTV work and are vital to voter turnout in the Native American community. PTX262; Aug. 17, 2022, Trial Tr. 818:25-819:13, 834:3-11 (Horse).

32. WNV is able to engage in this work by hiring organizers living on reservations to work in each

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community. PTX261. Each organizer participates in several days of training before they begin their GOTV program. Aug. 17, 2022, Trial Tr. 823:7-12, 840:6-12 (Horse); PTX267; PTX269. This training enables the organizers to be effective once out in the field. The training discusses the history of the Native American vote and the importance of the Native vote. Aug. 17, 2022, Trial Tr. 823:7-12, 15-18 (Horse).

33. WNV engages in robust Election Day activities, including door knocking, ballot collection and providing rides to the county seat for EDR and voting. Aug. 17, 2022, Trial Tr. 856:8-18 (Horse); Perez Dep.[2] 99:3-15, 136:14-20, 137:13-25, 138:3-22.

34. WNV pays its organizers an hourly wage that is not contingent on how many ballots they collect or rides they provide. Aug. 17, 2022, Trial Tr. 855:1-8 (Horse).

35. In prior election cycles, WNV hired dozens of individuals to work as community organizers, including on Election Day. PTX261; Aug. 17, 2022, Trial Tr. 821:19-823:6 (Horse); Perez Dep. 136:14-20. WNV has driven hundreds of voters to county election offices in order for those individuals to register and vote on Election Day. Perez Dep. 166:24-167:3.

36. For example, in 2020, WNV organizer Lauri Kindness drove over 150 people from the Crow Reservation

2. Defendant's Deposition Designations with Associated Exhibits (Aug. 11, 2022), Ex. 13 (Deposition of Ta'jin Perez as 30(b)(6) designee for Western Native Voice) ("Perez Dep.").

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to register to vote at the Big Horn County elections office. Aug. 17, 2022, Trial Tr. 856:19-25 (Horse); *see also* PTX070 at 37:13-39:3.

37. Providing rides to the county seat is a key component of GOTV activities. Aug. 18, 2022, Trial Tr. 874:12-15 (Horse).

38. WNV estimates that it has transported hundreds of voters to the polls to vote. Aug. 17, 2022, Trial Tr. 857:3-8 (Horse).

39. Providing rides to the county seat on Election Day is particularly important on rural reservations where numerous obstacles make it difficult for Native Americans to vote. PTX262. Those obstacles include distances to the elections offices, experiences of discrimination in border towns, low-quality vehicles, inclement weather, and socioeconomic problems. *Id.*; Aug. 17, 2022, Trial Tr. 859:12-23 (Horse); *see also* Aug. 15, 2022, Trial Tr. 91:12-92:9, 120:10-121:9 (McCool). Moreover, Election Day itself is an important organizing day for WNV because it is when Native American communities "pay the most attention." Aug. 17, 2022, Trial Tr. 857:15-20 (Horse).

40. HB 176 is impacting WNV's operations. WNV is no longer able to only employ organizers on Election Day, as the opportunity for EDR has been eliminated. Instead, it must spend additional resources to hire organizers earlier in the election cycle in order to mobilize turnout. Aug. 17, 2022, Trial Tr. 860:19-25 (Horse).

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41. HB 176 eliminates an important tool for WNV to increase voter turnout among Native American voters. Aug. 17, 2022, Trial Tr. 857:9-17 (Horse). Election Day registration and voting provides "possibly a really high benefit and relatively low cost" to voting which is "potentially pretty important for turnout." Aug. 16, 2022, Trial Tr. 332:7-10 (Street). Research concerning Election Day registration "quite consistently shows positive effects of Election Day registration on turnout in the range of a few percentage points." Aug. 16, 2022, Trial Tr. 332:11-15 (Street).

42. WNV collects ballots on all seven reservations in Montana, as well as in urban Indian centers such as Missoula, Great Falls, and Billings. PTX262; Aug. 17, 2022, Trial Tr. 935:14-25 (Horse); Perez Dep. 37:15-38:11. WNV hires local organizers and pays them to collect voted ballots and deliver them to election offices. Aug. 17, 2022, Trial Tr. 821:2-5, 833:15-834:2 (Horse). In 2018, WNV and its then-sister organization, Montana Native Vote ("MNV") collected and conveyed at least 853 ballots. Perez Dep. 240:10-21. In the 2020 general election, after the Montana Ballot Interference Prevention Act ("BIPA") was permanently enjoined by two Yellowstone County district court judges, WNV and MNV paid organizers to collect and convey several hundred ballots. PTX276; Aug. 17, 2022, Trial Tr. 833:10-14, 844:3-5 (Horse); PTX273.

43. Since WNV relies on paid organizers to collect ballots, § 2 of HB 530 outlaws all ballot collection efforts by WNV. Perez Dep. 250:24-251:18. These efforts are core to its GOTV work and could not be replaced by other

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measures. Volunteer ballot collection cannot substitute for the work that WNV does. WNV specifically hires organizers from the communities in which they do their work—*i.e.*, from the on-reservation Native American population who face poverty at much higher rates—and would be unable to undertake its work if it was forced to rely only upon those who are able to forego wages. Aug. 17, 2022, Trial Tr. 853:10-23 (Horse); Perez Dep. 141:2-9, 189:9-11, 191:8-192:2, 211:10-21; Aug. 15, 2022, Trial Tr. 88:10-15, 93:3-7 (McCool). To the extent HB 530, § 2 does not ban all ballot collection efforts by WNV, its terms nonetheless are already chilling any such efforts by WNV due to the risk of substantial fines. Aug. 17, 2022, Trial Tr. 852:12-22, 854:6-14 (Horse); Perez Dep. 250:24-251:18; *see also* Aug. 16, 2022, Trial Tr. 437:11-18 (Street).

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44. WNV collected hundreds of ballots using paid ballot collectors in 2020, and paid ballot collectors collected more than 800 ballots in the 2018 election. Aug. 15, 2022, Trial Tr. 142:17-143:3 (McCool).

45. WNV's ballot collection practices have never been the subject of a complaint, investigation, or prosecution. Aug. 17, 2022, Trial Tr. 859:24-860:18 (Horse); Aug. 24, 2022, Trial Tr. 2093:17-25 (Rutherford).

46. WNV has incurred, and will continue to incur, distinct injuries directly traceable to HB 176 and HB 530, § 2. HB 176 forces WNV to spend additional resources to hire organizers earlier in the election cycle in order to mobilize turnout, and HB 530, § 2 effectively ends its ballot collection and assistance work, which is central to its GOTV work and cannot be replaced by other measures.

Aug. 17, 2022, Trial Tr. 860:19-25, 861:6-9 (Horse); Perez Dep. 250:24-251:18.

47. HB 530 and HB 176 have impacted WNV's mission by creating more barriers to voting for Native Americans, which WNV actively works to attempt to alleviate. Aug. 17, 2022, Trial Tr. 861:6-9 (Horse).

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48. WNV's members include Native Americans who are disproportionately affected by HB 176's ban of EDR and HB 530, § 2's limitation on ballot collection. Native Americans in Montana disproportionately rely on ballot collection and EDR because of the disproportionate and severe voter burdens they face. PTX262; Aug. 15, 2022, Trial Tr. 78:1-25 (McCool); PTX196-199; PTX299; PTX307; PTX314; PTX228.1; PTX228.2; PTX228.3; PTX228.4; PTX228.5; Aug. 16, 2022, Trial Tr. 345:23-346:8, 351:2-15, 355:6-23, 356:6-358:3 (Street).

D. Montana Native Vote

49. Montana Native Vote ("MNV") is a Native American led organization that organizes and advocates in order to build Native American leadership in Montana.

50. MNV is a 501(c)(4) organization. Aug. 17, 2022, Trial Tr. 841:10-12 (Horse); Perez Dep. 219:22-23. In prior years, MNV and WNV had a cost sharing agreement. Aug. 17, 2022, Trial Tr. 841:7-9 (Horse).

51. MNV has about a thousand members. Aug. 17, 2022, Trial Tr. 841:13-15 (Horse).

52. MNV has historically engaged in GOTV activities that are substantially similar to those conducted by WNV. Aug. 17, 2022, Trial Tr. 842:1-7 (Horse). In addition, MNV has historically collected ballots during primary elections. Aug. 18, 2022, Trial Tr. 896:8-13 (Horse); DTX534.

53. HB 176 and HB 530, § 2 will significantly restrict MNV's GOTV efforts and will effectively frustrate it from fulfilling its organizational mission.

E. Blackfeet Nation

54. Blackfeet Nation is a federally recognized tribe with approximately 17,500 enrolled members. Aug. 16, 2022, Trial Tr. 518:6-13 (Gray); Agreed Fact No. 21.

55. Blackfeet Nation has approximately 8,000 members living on the reservation. Aug. 16, 2022, Trial Tr. 519:3-8 (Gray). Over 6,000 members residing on the Blackfeet Reservation are 18 years of age or older. *Id.* at 519:9-10 (Gray).

56. Blackfeet Nation's headquarters are in Browning, Montana. *Id.* at 519:11-12 (Gray).

57. The Blackfeet reservation is located in northwestern Montana and covers approximately 1.5 million acres. *Id.* at 518:21-519:2 (Gray); *see also* Agreed Fact No. 22. The reservation is intersected by Glacier and Pondera counties. Aug. 16, 2022, Trial Tr. 519:13-16 (Gray). The county seat for Glacier is in Cut Bank and the county seat for Pondera is in Conrad. Aug. 16, 2022, Trial Tr. 519:17-19 (Gray).

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58. Blackfeet Nation cares for the health and welfare of its tribal citizens and has an interest in protecting the economic and physical health and well-being of those tribal citizens. *Id.* at 552:8-16 (Gray).

59. Blackfeet Nation encourages civic participation of its tribal members, including voting in state and federal elections. For Blackfeet Nation, voting is critical to protect tribal sovereignty and ensure representation on issues affecting the tribe. *Id.* at 552:1-9 (Gray).

60. Blackfeet tribal members are less likely to go to county seats to conduct their election related business because they experience racism in border towns where the county seats are located. *Id.* at 548:6-549:10 (Gray).

61. Blackfeet Nation has a strained relationship with the county election officers that provide election services to their members. The relationship with Pondera County is "nonexistent." *Id.* at 546:11-13 (Gray). The county administrator in Glacier refused to take calls from Blackfeet leadership. Aug. 17, 2022, Trial Tr. 617:10-15 (Gray). Election administrators in both counties are described as "[h]ostile. Pushback. No communication." Aug. 16, 2022, Trial Tr. 545:22-546:1 (Gray). In 2020, Blackfeet Nation had disagreements with both Pondera and Glacier County administrators about the election services provided. Blackfeet Nation sued Pondera County for satellite services, and Blackfeet Nation had to threaten legal action for Glacier County to provide services. *Id.* at 546:2-547:1 (Gray).

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62. WNV and MNV pick up and drop off ballots on the Blackfeet Reservation. PTX262; Aug. 16, 2022, Trial Tr. 537:19-25 (Gray); Aug. 17, 2022, Trial Tr. 842:1-7 (Horse). WNV's ability to pick up and drop off ballots for Blackfeet tribal members would be severely compromised by HB 530, § 2, to the detriment of Blackfeet tribal members. Aug. 16, 2022, Trial Tr. 537:21-539:1 (Gray).

63. WNV ballot collectors provide a "comforting atmosphere" and mitigate the need to go to a county election office and encounter potential border town racism because the voter only needs to interact with a people who are "invested in making sure people have access to a vote." Aug. 16, 2022, Trial Tr. 550:25-551:13 (Gray).

64. Blackfeet members rely on EDR. *Id*. at 543:7-23, 545:6-8 (Gray). HB 176 takes away the ability for Blackfeet tribal members to register and vote on Election Day. *Id.* at 545:9-21 (Gray).

65. HB 176 and HB 530, § 2 make it more difficult for Blackfeet tribal members to register and vote, and Blackfeet tribal members' attempts to vote are less likely to be successful. *Id*. at 538:9-20, 539:10-19 (Gray). By taking away same day registration and ballot collection, "you basically shut the door on their opportunity to vote." *Id.* at 551:21-25 (Gray).

66. HB 176 and HB 530, § 2 disproportionately burden Blackfeet voters compared to non-Native voters due to inequities in mail delivery service, access to post offices and post office boxes, distance to county

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seats, and increased burdens on Blackfeet voters due to disproportionate rates of poverty and lack of vehicle access, internet access, and stable housing. Aug. 15, 2022, Trial Tr. 91:12-92:9, 93:17-94:1, 107:12-108:22, 120:10-121:9, 122:8-123:4, 124:18-125:6 (McCool); PTX228.1; PTX228.2; PTX228.3; PTX228.4; PTX228.5; Aug. 16, 2022, Trial Tr. 520:20-522:3, 522:13-525:14, 528:4-13, 529:18-530:3, 530:23-531:3 (Gray); Aug. 15, 2022, Trial Tr. 230:21-231:22 (Weichelt) (post office open average of 7 hours on weekdays); *id.* at 233:2-13 (Weichelt) (longest distance to post office, 15.7 miles); *id.* at 241:9-242:1 (Weichelt) (longest distance to county seat, 69.6 miles); *id.* at 248:8-20 (Weichelt) (average distance to Department of Motor Vehicles ("DMV"), 38.27 miles).

67. Blackfeet Nation is confused as to the precise meaning of "pecuniary benefit" found in HB 530, § 2. Aug. 16, 2022, Trial Tr. 539:22-25 (Gray).

68. Blackfeet Nation does not know if tribes will be interpreted to fall under the "governmental entity" exception found in HB 530, § 2, especially because "there's always been something in the legislation that refers specially to tribes." *Id.* at 540:1-18 (Gray).

69. Blackfeet Nation is unsure whether the governmental entity exception would permit them to pay third parties to collect ballots on their behalf. *Id.* at 540:20-541:1 (Gray).

70. Blackfeet Nation is not confident the rulemaking process required under HB 530, § 2 will result in their

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ability to collect ballots because there has been a lack of consultation. *Id*. at 541:14-18 (Gray).

F. Confederated Salish and Kootenai Tribes

71. The Confederated Salish and Kootenai Tribes of the Flathead Reservation ("CSKT") is a sovereign, federally recognized tribe. (Agreed Fact No. 23). The Flathead Reservation is located in western Montana. (Agreed Fact No. 24). CSKT has approximately 8,000 enrolled members with approximately 5,500 members living on the Flathead Reservation. CSKT 30(b)(6) Dep.[3] 78:15-18, 79:2-3. There are also numerous other Native Americans that are members of other tribes living on the reservation. CSKT 30(b)(6) Dep. 92:22-24; McDonald Dep.[4] 19:7-13.

72. CSKT cares for the health and welfare of its tribal citizens and has an interest in protecting the economic and physical health and well-being of those tribal citizens. McDonald Dep. 53:21-55:21.

73. CSKT encourages civic participation of its tribal members, including voting in state and federal elections. CSKT 30(b)(6) Dep. 121:9-13; McDonald Dep. 18:19-21:24.

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3. Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. I-1 (Deposition of Robert McDonald as 30(b)(6) designee for the Confederated Salish and Kootenai Tribes) ("CSKT 30(b)(6) Dep.").

4. Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. H-1 (Deposition of Robert McDonald) ("McDonald Dep.").

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74. WNV and MNV pick up and drop off ballots on the Flathead reservation, including for CSKT tribal members. PTX262; Aug. 17, 2022, Trial Tr. 835:14-18, 842:1-7 (Horse). WNV and MNV's ability to pick up and drop off ballots for CSKT tribal members would be severely compromised by HB 530, § 2, to the detriment of CSKT tribal members. CSKT 30(b)(6) Dep. 30:22-31:8, 32:15-23, 75:4-7.

75. CSKT encourages its tribal members to vote and yearly conducts GOTV efforts with expenditures of approximately $5,000 per year. These efforts include ballot collection, including ballot collection that took place at taco feeds. CSKT 30(b)(6) Dep. 121:22-122:4, 131:22-132:3.

76. CSKT members rely on EDR. HB 176 takes away the ability for CSKT tribal members to register and vote on Election Day. CSKT 30(b)(6) Dep. 173:3-5, 192:13-193:11.

77. CSKT's GOTV efforts also include driving CSKT members to the county seat to register and vote on Election Day. CSKT 30(b)(6) Dep. 129:4-9, 134:7-24; *see also* McDonald Dep. 27:13-28:16. HB 176 prevents CSKT from engaging in this GOTV service for those who need to register or update their registration.

78. HB 176 and HB 530, § 2 make it more difficult for CSKT tribal members to register and vote, and CSKT tribal members' attempts to vote are less likely to be successful.

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79. HB 176 and HB 530, § 2 disproportionately burden CSKT voters compared to non-Native voters due to increased burdens on CSKT voters due to disproportionate rates of poverty and lack of vehicle access and stable housing. McDonald Dep. 53:21-55:21, 62:15-63:25, 65:13-22.

80. CSKT believes CSKT is a governmental entity but does not know if tribes will be interpreted to fall under the "governmental entity" exception found in HB 530, § 2. CSKT 30(b)(6) Dep. 18:22-24, 105:23-106:9.

81. CSKT is unsure whether they will be permitted to continue their ballot collection activities, especially related to ballot collection that occurred in conjunction with third parties. CSKT 30(b)(6) Dep. 108:19-109:8.

G. Fort Belknap Indian Community

82. The Fort Belknap Indian Community is a sovereign, federally recognized tribe. (Agreed Fact No. 25). The Fort Belknap Indian Community ("FBIC") is a federally recognized tribe with approximately 4,481 enrolled members living on the reservation with approximately 2,000 residents over 18. FBIC 30(b)(6) Dep.[5] 29:20-30:5.

83. FBIC cares for the health and welfare of its tribal

5. Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. E-1 (Deposition of Delina Cuts the Rope as the 30(b)(6) designee for the Fort Belknap Indian Community) ("FBIC 30(b)(6) Dep.").

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citizens and has an interest in protecting the economic and physical health and well-being of those tribal citizens. FBIC 30(b)(6) Dep. 10:10-11:9.

84. FBIC encourages civic participation of its tribal members, including voting in state and federal elections. FBIC 30(b)(6) Dep. 215:11-20.

85. WNV and MNV pick up and drop off ballots on the Fort Belknap reservation. PTX262; Aug. 17, 2022, Trial Tr. 835:14-18, 842:1-7 (Horse). WNV and MNV's ability to pick up and drop off ballots for Fort Belknap tribal members would be severely compromised by HB 530, § 2, to the detriment of Fort Belknap tribal members. FBIC 30(b)(6) Dep. 152:12-23.

86. Fort Belknap tribal members rely on EDR. HB 176 takes away the ability for Fort Belknap tribal members to register and vote on Election Day. FBIC 30(b)(6) Dep. 215:11-216:12.

87. HB 176 and HB 530, § 2 make it more difficult for Fort Belknap tribal members to register and vote, and Fort Belknap tribal members' attempts to vote are less likely to be successful. FBIC 30(b)(6) Dep. 215:11-216:4, 227:10-25, 228:11-17.

88. HB 176 and HB 530, § 2 disproportionately burden Fort Belknap voters compared to non-Native voters due to inequities in mail delivery service, access to post offices and post office boxes, distance to county seats, and increased burdens on Fort Belknap voters due to

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disproportionate rates of poverty and lack of vehicle access and stable housing. FBIC 30(b)(6) Dep. 181:3-14, 187:14-191:19, 232:15-233:12; Aug. 15, 2022, Trial Tr. 230:21-231:21 (Weichelt) (post office open average of 7 hours on weekdays); *id.* at 233:2-13 (Weichelt) (longest distance to post office, 12.4 miles); *id.* at 241:9-23 (Weichelt) (average distance to county seat, 42.68 miles; longest distance to county seat, 64.1 miles); *id.* at 248:8-17 (Weichelt) (average distance to DMV, 45.4 miles; longest distance to DMV, 60.1 miles).

89. FBIC is confused as to the precise meaning of "pecuniary benefit" found in HB 530, § 2. FBIC 30(b)(6) Dep. 198:5-21.

90. FBIC believes FBIC is a governmental entity but does not know if tribes will be interpreted to fall under the "governmental entity" exception found in HB 530, § 2. FBIC 30(b)(6) Dep. 5:22-25, 10:13-20, 197:17-24, 219:3-11, 232:23-25.

91. FBIC is unsure whether the governmental entity exception found in HB 530, § 2(b) would permit them to pay third parties to collect ballots on their behalf. FBIC 30(b)(6) Dep.198:5-21.

H. Northern Cheyenne Tribe

92. The Northern Cheyenne Tribe is a federally recognized tribe with approximately 12,000 enrolled members with approximately 6,000 members living on the Northern Cheyenne Reservation. Aug. 17, 2022, Trial Tr. 709:23-24, 710:10-13 (Spotted Elk).

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93. The reservation is located in southeastern Montana and covers approximately 440,000 acres. *Id.* at 709:25-710:9 (Spotted Elk). The reservation is intersected by Rosebud and Big Horn counties. *Id.* at 710:21-23 (Spotted Elk).

94. The Northern Cheyenne Tribe cares for the health and welfare of its tribal citizens and has an interest in protecting the economic and physical health and well-being of those tribal citizens. *Id.* at 731:13-732:9 (Spotted Elk).

95. The Northern Cheyenne Tribe encourages civic participation of its tribal members including voting in state and federal elections. *Id.* at 721:17-20, 731:13-18, 732:1-3 (Spotted Elk).

96. Northern Cheyenne members are less likely to go to county seats to conduct their election related business because they experience racism in border towns where the county seats are located. *Id.* at 729:13-730:14 (Spotted Elk).

97. Satellite voting locations on Northern Cheyenne are open for a very limited number of days. *Id.* at 723:5-7 (Spotted Elk).

98. WNV and MNV pick up and drop off ballots on the Northern Cheyenne reservation. PTX262; Aug. 17, 2022, Trial Tr. 721:22-722:2, 722:16-17 (Spotted Elk); *id.* at 835:14-18, 842:1-7 (Horse). WNV's ability to pick up and drop off ballots for Northern Cheyenne tribal members

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would be severely compromised by HB 530, § 2, to the detriment of Northern Cheyenne tribal members. *Id*. at 724:22-725:1, 731:11-23 (Spotted Elk).

99. WNV hires Northern Cheyenne community members to conduct ballot collection. Because WNV ballot collectors are tribal members, this helps mitigate the need to go to a county election office and encounter potential border town racism because the voter only needs to interact with a "familiar face." *Id.* at 730:15-731:10 (Spotted Elk).

100. Northern Cheyenne members rely on Election Day voter registration. There are many impediments to registration on Northern Cheyenne such as "distance . . . to the county seats [that] make it challenging." *Id.* at 727:20-25 (Spotted Elk). Additionally, Northern Cheyenne people "want to vote on Election Day." *Id.* at 723:23-724:1 (Spotted Elk). HB 176 takes away the ability for Northern Cheyenne tribal members to register and vote on Election Day. *Id.* at 727:15-25, 728:9-13, 731:11-23 (Spotted Elk).

101. HB 176 and HB 530, § 2 make it more difficult for Northern Cheyenne tribal members to register and vote, and Northern Cheyenne tribal members' attempts to vote are less likely to be successful. *Id.* at 731:19-23 (Spotted Elk).

102. HB 176 and HB 530, § 2 disproportionately burden Northern Cheyenne voters compared to non-Native voters due to inequities in mail delivery service, access to post offices and post office boxes, distance

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to county seats, and increased burdens on Northern Cheyenne voters due to disproportionate rates of poverty and lack of vehicle access, internet access and stable housing. *Id.* at 712:14-15, 713:2-17, 713:21-719:8, 719:12-14, 719:16-20, 719:25-720:24 (Spotted Elk); Aug. 15, 2022, Trial Tr. 230:21-231:17 (Weichelt) (post office open average of 6.5 hours on weekdays); *id.* at 233:2-11 (Weichelt) (longest distance to post office, 9.1 miles); *id.* at 241:9-19 (Weichelt) (average distance to county seat, 53.33 miles; longest distance to county seat, 63.4 miles); *id.* at 248:8-17 (Weichelt) (average distance to DMV, 27.28 miles; longest distance to DMV, 39.4 miles).

103. Northern Cheyenne believes Northern Cheyenne is a governmental entity but does not know if tribes will be interpreted to fall under the "governmental entity" exception found in HB 530, § 2(b), especially because typically when tribes are included in State legislation they are referred to as "Tribal governments" or "Tribal nations." *Id.* at 725:14-726:7 (Spotted Elk).

104. Northern Cheyenne is unfamiliar with the rulemaking process required under HB 530, § 2(1), and is unsure whether it will resolve whether or not Northern Cheyenne will be considered a governmental entity. *Id.* at 726:17-21 (Spotted Elk).

I. Montana Youth Action

105. Montana Youth Action ("MYA") is a nonpartisan, under-18, student-run 501(c)(3) organization in Montana. Aug. 18, 2022, Trial Tr. 1109:12-16, 1110:3-9 (Nehring).

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Isaac Nehring founded MYA in 2019. Id. at 1109:20-24 (Nehring).

106. MYA's mission is to promote civic engagement opportunities and to educate young people about getting involved in political systems, with a particular focus on voter registration. *Id.* at 1110:10-1111:5 (Nehring).

107. MYA is a membership organization currently run by a 17-member board of high school students. *Id.* at 1109:25-1110:2 (Nehring); *see id.* at 1112:1 ("[W]e're all high schoolers. And it takes time out of our day, our weeks, our months to learn all these different processes ourselves.").

108. Most MYA members are middle and high school students. *Id.* at 1109:25-1110:9 (Nehring). The organization prioritizes participation in civic life and works to prepare members and other young people to become active voters. *Id.* at 1110:10-1111:5 (Nehring).

109. As a result, voter registration is a central mission and core program of MYA. *Id.* at 1110:18-1111:5 (Nehring). MYA registers new voters in advance of elections and plans to continue doing so. *Id.* at 1131:17-1132: 1 (Nehring). MYA trains its board and members on how to conduct voter registration and educate young people about election processes. *Id.* at 1111:22-1112:19, 1132:10-12 (Nehring).

110. HB 176 and SB 169 harm MYA because both laws require navigating new information and make

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voting and registering to vote more complicated than it was before—and especially "harder for young people to understand." *Id.* at 1112:4-8 (Nehring). Fundamentally, the challenged laws "make[] it more difficult for [MYA] to fulfill [its] mission." *Id.* at 1112:9-10 (Nehring).

111. In particular, HB 176 makes it more difficult for MYA because it eliminates an important "fallback" voting option that has long been available. *Id.* at 1112:11-19 (Nehring). Without EDR, MYA has a more difficult time "help[ing] young people formulate a plan" to register and vote. *Id.* at 1112:18-19 (Nehring). This is compounded for MYA by the fact that "there's certainly a lack of knowledge [about voting and registering to vote] among a lot of young people that isn't necessarily covered in school." *Id.* at 1116:8-10 (Nehring). And, without EDR, when some first-time voters—including MYA members—inevitably make mistakes in the registration process, they will be prevented from voting. *Id.* at 1121:22-1122:22 (Nehring). Thus, eliminating EDR directly harms MYA members. *Id.* at 1115:1-6, 1115:19-1116:10 (Nehring).

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112. Because young and first-time voters need and rely on EDR, *id.* at 1112:11-19 (Nehring), MYA has an express interest in preserving its availability. And because of the natural difficulties of beginning a new activity, MYA has a similar interest in maintaining voting requirements in the simplest possible form. *Id.* at 1115:1-6, 1115:19-1116:10 (Nehring).

113. SB 169 harms MYA and its members by compromising this latter interest and by complicating

voter ID requirements. *Id.* at 1112:4-10 (Nehring). MYA members do not always have access to driver's licenses or other forms of standalone ID that SB 169 permits. *Id.* at 1136:25-1137:12 (Nehring).

114. At least one MYA board member intends to rely on Montana University System-issued student ID to vote. *Id.* at 1136:15-17, 1141:2-5 (Nehring). Moreover, MYA has a broader interest in maintaining the availability of student ID as a standalone form of voter ID because it is less burdensome than the combination forms of ID that SB 169 requires of individuals using a student ID. *Id.* at 1111:22-1112:19 (Nehring).

115. As MYA members transition to adulthood, they become first-time voters, and must necessarily navigate the process of registering to vote and voting for the first time. *Id.* at 1120:23-1121:12 (Nehring). MYA is dedicated to educating young people to make that process as straightforward as it can be; the challenged laws undermine their work. *Id.* at 1120:25-1121:12 (Nehring).

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J. Forward Montana Foundation

116. Forward Montana Foundation ("FMF") is a nonpartisan, not-for-profit organization headquartered in Missoula. The organization received 501(c)(3) charitable status in 2011. Aug. 17, 2022, Trial Tr. 665:24-666:1, 666:12-14, 667:23-25 (Iwai).

117. FMF is dedicated to educating, engaging, and organizing young Montanans to become engaged in democracy. *Id.* at 666:15-21 (Iwai).

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118. FMF was established by a group of students at the University of Montana who found there were many barriers to getting young people involved in civic life in Montana. *Id.* at 667:16-22 (Iwai). FMF has since grown into a youth civic engagement organization in Montana, with year-round staff in Kalispell, Billings, Bozeman, and Missoula. *Id.* at 668:4-13 (Iwai).

119. At the heart of FMF's work is empowering young Montanans to exercise their civic rights through voting. As a result, FMF dedicates itself in significant part to voter registration and GOTV efforts. *Id.* at 669:19-670:18 (Iwai).

120. Since 2011, FMF has registered over 45,000 voters. The organization has mobilized hundreds of thousands of voters through direct phone calls, text messages, social media posts and ads, and other forms of engagement. *Id.* at 671:21-672:12 (Iwai).

121. FMF faces harm under SB 169 and HB 176 because these laws will require FMF to expend significant resources in developing and distributing new voter education materials, engaging in campaigns to educate young voters, and conducting expanded GOTV efforts. *Id.* at 681:3-20, 682:9-683:1 (Iwai); FMF 30(b)(6) Dep.[6] 80:13-24, 129:23-130:3.

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6. Defendant's Deposition Designations with Associated Exhibits (Aug. 11, 2022), Ex. 3 (Deposition of Kiersten Iwai as 30(b)(6) designee for Forward Montana Foundation) ("FMF 30(b)(6) Dep.").

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K. Montana Public Interest Research Group

122. The Montana Public Interest Research Group ("MontPIRG") is a nonpartisan, student directed and funded organization. MontPIRG 30(b)(6) Dep.[7] 18:9-15.

123. MontPIRG is a membership organization with approximately 5,000 members. MontPIRG members are students attending the University of Montana. *Id.* at 28:3-12.

124. MontPIRG is dedicated to effecting change through educating and empowering the next generation of civic leaders. *Id.* at 22:25-23:4.

125. Protecting and expanding voting rights is one of MontPIRG's priority issues. Id. at 53:6-12. MontPIRG works to increase the share of youth voter turnout in each election by registering voters and conducting GOTV efforts. *Id.* at 68:17-69:5, 123:6-124:8.

126. In 2016, MontPIRG knocked on over 23,000 doors, registered over 3,500 voters, distributed 3,000 voter guides, and made over 10,000 calls to voters for its Youth 12K campaign. *Id.* at 129:24-130:4.

127. MontPIRG is harmed by SB 169 and HB 176 because these laws require MontPIRG to expend

7. Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. G-1 (Deposition of Hunter Losing as 30(b)(6) designee for MontPIRG) ("MontPIRG 30(b)(6) Dep.").

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significant resources in developing new voter education materials, engaging in campaigns to reeducate young voters with whom they've engaged previously, conducting expanded GOTV efforts, and training volunteers and interns. *Id.* at 85:25-86:3, 86:25-87:10, 94:3-24, 135:22-137:8, 150:13-151:4, 198:12-24.

128. MontPIRG members are also harmed by SB 169's limitations on voter identification and HB 176's limitations on registration. Some young voters lack the forms of standalone identification required by SB 169 and will have a more difficult time using their student IDs to vote. *Id.* at 95:15-24, 151:5-10. And some student voters, like MontPIRG's members, face particular time constraints that make Election Day the only day available to them to register to vote. *Id.* at 95:25-96:4.

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L. Christi Jacobsen

129. Defendant Christi Jacobsen is the Secretary of State of the State of Montana. (Agreed Fact No. 18).

130. The Secretary of State is the chief election officer of the State. § 13-1-201, MCA. The Secretary of State tries to make election practices uniform throughout Montana. Aug. 23, 2022, Trial Tr. 1552:24-1553:3 (Custer).

131. The Secretary's office was intimately involved in the legislative process for SB169 and HB176. The Legislature passed both SB 169 and HB 176 at the Secretary's request. Aug. 25, 2022, Trial Tr. 2234:22-2235:6, 2258:12-14 (James). Mr. James personally wrote

the first draft of SB 169, and he was the primary drafter of HB 176. *Id.* at 2235:12-2236:7, 2258:15-17 (James). The Secretary and her staff met with legislators and lobbied on behalf of both bills. *Id.* at 2236:8-18, 2258:18-25 (James). Dana Corson, the Director of the Elections Division at the Secretary of State, even wrote talking points for the primary sponsor of HB 176, identifying for her the purported justification for the bill and the purported "common voter problems" that would be resolved by the bill—but were counterfactual and incoherent. *Id.* at 2236:19-2242:4 (James); PTX066.

132. The Secretary of State's Office was a proponent of HB 176 and testified in favor of it at the legislative hearings. Aug. 25, 2022, Trial Tr. 2242:5-2243:7; PTX070 at 4:18-6:22; PTX091 at 4:2-6:5. The Secretary herself appeared in person to express her support for the bill. PTX070 at 4:18-5:4; Aug. 23, 2022, Trial Tr. 1558:12-13, 1561:25-1562:7 (Custer). Statewide elected officials rarely if ever personally appear as bill proponents before the Legislature. Aug. 23, 2022, Trial Tr. 1562:9-15 (Custer).

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133. The Secretary's Office repeatedly solicited people to testify in favor of HB 176 at legislative hearings. Aug. 25, 2022, Trial Tr. 2236:16-18 (James). The only election administrator who testified in support of HB 176 at the January 21, 2021, hearing did so only because the Secretary's Office personally solicited him the night before the hearing. *Id.* at 2242:17-2248:12, 2251:11-15 (James); PTX068; PTX069; PTX070.

134. The Secretary has not undertaken any surveys of public support for EDR. *Id.* at 2233:20-23 (James).

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135. The Secretary of State's Office was a proponent of SB 169 and testified in favor of it at legislative hearings. Agreed Fact No. 11; PTX082 at 4:24-5:15; PTX094 at 5:8-6:1. As she had for HB 176, the Secretary again testified in person as a bill proponent, showing an unusual level of investment in its passage. PTX082 at 4:24-5:15; Aug. 23, 2022, Trial Tr. 1558:6-14, 1562:4-15 (Custer).

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136. The Secretary of State's Office did not request the amendment to HB 530 that added Section 2 and did not support a renewed ban on ballot collection. Aug. 25, 2022, Trial Tr. 2216:23-2217:3 (James).

137. Mr. James admitted that the Secretary has no evidence:

a. Of voter fraud or intimidation related to the practices addressed by HB 176, SB 169, or HB 530, § 2. *Id.* at 2210:4-8, 2262:18-20 (James).

b. That eliminating EDR will deter potential voter fraud. *Id.* at 2254:4-7 (James).

c. That EDR decreased public confidence in the security and legitimacy of Montana's elections. *Id.* at 2254:8-11 (James).

d. Of any unlawful conduct in Montana related to the use of school district or postsecondary education photo ID for the purpose of voting. *Id.* at 2262:25-2263:7 (James).

e. That using student IDs to vote has negatively affected public confidence in Montana's elections. *Id.* at 2263:15-18 (James).

f. That using student IDs or out-of-state drivers' licenses to vote in Montana resulted in less efficient or orderly elections. *Id.* at 2263:19-22 (James).

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II. Witnesses

A. Daniel McCool, Ph.D.

138. Daniel McCool, Ph.D., was a tenured professor of political science at the University of Utah for decades, and currently is a professor emeritus of political science at the University. Aug. 15, 2022, Trial Tr. 47:24-48:5 (McCool). He provided expert testimony on behalf of Plaintiffs. In his career, Dr. McCool's primary area of academic research has been "the political relationship between Native Americans and the larger Anglo community," and he has researched in the area of Native American voting rights for forty years. *Id*. at 48:12-22 (McCool). He has published about 20 articles in peer-reviewed journals and 7 to 8 books that have gone through the University Press process, including articles, books, and book chapters about Native American voting rights. *Id*. at 49:13-53:13 (McCool). Dr. McCool has served as an expert witness in over 20 voting rights cases. *Id*. at 53:18-23 (McCool). His testimony was credited in two Montana cases concerning Native American voting rights—*United States v. Blaine County* and *Western Native Voice v. Stapleton* ("*WNV I*").

Id. at 53:24-55:2 (McCool). In the latter case, Dr. McCool "used the frame of the cost of voting to analyze the impact of BIPA on Native American voters." *Id.* at 48:16-24, 54:19-21 (McCool). The qualitative methodology Dr. McCool used in evaluating BIPA in *WNV I*, and HB 176 and HB 530 in this case, is "the same" methodology he uses in his published peer-reviewed work. *Id.* at 61:16-19 (McCool).

139. In coming to his conclusions in this case, Dr. McCool relied upon 336 sources. *Id.* at 138:9-10 (McCool). These sources include census and ACS data; other federal, state, and county data, including data from the Montana Secretary of State's Office; interviews; secondary sources such as books and articles; legislative history. *Id.* at 62:6-66:16 (McCool).

140. Dr. McCool arrived at three central conclusions related to the costs and benefits of HB 176 and HB 530, § 2. First, Dr. McCool determined that Native Americans in Montana face disproportionate voter costs as compared to their non-Native counterparts because of a slew of preexisting socioeconomic disparities. *Id.* at 78:3-17 (McCool). Dr. McCool found that, in Montana, Native Americans face dramatic disparities in the following areas: income levels; poverty levels; child poverty levels; food stamp usage; vehicle availability; homelessness; home ownership; rates of housing discrimination; rates of substandard housing; a wide array of health outcomes; high school and college graduation rates; internet access; computer ownership; incarceration rates; experiencing discrimination, including voter discrimination; and experiencing violence. *Id.* at 81:11-113:22, 150:13-151:2

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(McCool). The dramatic disparities in income and poverty also mean that Native Americans have less money for gas, car insurance, car maintenance, and getting a license plate—all of which increase travel costs. *Id.* at 120:25-121:9 (McCool). Dr. McCool explained that these socioeconomic disparities are the result of centuries of violence, racism, and discrimination against Native Americans in Montana, including the theft of land and resources. *Id.* at 113:23-114:17 (McCool).

141. Second, Dr. McCool determined that HB 176 and HB 530 would have a disproportionate negative impact on Native American voters in Montana. *Id.* at 78:18-25, 121:10-21, 125:7-21 (McCool). Dr. McCool explained that the political science literature is "very consistent" that EDR increases turnout. *Id.* at 115:8-116:4 (McCool). He further determined that—because Native Americans face socioeconomic disparities and disproportionate travel costs, which includes the fact that many Native Americans in Montana live extremely far away from their county seat, *id.* at 120:4-24 (McCool)—repealing EDR will disproportionately harm Native Americans, *id.* at 131:11-21 (McCool). Dr. McCool detailed the significant problems with mail service on Native American reservations in Montana, all of which make it harder to vote by mail or register to vote by mail. *Id.* at 122:8-123:12, 124:3-24 (McCool). He concluded that these mail service issues, combined with the other disproportionate socioeconomic and travel costs, makes HB 530 particularly burdensome on Native American voters. *Id.* at 125:7-21 (McCool).

142. Third, Dr. McCool determined that HB 176 and HB 530 have "no discernable [public] benefit" in

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terms of election integrity and voter fraud. *Id*. at 127:13-16 (McCool). Dr. McCool found that voter fraud rates in Montana and the United States are exceptionally low, *Id*. at 127:20-137:23 (McCool), and that there is no connection between voter fraud and either EDR or third-party ballot collection, *Id*. at 137:18-23 (McCool). Indeed, voter fraud—while extremely rare everywhere—is actually more common in states that *ban* ballot collection than those that *allow* it. *Id*. at 133:2-137:14 (McCool).

143. Dr. McCool's conclusions are well supported by sources, analyzed through the methods of his field, and the Secretary fails to contest the vast majority, if not all, of the data and facts on which he relies. His analyses and ultimate conclusions are entitled to substantial weight.

B. Ryan Weichelt, Ph.D.

144. Ryan Weichelt, Ph.D., is a tenured professor of geography at the University of Wisconsin-Eau Claire, Aug. 15, 2022, Trial Tr. 195:11-18 (Weichelt), and he provided expert testimony on behalf of Plaintiffs. He has published peer-reviewed academic articles, chapters, and two books, a 2016 and 2020 Atlas of Elections. *Id.* at 199:14-200:3 (Weichelt). Both books are commonly used in university courses, and his 2016 Atlas of Elections was rated as the best reference book by the Library Journal. *Id.* at 200:4-14 (Weichelt). Dr. Weichelt provided expert testimony in *WNV I* regarding distances people in Montana have to travel to post offices, and there the court relied upon his analysis twice. *Id.* at 202:20-203:8 (Weichelt).

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Appendix B

145. Dr. Weichelt regularly uses maps and GIS to investigate spatial implications and do spatial comparisons; he used those same methods in this case to analyze voter access, specifically distance as a voter cost, *id.* at 204:24-208:23 (Weichelt), and how that is impacted by HB 176 and HB 530, § 2. *Id.* at 204:20-23 (Weichelt). His analysis was particularly important in this case because the voter costs of distance and time have consistently been identified, used, and "vetted through numerous studies in political science and political geography." *Id.* at 256:2-13 (Weichelt). In conducting his analyses, Dr. Weichelt used numerous data sources that he typically uses in his peer reviewed work, including the addresses of post offices from postallocations.com; locations of DMVs and county seats from the State of Montana; Google Maps to understand driving times and driving distances; and demographic data from the 2020 United States Census Bureau Redistricting PL-94 datafile and 2019 and 2010 ACS data. *Id.* at 211:21-213:25 (Weichelt).

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146. After investigating spatial implications regarding voting access under HB 530 and HB 176 and doing spatial comparisons between voters who live on-reservation and voters who live off-reservation, Dr. Weichelt concluded that Native American and non-Native American voters encounter differential obstacles to electoral participation. Aug. 15-16, 2022, Trial Tr. 194:9-309:2 (Weichelt). He specifically analyzed the distances to post offices, the hours of operation of post offices, and the density of populations post offices serve; the distances to county seats; and the distances to DMVs. *Id.* Dr. Weichelt concluded that the average distance to these three places

is farther for voters on-reservation and "that incurs a larger voter cost on them." Aug. 15, 2022, Trial Tr. 249:9-19 (Weichelt). This is true even taking into account the off-reservation locations that Dr. Weichelt did not include in some of his averages, since he also provided the average distance including those locations. Aug. 16, 2022, Trial Tr. 284:2-12 (Weichelt). Even with those inclusions, the distances for on-reservation voters were still farther away. *Compare id.* with Aug. 15, 2022, Trial Tr. 228:2-10 (Weichelt).

147. Dr. Weichelt's analysis and ultimate conclusions are entitled to substantial weight, and, indeed, his testimony was credited by this Court during the trial. Aug. 16, 2022, Trial Tr. 528:22-25.

C. Alex Street, Ph.D.

148. Alex Street, Ph.D., is a tenured professor of political science and international relations at Carroll College in Helena, Montana, *id*. at 311:25-312:21 (Street), and he provided expert testimony on behalf of Plaintiffs. He has published peer-reviewed academic articles in the field of political science, often in the area of political behavior, including a peer-reviewed article related to EDR. PTX231; Aug. 16, 2022, Trial Tr. 314:5-16, 315:13-316:14 (Street). Beyond his work in this case and in *WNV I*, Dr. Street has examined other elections in Montana and has even worked as an election judge in Helena. Aug. 16, 2022, Trial Tr. 313:15-314:4, 318:2-10, 406:15-18 (Street). He regularly uses methods of statistical analysis in his published research and used those same methods here

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to assess the likely impacts of HB 176 and HB 530, § 2, on Native Americans living on reservations in Montana. *Id.* at 316:3-5, 317:10-318:1, 323:4-15, 325:25-326:7, 338:6-8 (Street). He also assessed HB 176 and HB 530, § 2, through three commonly used and complementary frameworks in political science of voting as rational, habitual, and social. *Id.* at 327:2-332:15, 332:24-338:5 (Street).

149. In conducting his statistical analyses, Dr. Street used numerous data sources, many of which came directly from the Secretary of State's Office. *Id.* at 338:9-342:21, 343:9-345:15 (Street). He made use of shapefiles of the seven reservations in Montana, obtained from the Montana State Library, as well as files from the 2020 Census in order to identify impacts by race. *Id.* Using these data sources, Dr. Street conducted statistical analysis of the primary and general elections in 2014, 2016, 2018, and 2020, and concluded that individuals living on reservation in Montana were particularly reliant on EDR, to a statistically significant degree, and that the more Native parts of reservations were those most reliant on EDR. *Id.* at 345:23-355:23 (Street).

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150. While there is no data source reflecting quantitative use of ballot assistance, Dr. Street undertook a number of analyses regarding third-party ballot assistance. Using the same data sources, Dr. Street conducted statistical analysis of the primary and general elections in 2014, 2016, 2018, and 2020, and concluded that individuals living on reservation in Montana were particularly likely to request their absentee ballots in the late registration period, after the date in which absentee

ballots are mailed out en masse, 25 days before the election, to a statistically significant degree. *Id.* at 356:6-362:5 (Street). Similar to reliance on EDR, the patterns were driven by the more Native parts of the reservations. *Id.* at 357:23-358:3 (Street). To offer additional analysis regarding HB 530, Dr. Street compared turnout for absentee voters between the 2016 and 2020 primaries, as BIPA had prevented almost all organized ballot collection on reservation for the 2020 primary, finding a statistically significant differential difference in turnout on- and off-reservation. *Id.* at 362:6-368:16 (Street). Similarly, an analysis of the 2016 and 2018 primaries compared to the 2020 primary showed greater degrees of ballot rejection on-reservation for reasons that organizers who conduct ballot assistance on reservation help voters avoid. *Id.* at 368:18-371:14 (Street). The Secretary's argument that Dr. Street's analyses were based on a faulty assumption is unfounded, as testimony from both *WNV I* and in this case indicates that MNV did conduct ballot collection during primary elections. *See* Aug. 18, 2022, Trial Tr. 896:8-13 (Horse); DTX534. Moreover, even were the Court to credit the Secretary's argument as to the last two pieces of Dr. Street's analysis, his ultimate conclusion regarding HB 530, § 2, is supported by substantial other analysis. *See, e.g.*, Aug. 16, 2022, Trial Tr. 333:1-334:14, 334:17-335:6, 335:14-17, 337:9-338:5, 355:24-362:5, 371:13-372:20, 397:15-398:2, 437:19-438:23 (Street).

151. From these analyses, Dr. Street concluded that "HB 176 and HB 530 are likely to have a differential negative impact on voter registration and voting for Native Americans living on Indian Reservations in Montana." *Id.*

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at 371:15-372:20 (Street). Dr. Street conducted rigorous and meticulous analyses, using a wide variety of data sources (many provided by the State) and the methods of his field. His conclusions are well supported and credible. His analyses and ultimate conclusions are entitled to substantial weight.

152. Dr. Street also conducted analysis on the comparative reliance on EDR versus other days in the late registration period, again using data supplied by the Secretary of State, demonstrating that Election Day is the most used day of the late registration period. *Id.* at 374:2-381:8 (Street). He also conducted analysis on wait times to vote in Montana, *id.* at 381:9-385:23 (Street), using a survey conducted nationwide, with a "much better" sample for Montana than is typically seen, *id.* at 383:8-16 (Street). The Secretary's own expert agrees that the survey used by Dr. Street for this analysis is considered reliable and it is run by a well-respected political scientist. Aug. 24, 2022, Trial Tr. 1996:3-17 (Trende). Dr. Street's analysis showed that wait times in Montana are consistently below 10 minutes, have been decreasing across time, and are well below the national average. Aug. 16, 2022, Trial Tr. 384:2-385:23 (Street). He also assessed voter confidence in Montana and assessed the factors that actually influence voter confidence. That analysis—using the same survey that the Secretary's expert believes is considered reliable—demonstrated that voter confidence in Montana is quite stable and relatively high over time. *Id.* at 393:3-395:25 (Street). And the factors that influence voter confidence are cues from party leaders and whether someone's preferred candidate won the previous

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election—the so-called winner's effect—not the specifics of the legal regime governing election administration. *Id.* at 390:19-395:25 (Street). These opinions are well supported and credible. Indeed, the Secretary's own expert witness testified that voter confidence is not influenced by the specific legal regime governing elections, Aug. 24, 2022, Trial Tr. 2024:11-2025:23 (Trende), as well as acknowledging the impact of partisan cues and the winner's effect, *id.* at 2030:21-2031:4 (Trende).

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D. Kenneth Mayer, Ph.D.

153. Kenneth Mayer, Ph.D., is a full professor of political science at the University of Wisconsin, Madison, and the authoritative faculty of La Follette School of Public Affairs at UW-Madison. Aug. 22, 2022, Trial Tr. 1285:8-18 (Mayer). He provided expert testimony on behalf of Plaintiffs. He received a Ph.D. in political science from Yale University. *Id.* at 1285:5-7 (Mayer). At the University of Wisconsin, Dr. Mayer teaches courses about election administration, election law, voting, and voting behavior. *Id.* at 1285:21-1286:3 (Mayer). He also conducts academic research about election administration and voting. *Id.* at 1286:4-9 (Mayer). Dr. Mayer has received numerous awards for both his teaching and his academic scholarship. *Id.* at 1286:10-1287:9 (Mayer); PTX215.001-002. These recognitions include an award for the best journal article published in the American Journal of Political Science in 2014, an award for the best application of quantitative methods to a paper at the 2013 conference of the Midwest Political Science Association, and an award from the American Political Science Association for the best book

written on the presidency in 2001. Aug. 22, 2022, Trial Tr. 1286:10-1287:9 (Mayer). Dr. Mayer has published nine books, seven monographs, and ten book chapters. PTX215.004-007. He has published over 25 peer-reviewed articles, most of which have involved the application of quantitative methods, and a number of which concern election administration, voting behavior, voter turnout, and factors that affect voter turnout. Aug. 22, 2022, Trial Tr. 1288:2-22 (Mayer). Dr. Mayer also serves as the chair of a County Commission on Election Security. *Id.* at 1289:14-16 (Mayer).

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154. In assessing the effects of SB 169, HB 176, and HB 530, Dr. Mayer relied on voter files and voter turnout data from the Secretary of State's Office, data published by the Montana State University system about student demographics, the American Community Survey produced by the U.S. Census, the 2020 and 2016 Survey on the Performance of American Elections by the MIT Election Data and Science Lab, and peer-reviewed literature. *Id.* at 1293:6-1294:1 (Mayer). He also applied the calculus of voting model, a framework widely used in the field of political science to evaluate and hypothesize about how changes in election administration will affect voting practices and voter turnout. *Id.* at 1294:6-19 (Mayer).

155. The calculus of voting paradigm shows that the decision whether to vote reflects the relative costs and benefits of voting. *Id.* at 1294:6-1295:4 (Mayer). The costs of voting include informational and administrative costs such as unexpected changes to voting processes, burdens associated with overcoming bureaucratic requirements, compliance costs, opportunity costs, time costs, travel

costs, administrative hurdles, and actual monetary costs. *Id*. at 1294:23-1296:9 (Mayer). In broad terms, Dr. Mayer testified that as the costs of voting increase, the likelihood that an individual votes decreases. *Id*. at 1294:23-1295:4 (Mayer). Applying that model to the facts of this case, Dr. Mayer concluded that SB 169, HB 530, and HB 176 all "increase the cost of voting and will result in otherwise eligible voters not being able to vote." *Id*. at 1305:11-12 (Mayer). Dr. Mayer further concluded that the cumulative effect of SB 169, HB 176, and HB 530, § 2 will, working in combination, result in greater disenfranchisement than each would on its own. *Id*. at 1385:23-1386:19 (Mayer).

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156. He also explained that the burdens of SB 169 and HB 176 will fall disproportionately on students and young people. Relying on academic literature, as well as Montana-specific data about the number and ages of Montanans who use EDR, Dr. Mayer determined that HB 176 is a particular burden on young people because younger voters are far more likely to rely on EDR than older voters. *See id*. at 1305:25-1306:2, 1328:18-1329:18 (Mayer) (explaining that younger and first-time voters disproportionately rely on EDR because they tend to move more frequently and are less familiar with voting requirements and processes). Dr. Mayer also determined that SB 169 is likely to burden students because Montana's youngest voters are less likely to have one of the primary forms of identification under SB 169. *Id*. at 1305:25-1306:4, 1358:16-1359:20 (Mayer).

157. Dr. Mayer further concluded that SB 169, HB 530, and HB 176 do nothing to advance the Secretary's

purported state interests. They are all "what the public administration literature would call pure dead weight," and they "do nothing but make it harder to vote." *Id.* at 1305:12-21 (Mayer) (explaining that the laws "have nothing to do with the integrity of the election process," and "don't increase administrative efficiency or decrease the burden on election officials"). Relying on comprehensive data, academic literature, and his expertise in election administration, Dr. Mayer concluded that there is no evidence of any connection between HB 176, SB 169, or HB 530, § 2 and the state's purported interests in increasing voter confidence, preventing voter fraud, decreasing wait times for voters, or enhancing election integrity. *Id.* at 1363:21-1364:2, 1371:24-1372:11, 1379:2-1380:20, 1385:23-1386:9, 1386:23-1387:5 (Mayer). Specifically, Dr. Mayer explained Montana does not have a voter confidence problem, and if it did, none of these laws would address it. Montana ranks among the highest in the nation in terms of voter confidence. *Id.* at 1384:19 -1385:22 (Mayer) (relying on the Survey on Performance of American Elections, which was relied on by one of the Secretary's experts in the BIPA litigation and credited by the Secretary's expert in this case). The factor that most influences voter confidence in elections is whether their preferred candidates win. *Id.* 1371:16-19 (Mayer). There is little relationship, for example, between voter confidence and voter ID laws. *Id.* at 1371:15-16 (Mayer).

158. Dr. Mayer's conclusions are credible and well-supported. In fact, the Secretary's expert does not dispute any of the factual findings in Dr. Mayer's rebuttal report. Aug. 24, 2022, Trial Tr. 1995:3-8 (Trende). Dr. Mayer's

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analyses and conclusions are entitled to substantial weight. The Secretary's expert provided no grounds to dispute Dr. Mayer's analysis, as Mr. Trende did not review the computer code Dr. Mayer used in conducting his analysis in this case, nor did he independently run any of the analysis performed by Dr. Mayer. *Id.* at 1995:9-15 (Trende). Mr. Trende further testified that he had no basis to disagree with Dr. Mayer's conclusions that younger voters and college students are more reliant on EDR, *id.* at 2013:11-15 (Trende), and less likely to have a driver's license as a form of primary ID under SB 169, *id.* at 2020:8-16 (Trende).

E. Sean Trende

159. Sean Trende is a doctoral student in political science at the Ohio State University, and he provided expert testimony on behalf of the Secretary. Mr. Trende has never published a peer reviewed article concerning EDR, voter ID, absentee ballot assistance, voting by Native Americans, whether voting laws have an effect on turnout of voters of different racial groups, or whether voting laws have an effect on voter turnout; nor could he recall ever writing an article of any kind on these topics relevant to the current matter. Aug. 24, 2022, Trial Tr. 1990:11-1991:9 (Trende). At the time he formed his opinions in this case, he had never published a peer-reviewed article or even submitted an article to a peer-reviewed political science journal, having just recently published (as the third author) his first such article, in an area unrelated to the matters in this case. *Id.* at 1991:10-1992:8 (Trende).

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160. Mr. Trende's opinions are entitled to little, if any, weight for a number of reasons. He has provided no specific analysis of the issues in this case. *Id.* at 1997:9-11, 1999:16-2000:1, 2013:5-10, 2036:13-2037:14, 2040:18-20, 2041:3-7 (Trende). The article on which he seeks to hang much of his criticism of the findings of political science related to EDR excludes racial minorities from its analysis and, for its assertion that EDR has not had a positive impact on voter turnout in Montana, cites to a book that expressly notes that it did not study the impact of EDR in Montana because it lacked the data to do so. *Id.* at 2007:5-2009:10 (Trende). He admits that the laws of other states have no impact on Montanans' ability to vote, *id.* at 2035:23-2036:1 (Trende), but offers a comparison among states, with questionable factual underpinning, *id.* at 2033:14-2034:4 (Trende). And the "context" he purports to provide, *id.* at 1950:8-17 (Trende), was already well-provided to the Court through the testimony of the political scientists who testified in this case, *see*, *e.g.*, Aug. 16, 2022, Trial Tr. 319:1-321:17 (Street) (testifying regarding observational data and political science). Mr. Trende offers no testimony contrary to Plaintiffs' experts regarding the costs of voting, and he agrees that "small changes in costs can cause significant changes in individuals' decisions," that "there is little doubt that there's a relationship between the cost of voting and the decision to turn out," and that these sorts of voting costs "can impact those who are already marginalized." Aug. 24, 2022, Trial Tr. 2003:7-25 (Trende).

F. Fact Witnesses

161. Mr. Bohn testified about the challenges he faces in returning his ballot as a person with a disability and the

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need for people with disabilities to have access to ballot return assistance. Aug. 15, 2022, Trial Tr. 179:3-182:2 (Bohn). Mr. Bohn testified competently and credibly.

162. Thomas Bogle testified about his experience attempting to register at the DMV and vote in person on Election Day in November 2021, only to be told that the DMV had not processed his registration and he would be unable to vote because HB 176 ended EDR. See Aug. 16, 2022, Trial Tr. 483:24-486:5 (Bogle). Mr. Bogle testified competently and credibly.

163. Dawn Gray, the managing attorney and party representative for Blackfeet Nation, testified about the extreme difficulties accessing the franchise on the Blackfeet reservation. Aug. 16, 2022, Trial Tr. 517:8-10, 519:13-534:5 (Gray). She testified about the way in which conditions on the reservation impact the ability of members of Blackfeet Nation to vote and the importance of ballot assistance and EDR in mitigating the barriers to the franchise. Id. at 534:6-553:9 (Gray). Ms. Gray testified competently and credibly, and gave the Court a compelling picture of the difficulties facing Native Americans living on reservations in Montana.

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164. Sarah Denson testified about her experiences attempting to vote in the November 2021 municipal election after attempting to update her registration on the U.S. Postal Service website several months earlier. Aug. 17, 2022, Trial Tr. 630:25-631:16 (Denson). When she arrived at the Gallatin County courthouse on Election Day, she found the registration update had not gone through,

and she was unable to vote because of the change in law from HB 176. *Id.* at 634:22-639:13 (Denson). Ms. Denson testified competently and credibly.

165. Kiersten Iwai, the executive director of FMF, testified about the challenges young voters face in registering to vote and casting a ballot. Aug. 17, 2022, Trial Tr. 676:2-24, 679:13-680:1 (Iwai). She testified about the impact of HB 176 and SB 169 on young voters. *Id.* at 682:9-17, 684:5-686:25 (Iwai). Ms. Iwai testified competently and credibly.

166. Lane Spotted Elk, Tribal Council member and party representative of the Northern Cheyenne Tribe, testified about the extreme difficulties accessing the franchise on the Northern Cheyenne reservation. Aug. 17, 2022, Trial Tr. 708:10-17, 710:21-720:16 (Spotted Elk). He testified about the way in which conditions on the reservation impact the ability of members of the Northern Cheyenne Tribe to vote and the importance of ballot assistance and EDR in mitigating the barriers to the franchise. *Id.* at 720:17-732:9 (Spotted Elk). Councilman Spotted Elk testified competently and credibly and provided the Court with insight into the difficulties that Native Americans living on reservations in Montana face.

167. Kendra Miller testified about her analysis of the number of people who were disenfranchised by HB 176 in the November 2021 municipal elections based on her review of public records from county elections offices and the Secretary of State's website. Ms. Miller was competent and credible. *See* Aug. 17, 2022, Trial Tr. 760:7-

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770:6 (Miller). Upon reviewing these public records, the Court accepts her findings that "at least 59 Montanans were prevented from voting due to House Bill 176" in the November 2021 municipal elections alone. Aug. 17, 2022, Trial Tr. 786:19-23 (Miller).

168. Ronnie Jo Horse, WNV's executive director, testified extensively about the organization's mission (fostering Native American civic education, civic engagement, and leadership development), Aug. 17, 2022, Trial Tr. 813:8-12, 815:8-14 (Horse), and the ways that WNV effectuates that mission (through various GOTV strategies, including providing rides to the county elections office on Election Day and providing ballot assistance), *id.* at 827:19-23 (Horse). Ms. Horse testified that WNV's GOTV activities are especially important on rural reservations because of the various challenges Native American voters have historically had to surmount. *Id.* at 835:19-25, 857:21-858:17 (Horse); PTX262. Ms. Horse demonstrated that WNV's GOTV activities are safe and secure, and that WNV has never been the subject of a complaint or investigation. Aug. 17, 2022, Trial Tr. 859:24-860:18 (Horse). Finally, Ms. Horse testified that WNV's work is crucial to ensure that Native American voices are "heard in the electoral process." *Id.* at 864:7-11 (Horse). Ms. Horse testified competently and credibly.

169. Bradley Seaman, the elections administrator of Missoula County, has helped administer Missoula County's elections since 2006. *See* August 18, 2022, Trial Tr. 898:1-899:1 (Seaman). He served as an election judge for ten years, and then served as the election supervisor

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between 2016 to 2020. *Id.* Mr. Seaman began working as the County's election administrator in March 2020. *Id.* at 898:16-17 (Seaman). Mr. Seaman testified about the impact of HB 176 and SB 169 on the services Missoula County provides to its voters. *Id.* at 897-1107 (Seaman). Mr. Seaman also testified about the security and integrity of elections in Missoula County, despite conspiracy theories that have born challenges to them. *Id.* Mr. Seaman described the impact such misinformation has had on Missoula County's voters and the administration of Missoula County's elections. *Id.* Mr. Seaman does not have any political affiliations and serves in a non-partisan, appointed position. *Id.* at 900:9-13 (Seaman). Mr. Seaman testified competently and credibly.

170. Mr. Nehring, founder, former executive director, and board co-chair of MYA, testified about the experiences of first-time voters and the impact of HB 176 and SB 169 on young voters. Aug. 18, 2022, Trial Tr. 1111:9-1112:19, 1120:23-1123:20 (Nehring). He provided a detailed account of several first-time voters navigating the registration and voting process days before the June 3, 2022, primary election. *Id.* at 1117:10-1122:22 (Nehring). Mr. Nehring also testified to his experience interacting with legislators during the 2021 legislative session. *Id.* at 1125:24-1129:6 (Nehring). Mr. Nehring testified competently and credibly.

171. Shawn Reagor is the Director of Equality and Economic Justice at the Montana Human Rights Network. Aug. 19, 2022, Trial Tr. 1155:18-1157:11 (Reagor). Mr. Reagor testified about the particular processes that transgender individuals must go through to acquire a

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Montana driver's license and the comparatively easier process they have in acquiring gender affirming student identification. *Id.* at 1158:14-1169:12 (Reagor). Through his testimony, Mr. Reagor demonstrated the particularized burdens SB 169 places on transgender individuals. *Id.* Mr. Reagor testified competently and credibly.

172. Jacob Hopkins is the data director of MDP. Aug. 19, 2022, Trial Tr. 1179:16-17 (Hopkins). Mr. Hopkins testified regarding the impacts the challenged restrictions have had, and will continue to have, on the operations of MDP. *Id.* at 1180:3-5 (Hopkins). As data director, Mr. Hopkins analyzes data to enable MDP to run efficient campaigns. *Id.* at 1180:19-22 (Hopkins). Mr. Hopkins's familiarity with voter data gives him more insight than a typical campaign staffer. *Id.* at 1193:25-1195:2 (Hopkins). He has insight into how different counties process ballots, *see*, *e.g.*, *id.* at 1194:25-1195:2 (Hopkins), certain voter behaviors, *see e.g.*, *id.* at 1195:7-11 (Hopkins), and voter demographics, *see*, *e.g.*, *id.* at 1195:17-21 (Hopkins). In his role as data director, Mr. Hopkins also has familiarity with MDP's election-related activities, as well as MPD's general mission. *Id.* at 1181:14-18 (Hopkins). Prior to becoming the data director of MDP, Mr. Hopkins worked as a field organizer for various democratic campaigns. *Id.* at 1181:7-13 (Hopkins). Mr. Hopkins testified competently and reliably.

173. Bernadette Franks-Ongoy, is the Executive Director of Disability Rights Montana ("DRM"), Montana's designated Protection and Advocacy Agency and a non-profit, non-partisan organization with responsibilities for

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overseeing facilities and providing services to people with disabilities in the state. Aug. 22, 2022, Trial. Tr. 1443:2-6, 1445:2-1446:21 (Franks-Ongoy). Ms. Franks-Ongoy is an attorney who has worked in the disability rights field for more than 20 years. *Id.* at 1442:20-21, 1443:2-1444:20 (Franks-Ongoy). Ms. Franks-Ongoy has been helping people with disabilities vote since she was eight years old. *Id.* at 1447:18-23 (Franks-Ongoy). Ms. Franks-Ongoy testified about the barriers persons with disabilities face in registering to vote and casting their ballots, how EDR and organized ballot assistance are crucial in enabling persons with disabilities to overcome those barriers, and about the work DRM does to help Montanans with disabilities access the franchise. *Id.* at 1450:5-1466:18 (Franks-Ongoy). Ms. Franks-Ongoy testified competently and credibly.

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174. Regina Plettenberg is the Clerk and Recorder-Election Administrator for Ravalli County, a position she has held since 2007. Aug. 22, 2022, Trial Tr. 1485:19-23 (Plettenberg). Ms. Plettenberg is also the legislative chair of the Montana Association of Clerks and Recorders and Elections Administrators (MACR). *Id.* at 1486:2-25 (Plettenberg). She testified about a straw poll of election administrators regarding support for HB 176 and that MACR remained neutral on HB 176 during the 2021 legislative session. *Id.* at 1504:12-1505:1 (Plettenberg). She also testified about lines at polling places, noting that they are never very long in Ravalli County, *id.* at 1507:6-24, 1527:24-1528:2 (Plettenberg), including the 2018 general election, where only people using EDR had to wait and only for a maximum of 20 minutes, *id.* at 1505:21-1507:4 (Plettenberg). She testified in agreement with her own

prior statement that the election security bills passed by the 2021 Legislature were "a solution in search of a problem." *Id.* at 1525:13-16 (Plettenberg). When asked about additional funding for Election Day, Ms. Plettenberg responded that she had been "raked over the coals" for accepting grant money to support election activities in the past. *Id.* at 1513:11-23 (Plettenberg). Ms. Plettenberg testified competently and credibly.

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175. Geraldine Custer is a Republican member of the Montana House of Representatives and the former Clerk and Recorder for Rosebud County, a position she held for thirty-six years. *See* Aug. 23, 2022, Trial Tr. 1546:4-1547:2, 1556:25-1557:3 (Custer). Representative Custer testified about her view of the passage of HB 176, HB 530, and SB 169 through the lens of her role as a state legislator and former elections official.

176. Representative Custer also testified about her 36 years of experience administering elections as the Clerk and Recorder of Rosebud County, including her view that elections in Montana are thoroughly secure. Aug. 23, 2022, Trial Tr. 1546:14-1547:22 (Custer). During her time as the Rosebud County Clerk and Recorder, Geraldine Custer served as the chief financial officer for the county and the clerk for the County Commissioners, in addition to handling payroll, retirement, health insurance, human resources, recording documents, and running elections. *Id.* at 1546:11-25 (Custer).

177. Representative Custer described the development of conspiracy theories related to elections, *id.*

at 1548:3-1549:11, 1554:1-1556:4 (Custer), and testified that she only began to hear about election fraud when Secretary of State Corey Stapleton was running for election, *id.* at 1547:6-12 (Custer). She also testified to her experience as an election administrator before and after the passage and implementation of EDR in Montana, explaining that although she did not at first support it, she came to see EDR as an essential service because Montanans voted against its repeal by a large margin, because elections technology improved dramatically and made it easier for county election administrators to administer EDR, and because 70,000 Montanans have relied on it to vote. *Id.* at 1562:16-1565:15 (Custer).

178. Representative Custer also testified to her view that her Republican caucus was motivated to pass HB 176 and SB 169 by the perception that students tend to be liberal, *see, e.g.*, *id.* at 1577:21-1581:15 (Custer), and that this motivation was particularly evident in the floor amendment to SB 169 that excluded Montana University System-issued student ID from the standalone ID category, *id.* at 1581:12-15 (Custer).

179. Representative Custer also testified that HB 530 was "hijack[ed]" at the last minute and that she understood it to be a ploy to pass a bill that has not been well vetted by public debate. *Id.* at 1558:19-1561:16 (Custer). Representative Custer testified competently and credibly.

180. Doug Ellis, the former elections administrator in Broadwater County, also testified about his experience

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administering elections. *See* Aug. 23, 2022, Trial Tr. 1650-1779 (Ellis). While serving as an elections administrator, Mr. Ellis also served as the Broadwater County Clerk and Recorder, County treasurer, and superintendent of schools. Aug. 23, 2022, Trial Tr. 1652:15-1653:4 (Ellis). As County treasurer, Mr. Ellis was tasked with running the motor vehicle department, registering vehicles, issuing licenses, handing out license plates, printing tax bills, collecting taxes, and collecting other revenue. *Id*. at 1653:5-4. As the superintendent of schools, Mr. Ellis was tasked with registering homeschool families, maintaining student information, issuing financial reports, and handling bus transportation. *Id*. at 1654:8-22. Of all the positions he held, running elections was the most challenging. *Id*. at 1656:12-15.

181. Mr. Ellis has always opposed EDR—including before he had any experience as an election administrator. *Id.* at 1726:2-7 (Ellis).

182. Although Mr. Ellis testified in support of HB 176 at a legislative hearing, while testifying under oath at trial, Mr. Ellis admitted that he testified before the Legislature because someone from the Secretary's Office asked him to. *Id.* at 1724:6-12 (Ellis). Mr. Ellis's testimony regarding the unique burdens placed on rural counties—whose staff handles other responsibilities in addition to elections—must be weighed in light of Mr. Ellis's further testimony that, in addition to himself, he had 5 full-time staff members, two of whom are dedicated exclusively to EDR. *Id.* at 1707:7-12 (Ellis).

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Appendix B

183. Mr. Ellis also testified that staff spend 70% of their time in the month leading up to an election preparing for that election, and 100% of their time on Election Day working the election. *Id*. at 1700:1-8 (Ellis). Similarly, Mr. Ellis's testimony that "budgetary constraints" limited the staff he could have assist him with elections should be considered in light of Mr. Ellis's admission that, during the 2020 election, Broadwater County spent only 53% of the amount it budgeted for election salaries and wages, 57% of the amount it budgeted for election judge stipends, and only 5% of the $24,000 it budgeted for office supplies and materials. *Id.* at 1708:11-1709:15 (Ellis).

184. Mr. Ellis also testified that he always administered well-organized elections, *id.* at 1717:8-19 (Ellis), he always successfully tabulated the votes, *id.* at 1717:4-7 (Ellis), he was never criticized for any delays, *id.* at 1717:13-15 (Ellis), and he is unaware of any material errors in any of the elections that he administered, *id.* at 1718:6-8 (Ellis).

185. The credibility of Mr. Ellis's testimony regarding administrative burdens is diminished by his personal beliefs. Mr. Ellis testified that a voter who appeared to register and vote two minutes before the deadline should not have been permitted to do so, even prior to the enactment of HB 176, regardless of any circumstances that may have contributed to the voter's late arrival. *Id.* at 1725:4-1726:1 (Ellis). Mr. Ellis admitted that he is not concerned that HB 176 may disenfranchise voters. *Id.* at 1726:14-24 (Ellis). When asked whether his lack of concern extended to disabled voters, Mr. Ellis

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stated, "Did they finally become disabled on Election Day? What changed? . . . [Y]ou have 364 days to come in and register. Why did they wait until the last day?" *Id.* at 1726:25-1727:9 (Ellis). Mr. Ellis testified that he believes voting is not only a right, but also a privilege and a responsibility. *Id.* at 1727:24-1728:1 (Ellis). And Mr. Ellis's testimony regarding EDR appears to be influenced by his belief that "Society has gotten to the point where everybody has a right and nobody has a responsibility." *Id.* at 1729:3-11 (Ellis).

186. Janel Tucek, elections administrator in Fergus County and former elections administrator in Petroleum County, testified about her job responsibilities administering elections in those counties. While her testimony was credible, Ms. Tucek's testimony regarding supposed administrative burdens of EDR is entitled to limited weight—both because she has minimal relevant experience and because her testimony is not probative of significant burdens on election administrators. Ms. Tucek has never administered an in-person election in Fergus County where there has been EDR, Aug. 23, 2022, Trial Tr. 1766:16-23 (Tucek) and has only ever registered one or two individuals in-person on Election Day using EDR in her entire career, *id.* at 1767:15-20 (Tucek). If anything, Ms. Tucek's testimony confirmed that HB 176 will not alleviate any administrative burdens. She testified that "it's confusing to constantly try to keep up with new laws passed by the Montana legislature." *Id.* at 1779:7-10 (Tucek). She further testified that it "usually" takes her less than five minutes to register a new voter, *id.* at 1768:24-1769:1 (Tucek), and that prior to HB 176 EDR

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occurred only at her county elections office, meaning that there are 16 precincts in Fergus County where only already registered voters can cast a ballot on Election Day, *id*. at 1767:24-1768:11 (Tucek).

187. While administering the 2020 federal general election, Ms. Tucek stopped working on Petroleum County elections work at 9 p.m. and sent her election judges home at that time. *Id*. at 1769:21-1770:9 (Tucek). The election office in Fergus County has more than four times the number of staff members per registered voter, and the Petroleum County elections office has about 92 times the number of staff members per registered voter, than does Missoula County, *id*. at 1770:10-1775:4 (Tucek), whose election administrator testified against HB 176. Ms. Tucek offered no evidence of voter fraud or long lines to vote in either of her two counties, *id*. at 1769:2-12, 1775:9-1777:2 (Tucek), and she has had no professional experience involving Native American voters in Montana, *id*. at 1777:25-1778:19 (Tucek).

188. Gregory Hertz is a state senator representing Senate District 6. Aug. 24, 2022, Trial Tr. 1801:6-9 (Hertz). Senator Hertz characterized the enactments of HB 176, SB 169, and HB 530 as "preventative measures." *Id.* at 1824:18-22 (Hertz). However, Senator Hertz also testified that Montana has a long history of secure and transparent elections. *Id.* at 1828:14-16 (Hertz). Senator Hertz believes that the best legislation is "thought out, vetted and has input from all stakeholders." *Id.* at 1833:3-9 (Hertz).

189. However, when considering elections-related legislation, Senator Hertz never consulted with any

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elections administrators, *id.* at 1841:2-8 (Hertz), does not recall if any constituents contacted him to raise concerns about voter fraud, *id.* at 1842:9-13 (Hertz), and did not conduct any surveys or polls of his constituents regarding the challenged laws, *id.* at 1842:23-1843:5 (Hertz). HB 530, § 2, in particular, received zero input from stakeholders because, with Senator Hertz' support, it was blasted to the Senate floor where there was no opportunity for public input. PTX126; Aug. 24, 2022, Trial Tr. 1887:17-24 (Hertz).

190. Senator Hertz believes HB 530, § 2 is a "good bill" but has never read any of the court opinions holding that a prior restriction on ballot collection was unconstitutional. *Id.* at 1909:4-12 (Hertz). In supporting HB 176 and SB 169, Senator Hertz disregarded overwhelming public opposition to those bills. *Id.* at 1850:8-11, 1852:5-12 (Hertz). Senator Hertz testified that he believes that student identifications are inadequate for purposes of demonstrating that a voter lives in a particular voting district in Montana. *Id.* at 1864:16-1866:2 (Hertz). However, he acknowledged that multiple other forms of primary identification likewise do not contain a voter's address. *Id.* at 1866:3-1868:2 (Hertz).

191. Senator Hertz testified that he supported HB 530, § 2 out of concern that payment for ballot collection might incentivize individuals to collect more ballots. *Id.* at 1873:24-1874:3 (Hertz). But, Senator Hertz admitted that he was unaware that the Plaintiff organizations do not pay ballot collectors per ballot. *Id.* at 1874:9-15 (Hertz). Senator Hertz also believes that a salaried employee collecting ballots, or a volunteer who collects ballots

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but receives a gas card to cover expenses, is engaging in ballot collection in exchange for a pecuniary benefit. *Id.* at 1888:19-1889:3 (Hertz). Senator Hertz' testimony is neither competent nor credible: while he has publicly proclaimed that court cases should be decided on "facts, not feelings," *id.* at 1899:3-5 (Hertz), he admits that his support for the challenged laws is based on "just [his] feelings." *Id.* at 1899:9-15 (Hertz).

192. Bret Rutherford is the election administrator for Yellowstone County. Aug. 24, 2022, Trial Tr. 2047:19-22 (Rutherford). Although Mr. Rutherford testified that Yellowstone County has periodically seen long lines of voters on Election Day, he also asserted that there is a separate line at the centralized voting location (Metra Park) that services new voter registrations on Election Day. *Id.* at 2083:8-11 (Rutherford). He also testified that the primary cause of lines on Election Day is not EDR, but rather voter turnout. *Id.* at 2088:3-7 (Rutherford). Indeed, Mr. Rutherford testified that despite having "triple the amount of late registrations" in the 2016 general election as his county did in the 2012 general election, the lines in that 2016 general election were significantly shorter than they were in 2012. *Id.* at 2060:18-2066:11 (Rutherford).

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193. During the June 2022 primary election, Yellowstone County was forced to turn away voters who were seeking to register and vote on Election Day. *Id.* at 2088:17-20 (Rutherford). Mr. Rutherford testified that he was unaware of any evidence of voter fraud or voter intimidation in Yellowstone County. *Id.* at 2091:10-23 (Rutherford). He further testified that Yellowstone County elections are safe and secure. *Id.* at 2091:24-2092:1

(Rutherford). Mr. Rutherford testified competently and credibly.

194. Mr. James, Chief Counsel to the Secretary of State, testified on behalf of her Office. Mr. James testified that one of the Secretary's goals is to increase voter turnout. *Id.* at 2204:11-13 (James). Mr. James testified that one purpose of showing ID at the polls is to verify eligibility, *id.* at 2168:12-13, 20-22 (James), but the Secretary's own Election Judge Handbook expressly directs election workers to look at ID only to verify that the person is who they say they are and not to check any address on the ID. DTX599.091. And despite the Secretary's claim that SB 169 makes government issued ID primary and all other photo ID, including student ID, secondary, *see, e.g.*, Aug. 15, 2022, Trial Tr. 38:2-4, Mr. James, the drafter of the bill, admitted that even after SB 169 was enacted, he did not know whether Montana University System student IDs constitute government ID and that out-of-state driver's licenses are government-issued IDs. Aug. 25, 2022, Trial Tr. 2261:24-2262:17 (James).

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195. Likewise, despite referring to provisional ballots as the "last failsafe," *id.* at 2184:2-8 (James), Mr. James acknowledged that provisional ballots are insufficient to safeguard an otherwise eligible voter's right to vote because provisional ballots are not always counted, *id.* at 2255:20-2256:2 (James).

196. The Secretary believes that Montana's elections are "secure" and "always will be." *Id.* at 2207:1-3 (James).

Nevertheless, Mr. James researched historical examples of voter fraud and intimidation at the Montana Historical Society dating back more than 100 years in an attempt to provide post hoc justification for the challenged laws. *Id.* at 2209:16-2210:13 (James). Mr. James did not dispute the testimony of five current or former election administrators that Montana's elections are free of voter fraud. *Id.* at 2213:14-2216:20 (James).

III. Voting on Indian Reservations in Montana

197. Montana is home to seven Indian reservations: the Blackfeet Indian Reservation, the Crow Reservation, the Flathead Reservation, the Fort Belknap Reservation, the Fort Peck Indian Reservation, the Northern Cheyenne Indian Reservation, and the Rocky Boy's Reservation. These reservations intersect with sixteen counties: Glacier and Pondera Counties (the Blackfeet Indian Reservation), Big Horn and Yellowstone Counties (the Crow Reservation), Lake, Sanders, and Missoula Counties (the Flathead Reservation), Blaine and Phillips Counties (the Fort Belknap Reservation), Valley, Daniels, Roosevelt, and Sheridan Counties (the Fort Peck Indian Reservation), Big Horn and Rosebud Counties (the Northern Cheyenne Indian Reservation), and Hill and Chouteau Counties (the Rocky Boy's Reservation). Agreed Facts Nos. 19, 20.

198. In 2020, the counties with the highest proportion of Native Americans (Big Horn County, Roosevelt County, Blaine County, and Glacier County) had the lowest voter turnout. *Id.* at 220:19-221:7 (Weichelt). Voter turnout in Big Horn County was 65%, Roosevelt County was 68%,

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Glacier County was 69%, Rosebud was 75%, and Blaine County was 76%. *Id.* The turnout in counties with larger Native American populations was lower compared to other counties. *Id.* at 221:5-7 (Weichelt). As the proportion of Native Americans increase, voter turnout decreases. *Id.* at 221:9-11 (Weichelt).

199. There is a long history of state and local governments disenfranchising Native American voters in Montana. *Id*. at 113:23-114:17 (McCool).

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200. The reservations are home to thousands of Montana voters who lack equal access to registration and voting opportunities, and who experience greater barriers to casting mail ballots (both absentee and ballots in mail-only elections) than do other Montanans. Those barriers include:

1. Mail Service

201. There are limited mail routes and drop-off mail locations on rural reservations. Mail service is poor and/or non-existent on many reservations. *Id*. at 122:10-13 (McCool). A significant percentage of the Native Americans living on rural reservations have non-traditional mailing addresses, and many reservation homes do not have physical addresses, meaning the postal service does not deliver mail to their homes. *Id.* at 122:13-16 (McCool). Many Native Americans living on reservations do not have home mail delivery, and instead must use a P.O. box that is often a considerable distance from their home. *Id.* at 122:16-123:4 (McCool); *id.* at 218:16-20, 238:1-2 (Weichelt); Aug. 16, 2022, Trial Tr. 528:4-13 (Gray).

202. Postal delivery on reservations is often convoluted and inefficient due to limited mail routes and rural mail carriers. Aug. 15, 2022, Trial Tr. 122:12-18, 124:18-24 (McCool). Because of the large degree of absentee voting in Montana, the post office is an important site. *Id.* at 234:4-16 (Weichelt).

203. On average, voters on reservations must travel nearly twice as far as voters off reservation to access post offices. *Id.* at 228:6-229:14 (Weichelt). For example, on the Blackfeet Reservation, some members have to travel over 30 miles roundtrip to access their P.O. box. *Id.* at 233:2-13 (Weichelt). Post offices located in rural areas outside of reservations service fewer people than do post offices on reservations. *Id.* at 237:1-13 (Weichelt). On reservations, approximately 20 people per square mile are served by a post office, but in off-reservation rural areas, approximately 7.5 people per square mile were served by a post office. *Id.* at 237:8-13 (Weichelt).

204. Poor mail service also makes it more difficult for Native Americans in Montana to register to vote. *Id.* at 124:18-24 (McCool).

205. Post office hours on reservations are often limited. *Id.* at 230:21-232:17 (Weichelt). P.O. boxes are often shared and are not regularly checked. Many tribal members check their mail between once per week and once per month. When mail is collected from a P.O. box, it is not uncommon for it to be pooled among individuals. For example, on the Blackfeet Reservation, many members share post office boxes. Aug. 16, 2022, Trial Tr. 529:4-5

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(Gray). There are not enough P.O. boxes to service the entire population of tribal members. *Id.* at 529:11-12 (Gray). Additionally, "a lot of tribal members that cannot establish a residence cannot get their own post office box." *Id.* at 529:4-13 (Gray). Blackfeet and Northern Cheyenne tribal members also have difficulty accessing their P.O. boxes because they are not accessible 24 hours a day. *Id.* at 530:1-2 (Gray); Aug. 17, 2022, Trial Tr. 718:2-18 (Spotted Elk). Saturday hours are "very limited" and "if you work, you're not going to make the post office deadline." Aug. 16, 2022, Trial Tr. 530:10-13 (Gray).

206. Challenging weather can also limit mail service. On Blackfeet Reservation, post office trucks regularly come in late during the wintertime. *Id.* at 530:23-531:2 (Gray); Aug. 17, 2022, Trial Tr. 859:16-23 (Horse). Senator Hertz, a resident of the Flathead Reservation, acknowledged that "when we have a bad storm, some people just don't get to vote." Aug. 24, 2022, Trial Tr. 1861:12-25 (Hertz).

207. Mail service on the Northern Cheyenne Reservation is very limited. There is only one mail route. Some tribal members share P.O. boxes, and access to P.O. boxes is only available during the limited hours that the post office is open. Aug. 17, 2022, Trial Tr. 717:9-23 (Spotted Elk).

208. Native Americans report low levels of trust in the Postal Service. Aug. 15, 2022, Trial Tr. 123:5-12 (McCool); Perez Dep. 113:4-9.

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2. Income and Poverty

209. Native Americans consistently experience higher poverty rates than the rest of Montana's population. Aug. 15, 2022, Trial Tr. 93:3-7 (McCool).

210. 34% of Native Americans in Montana live in poverty, as compared to 10% of white Montanans. *Id.* at 88:10-15 (McCool). The child poverty rate for Native Americans in Montana is 42%, which is 29 percentage points higher than the overall child poverty rate in Montana (13%). *Id.* at 88:2-9 (McCool).

211. The overall poverty rate in Montana, 12.5%, is dwarfed by poverty rates on all reservations in Montana: 27.5% on the Blackfeet Indian Reservation, 24.1% on the Crow Reservation, 39.3% on the Fort Belknap Reservation, 28.5% on the Fort Peck Indian Reservation, 23.6% on the Northern Cheyenne Indian Reservation, 13.7% on the Flathead Reservation,[8] 37.5% on the Rocky

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8. As multiple experts explained, *see* Aug. 15, 2022, Trial Tr. 85:20-22, 87:17-23 (McCool); *id.* at 223:5-17 (Weichelt); Aug. 16, 2022, Trial Tr. 344:1-20 (Street), Flathead is a majority-white reservation. This large white population on Flathead Reservation inflates the reservation's socioeconomic indicators; if the reservation reported only its Native American population, the disparities between the reservation and the state would be more pronounced. *See* Aug. 15, 2022, Trial Tr. 87:17-23 (McCool). All data comparing Native Americans to the state of Montana as a whole also undersells the disparities between Native Americans and non-Native Americans in the state because Native Americans are included in the statistics for the state of Montana. *See id.* at 87:13-16 (McCool).

Boy's Reservation, and 25.6% on the Turtle Mountain Reservation. PTX228.1; Aug. 15, 2022, Trial Tr. 85:9-87:2 (McCool).

212. Montana's unemployment rate is 3.5%, significantly lower than that on all reservations in Montana: 9.1% on the Blackfeet Indian Reservation, 16.3% on the Crow Reservation, 33.2% on the Fort Belknap Reservation, 14.2% on the Fort Peck Indian Reservation, 13.7% on the Northern Cheyenne Indian Reservation, 7.4% on the Flathead Reservation, 9.8% on the Rocky Boy's Reservation, and 9.9% on the Turtle Mountain Reservation. PTX228.1; Aug. 15, 2022, Trial Tr. 85:9-87:12 (McCool).

213. 12.4% of Montanans rely on food stamps, significantly fewer than on all reservations in Montana: 19.8% on the Blackfeet Indian Reservation, 20.5% on the Crow Reservation, 34.6% on the Fort Belknap Reservation, 18.3% on the Fort Peck Indian Reservation, 33% on the Northern Cheyenne Indian Reservation, 18.1% on the Flathead Reservation, and 48.6% on the Rocky Boy's Reservation. PTX228.2; Aug. 15, 2022, Trial Tr. 89:19-90:1 (McCool).

214. The extreme poverty and disparities in income facing Native Americans in Montana has "remained quite consistent" over time. Aug. 15, 2022, Trial Tr. 92:24-93:7 (McCool).

215. Approximately 80% of Blackfeet Reservation residents rely on at least one form of public assistance. Aug. 16, 2022, Trial Tr. 521:10-12 (Gray).

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216. There is high unemployment, high poverty, and limited access to vehicles on the Northern Cheyenne Reservation. Aug. 17, 2022, Trial Tr. 713:2-10 (Spotted Elk).

217. One-third of Native Americans have reported that they were personally discriminated against in terms of being paid or promoted equally at work, and 31% report that they were personally discriminated in job applications—discrimination that harms Native Americans' economic well-being. Aug. 15, 2022, Trial Tr. 111:18-25 (McCool).

218. "The poorer you are, the less likely you are to participate and vote." *Id.* at 81:15-21 (McCool). "The political science literature is quite clear that level of poverty is definitely a significant cost of voting and it tends to decrease turnout and political participation[.]" *Id.* at 93:8-13 (McCool); see also Aug. 22, 2022, Trial Tr. 1303:9-20 (Mayer).

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3. Housing

219. Native American communities and homes often lack basic infrastructure commonly found off-reservation. Native American households in the United States are 19 times more likely than white households to lack running water. Aug. 15, 2022, Trial Tr. 96:2-9 (McCool). Almost half the homes on Native American reservations in the United States lack access to reliable water sources. *Id.* at 96:9-11 (McCool).

220. On reservations throughout Montana, some Native Americans live in poverty. Homes may lack indoor plumbing, electricity, heat, and running water. *Id*. at 93:18-19, 96:2-11 (McCool).

221. Racial disparities in home ownership in Montana are "very dramatic." *Id*. at 95:2-4 (McCool). Native Americans in Montana have a home ownership rate of slightly more than 35%—about half the home ownership of white Montanans and less than the home ownership of Hispanics in Montana. *Id*. at 95:10-15 (McCool). The home ownership rate for Native Americans in Montana is far lower than that of the lowest-ranked counties in Montana and the broader United States. *Id*. at 95:16-19 (McCool).

222. One out of every five of homeless people in Montana is Native American, even though Native Americans comprise less than 7% of the state's total population. *Id*. at 87:13-14, 93:23-25 (McCool).

223. Native Americans face a higher rate of housing discrimination than any other ethnic minority in the United States. *Id*. at 96:12-97:2 (McCool).

224. 17% of Native Americans report that they have personally been discriminated against in trying to rent or buy housing. *Id*. at 112:7-8 (McCool).

225. Native Americans in Montana have a high rate of mobility, in large part due to housing shortages and lack of money for rent. Aug. 16, 2022, Trial Tr. 524:2-14 (Gray); Aug. 17, 2022, Trial Tr. 715:22-716:13 (Spotted Elk). There

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is also a housing shortage on reservation, contributing to the high mobility rate.

226. Homes on reservations are often overcrowded with multigenerational and extended families living under one roof. Aug. 15, 2022, Trial Tr. 93:18-20 (McCool); Aug. 16, 2022, Trial Tr. 526:15-527:5 (Gray); Aug. 17, 2022, Trial Tr. 715:24-716:1 (Spotted Elk); FBIC 30(b)(6) Dep. 191:12-14.

227. On Blackfeet Reservation, housing is "very limited and substandard." Aug. 16, 2022, Trial Tr. 524:2-4 (Gray). Many of the houses are below substandard by HUD regulations. *Id*. at 524:7-9 (Gray). "Substandard" conditions may include broken windows, broken doors, no functional plumbing, and mold. *Id*. at 524:15-22 (Gray).

228. Blackfeet Nation has a "housing waitlist of over a hundred on a regular basis." *Id*. at 524:6-7 (Gray). Blackfeet Reservation also has a homeless population that struggles accessing basic needs including "clean water, place to sleep, food." *Id*. at 525:17-22 (Gray).

229. On the Northern Cheyenne Reservation, there is a "need" for housing. Homelessness is an issue on the reservation. It is not uncommon for 10-15 people to share a home. Housing insecurity is also common on the reservation. Aug. 17, 2022, Trial Tr. 715:22-716:13 (Spotted Elk).

230. Being homeless or insecurely housed or having to move frequently increases the burden on voters to

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participate politically and stay registered to vote. Aug. 15, 2022, Trial Tr. 93:14-94:1 (McCool).

4. Health

231. Native Americans in Montana have much worse health outcomes than the general population. *Id.* at 97:14-25, 100:21-101:8 (McCool).

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232. Native Americans in Montana are less healthy than even the least healthy county in the state. *Id.* at 100:17-101:2, 101:9-13 (McCool).

233. Native Americans in Montana have much worse health outcomes than any other racial group in the state. *Id.* at 101:3-8 (McCool). "There is a stunning difference in the length and quality of life between Native Americans and every other group." *Id.* at 101:3-8 (McCool).

234. The three Montana counties with the highest Native American population—Big Horn, Glacier, and Roosevelt—report much worse health outcomes than the state as a whole. *Id.* at 98:17-100:9 (McCool).

235. In terms of premature death—measured in years lost through premature death per 100,000 population—Roosevelt (21,000), Big Horn (21,300), and Glacier (16,400) Counties perform much worse than Montana as a whole (7,100). *Id.* at 99:10-17 (McCool).

236. In terms of reported poor or fair health, Roosevelt (25%), Big Horn (26%), and Glacier (27%)

Counties perform much worse than Montana as a whole (14%). *Id*. at 99:18-22 (McCool).

237. In terms of poor physical health days per 30 days, Roosevelt (5.6), Big Horn (5.2), and Glacier (5.9) Counties perform much worse than Montana as a whole (3.6). Id. at 99:23-100:2 (McCool).

238. In terms of poor mental health days per 30 days, Roosevelt (5.2), Big Horn (5.1), and Glacier (5.9) Counties perform much worse than Montana as a whole (3.9). Id. at 100:3-6 (McCool).

239. In terms of rates of low birthweight, Roosevelt (8%), Big Horn (8%), and Glacier (9%) Counties perform worse than Montana as a whole (7%). Id. at 100:7-9 (McCool).

240. Native Americans have the highest disability rate for any ethnic or racial group in the United States. *Id*. at 101:16-21 (McCool).

241. Nearly one in four Native Americans report that they have been personally discriminated against in a health care setting—which affects their health and well-being. *Id*. at 112:4-6 (McCool).

242. Being in poor physical or mental health makes it harder to participate politically and increases voter costs. *Id*. at 97:3-13 (McCool).

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5. Education

243. Native Americans in Montana have "significantly lower" levels of educational attainment than white Montanans. *Id*. at 102:3-8 (McCool). These disparities have been fairly stable over time. *Id*. at 104:25-105:5 (McCool).

244. In Montana, 93.6% of residents have a high school degree. PTX228.4; Aug. 15, 2022, Trial Tr. 104:3-5 (McCool). That figure is higher than the percentage on every Native American reservation in the state—Blackfeet (89.6%), Crow (89.3%), Flathead (91%), Fort Belknap (87.6%), Fort Peck (86.4%), Northern Cheyenne (90.3%), Rocky Boy (82.7%), and Turtle Mountain (85.7%). PTX228.4; Aug. 15, 2022, Trial Tr. 104:6-21 (McCool).

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245. In Montana, 32% of residents have a college degree. PTX228.4; Aug. 15, 2022, Trial Tr. 104:14-15 (McCool). That figure is higher than the percentage on every Native American reservation in the state—Blackfeet (21.4%), Crow (15.7%), Flathead (26.8%), Fort Belknap (14.6%), Fort Peck (16.7%), Northern Cheyenne (15.4%), Rocky Boy (10.1%), and Turtle Mountain (17.4%). PTX228.4; Aug. 15, 2022, Trial Tr. 104:6-21 (McCool).

246. 13% of Native Americans report that they have been personally discriminated against in either applying to or attending college—which directly affects Native Americans' ability to get an education. Aug. 15, 2022, Trial Tr. 112:9-12 (McCool).

247. Education is one of the best predictors of political participation. Those who are better educated are

more likely to participate politically than those who are not. *Id*. at 101:22-102:2 (McCool); Aug. 22, 2022, Trial Tr. 1301:19-1302:12 (Mayer).

6. Internet Access

248. Native Americans living on reservations in Montana have limited access to computers and broadband internet, which further reduces their ability to obtain information about voting opportunities and deadlines. Aug. 15, 2022, Trial Tr. 107:23-108:3 (McCool).

249. In Montana, 88.9% of households have a computer, far more than in every Native American reservation in the state—Blackfeet (65.4%), Crow (71.9%), Flathead (86.8%), Fort Belknap (74.2%), Fort Peck (74%), Northern Cheyenne (71.7%), Rocky Boy's (58.8%), and Turtle Mountain (77.3%). PTX228.5; Aug. 15, 2022, Trial Tr. 107:23-108:22 (McCool).

250. In Montana, 80.7% of households have an internet subscription, far more than in every Native American reservation in the state—Blackfeet (60.3%), Crow (59.3%), Flathead (75%), Fort Belknap (62.7%), Fort Peck (60.6%), Northern Cheyenne (52.8%), Rocky Boy's (47.9%), and Turtle Mountain (65.6%). PTX228.5; Aug. 15, 2022, Trial Tr. 107:23-108:22 (McCool).

251. Nationally, the internet subscription rate for Native Americans is 67%, compared to 82% for non-Native American households. Aug. 15, 2022, Trial Tr. 106:16-19 (McCool).

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252. 35% of households on Native American reservations in the United States do not have broadband service, compared to just 8% of the nation as a whole. Id. at 106:14-16 (McCool).

253. On Blackfeet Reservation, internet access is "very poor and spotty." Aug. 16, 2022, Trial Tr. 522:13-15 (Gray). Many tribal members do not have access to personal computers for internet use. *Id.* at 523:18-524:1 (Gray). Some places on Blackfeet Reservation "simply don't have an infrastructure for internet." *Id.* at 522:20 (Gray). Areas without infrastructure for internet access include Heart Butte, Babb, St. Mary, and East Glacier. *Id.* at 523:2-11 (Gray). In areas with infrastructure for internet, access is expensive. *Id.* at 522:21-22 (Gray).

254. There is very limited internet access on the Northern Cheyenne Reservation. Aug. 17, 2022, Trial Tr. 714:15-19 (Spotted Elk).

255. Lack of access to the internet makes it harder to access information on elections and political participation, which increases information costs and voter costs. Aug. 15, 2022, Trial Tr. 105:6-15, 149:21-25 (McCool); Aug. 17, 2022, Trial Tr. 858:7-17 (Horse); PTX262.

7. Criminal Justice

256. Native Americans are overrepresented in the criminal justice system. In 2010, Native Americans comprised 22% of Montana's population in jails and prisons, despite making up only 6% of the state's population at that time. Aug. 15, 2022, Trial Tr. 110:1-6 (McCool).

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257. Today, Native Americans comprise 18% of Montana's population in jails and prisons—still more than twice as high as their statewide population. *Id*. at 87:13-14, 110:7-11 (McCool).

258. Incarcerated individuals cannot vote in Montana, meaning that Native Americans are disproportionately disenfranchised in the state. *Id*. at 109:5-6 (McCool). Incarceration also negatively impacts future employment and one's earning potential; "there's a very close correlation between income levels and incarceration rates." *Id*. at 109:7-16 (McCool).

259. Twenty-nine percent of Native Americans report that they have been personally discriminated against when interacting with police—which has an impact on arrest and incarceration rates. *Id*. at 112:1-3 (McCool).

260. Native Americans in Montana are disproportionately the victims of crime. *Id*. at 150:17-151:2 (McCool). There are exceptionally high rates of violence against Native American women in particular—84% of Native American women report that they have been the victim of a violent crime, and the rate of rape of Native American women is ten times the national average. *Id*. at 150:17-151:2 (McCool). This rate of violence, and the reasonable fear that accompanies it, is an additional voter cost for Native Americans in Montana. *Id*. at 150:20-23 (McCool).

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8. Traveling to Vote and Registering to Vote

261. Higher poverty levels result in a lack of working vehicles and money for gasoline, car insurance, a driver's license, and maintaining a working vehicle, all of which means that Native Americans in Montana have disproportionate travel costs. *Id.* at 120:25-121:6 (McCool); *id.* at 217:13-218:11 (Weichelt).

262. "There are dramatic differences between Native American vehicle availability and Anglo vehicle availability." *Id.* at 91:12-16 (McCool). In three Montana counties for which data is available, Native American households were far likelier to report lacking access to a vehicle, as compared to white Montanans in the same counties. These counties were Big Horn (6.5% of Native American residents lacking a vehicle, compared to 1.9% of white residents), Blaine (14.2% to 4.1%), and Rosebud (8.8% to 4%). PTX228.3; Aug. 15, 2022, Trial Tr. 91:12-92:3, 120:25-121:6 (McCool).

263. On the Blackfeet Reservation, access to reliable vehicles is "very limited." Aug. 16, 2022, Trial Tr. 521:13-16 (Gray). Roads on Blackfeet Reservation are "not very well maintained." *Id.* at 533:6-10 (Gray). Those living on the reservation must "drive two hours just to shop for a reliable vehicle." *Id.* at 521:13-19 (Gray).

264. Four-wheel drive or all-wheel drive vehicles are preferred for driving on the reservation roads, and they're expensive. *Id.* at 533:19-534:4 (Gray). "If you don't have a job or credit, you're going to get into one of the deals where

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there's maybe high interest rates and a low performing car, a used car." *Id*. at 521:19-22 (Gray). It is also expensive to repair vehicles or access a new line of credit when cars break down. *Id*. at 521:23-25 (Gray). Access to finances for gasoline for vehicles is also a problem on Blackfeet Reservation. *Id*. at 522:1-3 (Gray).

265. Challenging weather also makes travel difficult, particularly in the election month of November. Aug. 17, 2022, Trial Tr. 859:16-20 (Horse). On the Blackfeet Reservation, there is snowfall 8 to 9 months of the year. Snow, ice, and wind create hazardous road conditions that make travel difficult or impossible. Aug. 16, 2022, Trial Tr. 532:4-533:5 (Gray). Likewise on the Northern Cheyenne Reservation, tribal members must navigate ice and snow on roads in November. Aug. 17, 2022, Trial Tr. 719:16-720:2 (Spotted Elk).

266. For many Native Americans living on rural reservations, vehicles are scarce and often shared among overcrowded homes. Aug. 16, 2022, Trial Tr. 521:13-25 (Gray). As a result, households often rely on a single vehicle for getting to and from work, to all social engagements, doctor's office visits, as well as any mail runs or ballot drop offs. In winter months, only the most reliable vehicles, if any, can traverse the poor roads from homes to the main roads. Aug. 17, 2022, Trial Tr. 713:16-714:8 (Spotted Elk).

267. On the Blackfeet Reservation, limited public transportation is available through Blackfeet transit buses. Aug. 16, 2022, Trial Tr. 522:4-9 (Gray). Six buses run daily during the week, and each bus seats about six

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people. Id. at 522:7-12 (Gray). Similarly, on the Northern Cheyenne Reservation, public transportation is available; however, the transit service runs only certain days of the week. Aug. 17, 2022, Trial Tr. 714:9-14 (Spotted Elk).

268. Thus, many Native Americans living on rural reservations without home mail access, or who utilize P.O. boxes because they are moving from home to home because they lack a permanent address, may have serious difficulties getting to their P.O. box due to distance, socioeconomic conditions, lack of reliable transportation, and weather. Aug. 15, 2022, Trial Tr. 92:4-12, 121:3-9, 153:18-20 (McCool); id. at 228:18-25 (Weichelt); Aug. 16, 2022, Trial Tr. 534:20-535:4 (Gray).

269. Ballots and registration applications may be dropped off at county election offices during the full early voting period. Agreed Fact No. 29. County election offices are generally open from 8 a.m. or 9 a.m. to 5 p.m., five days per week. The county election offices are only located in county seats. § 13-2-201, MCA. With the exception of Lake and Roosevelt Counties, all county seats are located outside reservations. *See* Perez Dep. 140:14-18, 141:2-9 (Mr. Perez also testified that some reservations do have satellite elections offices that provide voter services. *Id.* at 140:11-22).

270. Native Americans living on-reservation in Montana, on average, must travel longer distances to visit the post office, the DMV, and the county seats where voter registration occurs. Aug. 15, 2022, Trial Tr. 228:11-17, 240:5-8, 247:16-19, 256:2-13 (Weichelt).

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Appendix B

271. The average distance of all reservations (excluding the Flathead Reservation, which is majority white so does not provide information regarding the distances Native American voters must travel) is 36.8 miles to the county seat, or 73.6 miles roundtrip. Id. at 241:4-8 (Weichelt). And, within each reservation community, there are people who have to travel significantly farther. For example, the longest distance a person on Fort Belknap has to travel to the county seat is 64.1 miles or 128.2 miles roundtrip, on Blackfeet: 69.6 miles or 139.2 miles roundtrip, on Fort Peck: 55 miles or 110 miles roundtrip, on the Crow Reservation: 60.4 miles or 120.8 miles roundtrip. Id. at 241:15-23, 242:1-2 (Weichelt); see also id. at 120:18-20 (McCool); Aug. 16, 2022, Trial Tr. 520:13-19 (Gray). For some locations on the Northern Cheyenne Reservation, it can be 120 miles round-trip to get to the county seat. Aug. 17, 2022, Trial Tr. 710:24-711:3 (Spotted Elk); see also Aug. 15, 2022, Trial Tr. 120:20-22 (McCool) (for one town on Northern Cheyenne, the round-trip distance to the county seat is 157 miles). These distances are "extreme costs." Aug. 15, 2022, Trial Tr. 242:23-243:3 (Weichelt).

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272. Further, "border towns," or towns that border reservations, are notorious for their racism and discrimination toward Native Americans. Id. at 112:18-113:6, 113:13-22 (McCool); Aug. 16, 2022, Trial Tr. 548:6-21 (Gray); Aug. 17, 2022, Trial Tr. 730:10-14 (Spotted Elk); Perez Dep. 142:4-15, 144:3-16, 145:15-146:14; PTX262; PTX240; PTX320. For example, white nationalist and neo-Nazi signs are present in Flathead County. Aug. 24, 2022, Trial Tr. 1905:13-16 (Hertz). This is significant because border towns are where Native Americans often register

to vote, pick up election materials, and cast in-person absentee ballots. Aug. 15, 2022, Trial Tr. 75:22-76:3, 113:7-15 (McCool); Aug. 16, 2022, Trial Tr. 548:22-549:10 (Gray); Perez Dep. 142:4-15, 144:3-16.

273. Ten percent of Native Americans have experienced discrimination when attempting to vote or participate in political activities. Aug. 15, 2022, Trial Tr. 111:11-14, 112:13-14 (McCool).

274. Thus, Native American voters experience an additional burden when voting outside of a reservation.

9. Satellite Polling Locations

275. In-person early voting and late registration starts 30 days prior to Election Day. §§ 13-13-205(1)(a)(i); 13-2-301, MCA. Some counties have opened satellite election offices on reservations, but generally those satellite locations are open for only a few of the days (and for limited hours) of the early voting period. Aug. 15, 2022, Trial Tr. 244:3-19, 262:7-11 (Weichelt); Aug. 17, 2022, Trial Tr. 854:15-22 (Horse); PTX184; PTX185.

276. Unlike on other reservations, on Blackfeet, a year-round satellite election office with voter registration services is available in Browning, Montana. Aug. 25, 2022, Trial Tr. 2289:7-13. However, the availability of those services is not well known among Blackfeet residents, and there "has been no information on it" circulated on the reservation. Aug. 17, 2022, Trial Tr. 574:6-9, 577:9-15 (Gray). The managing attorney of the Blackfeet Tribe was

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unaware that registration was available at that site and was surprised that it was available. *Id*. at 573:23-574:7 (Gray).

277. Only on the Blackfeet Indian Reservation was there a satellite location on reservation where, prior to enactment of HB 176, voters could access EDR. Aug. 16, 2022, Trial Tr. 542:11-21 (Gray); PTX184; PTX185.

278. The fact that on-reservation satellite offices are open for only a fraction of the early voting and late registration periods—"not . . . very often, maybe a handful of days. Their hours are very short," Aug. 15, 2022, Trial Tr. 244:3-7 (Weichelt)—means that Native American voters living on rural reservations have reduced access to early voting and late registration even when they are able to make it to the satellite office. *Id*. at 244:3-16 (Weichelt). On Blackfeet Reservation, there were long lines at the satellite location in November 2020 since it allowed "three or four people at a time inside." Aug. 16, 2022, Trial Tr. 544:19-545:5 (Gray).

279. Strained relationships between tribes and county officials can make requesting, negotiating, and securing satellite offices difficult. For example, Blackfeet Nation had to sue Pondera County over their refusal to provide on reservation voter services for the 2020 election, despite providing in person voter services at the county seat. Blackfeet Nation also had to threaten legal action to have the Glacier County clerk provide ballot drop boxes for the 2020 election. Aug. 16, 2022, Trial Tr. 546:2-547:1 (Gray).

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10. Native American Reliance on EDR and Ballot Collection

280. Given the inaccessibility of mail service and polling locations, many tribal members register and/or change their registration on the same day as the day that they vote. Aug. 16, 2022, Trial Tr. 543:7-23 (Gray).

281. On reservations without EDR, organizations like WNV and MNV provide rides to the county seat for EDR and voting. In 2020, a WNV organizer drove 150 people from the Crow Reservation to register to vote at the Big Horn County elections office. Perez Dep. 166:24-167:3; Aug. 17, 2022, Trial Tr. 856:19-25 (Horse); Aug. 18, 2022, Trial Tr. 874:12-15 (Horse). Recognizing the need to provide access for its unregistered members, CSKT has also historically provided rides to register and vote on Election Day. McDonald Dep. 19:17-21, 27:19-28:16.

282. Native Americans living on-reservation in Montana use EDR at consistently higher rates than the rest of the population, in both primary and general elections. Aug. 16, 2022, Trial Tr. 350:24-351:15, 353:16-23, 355:16-23 (Street). This is especially true on the Blackfeet Reservation, where there is generally a satellite location allowing for registration and voting on Election Day. PTX184; PTX185.

283. Because of the many socioeconomic barriers, Native American voters in rural reservation communities also disproportionately rely on third parties' collection and conveyance of their ballots to cast their votes. Aug.

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17, 2022, Trial Tr. 720:17-723:4 (Spotted Elk); Aug, 16, 2022, Trial Tr. 534:6-538:20 (Gray); Aug. 15, 2022, Trial Tr. 242:19-243:3 (Weichelt); Aug. 16, 2022, Trial Tr. 333:1-334:14, 334:17-335:6, 335:14-17, 337:9-338:5, 355:24-362:5, 371:15-372:20, 397:15-398:2, 437:19-438:23 (Street). Groups like WNV and MNV play an integral role in facilitating voting access for tribal community members, by providing a range of services from hosting voter registration drives to collecting and conveying their absentee ballots. Aug. 17, 2022, Trial Tr. 821:2-5, 833:15-834:2, 835:14-25 (Horse); Perez Dep. 37:15-38:11, 240:10-21; PTX276.

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284. WNV and MNV typically hire dozens of community organizers to collect and convey ballots for Native American voters on reservations. PTX261; Aug. 17, 2022, Trial Tr. 821:19-823:6 (Horse); Perez Dep. 136:14-20.

285. In the 2020 general election, after BIPA was permanently enjoined by two Yellowstone County district court judges, WNV and MNV paid organizers to collect and convey hundreds of ballots. PTX261; Aug. 17, 2022, Trial Tr. 821:19-823:6 (Horse); Perez Dep. 136:14-20.

286. WNV and MNV's ballot collection activities have never been the subject of a complaint or investigation by Montana's Commissioner of Political Practices. Aug. 17, 2022, Trial Tr. 859:24-860:18 (Horse); *see generally* Aug. 24, 2022, Trial Tr. 2093:17-25 (Rutherford).

287. To evaluate HB 530, § 2's disproportionate effect on Native American voters, it is instructive to look at Montana's 2020 primary election. Just days before that

election, BIPA—a substantially similar law to HB 530, § 2—was enjoined. However, the law was on the books leading up to the election, preventing groups like MNV from providing ballot collection. In that primary election, the turnout rate for absentee voters living off-reservation dropped only by 0.2%, while the turnout rate for absentee voters living on-reservation dropped by 3.5%. This finding indicates that BIPA, which prohibited MNV's and other groups' ballot collection work in the same way HB 530, § 2 does, had a disproportionate negative effect on Native American voters living on-reservation. Aug. 16, 2022, Trial Tr. 363:16-366:14 (Street).

288. Similarly, the rejection rate of absentee ballots in that primary election for problems that ballot collectors could help fix was higher than in prior elections on Native American reservations, but not off-reservation. *Id.* at 368:17-371:5 (Street).

289. Montanans on Native American reservations are also likelier in both primary and general elections to request absentee ballots in the late registration period, making them "considerably more" reliant on absentee voting. *Id.* at 357:18-359:21 (Street). This pattern is driven by the more Native parts of the reservations. *Id.* at 357:23-358:3 (Street).

IV. Youth Voting in Montana

290. Over the last decade, youth voter turnout in Montana has increased dramatically. Aug. 17, 2022, Trial Tr. 675:18-25 (Iwai); FMF 30(b)(6) Dep. 107:18-23.

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291. Young people tend to move more frequently than older people. *See* Aug. 22, 2022, Trial Tr. 1329:13-15 (Mayer); *see also*, *e.g.*, Aug. 16, 2022, Trial Tr. 473:13-18 (Bogle) (explaining that he moved to Montana from another state with his wife and infant daughter); Aug. 17, 2022, Trial Tr. 630:2-24 (Denson) (explaining that she moved twice in the summer of 2021).

292. Younger voters are far more likely to rely on EDR than older voters. *See* Aug. 22, 2022, Trial Tr. 1305:25-1306:2, 1328:18-1329:18 (Mayer). Because younger and first-time voters tend to move more frequently, and are less familiar with voting requirements and processes, eliminating EDR burdens them more heavily than it does older adults. *See id.*

293. Just over 10% of Montana voters are youth aged 18 to 24, but since 2008, more than 30% of voters registering on Election Day are aged 18 to 24. *See id.* at 1325:13-1329:1 (Mayer); PTX222.

294. In Montana, only 71.5% of 18- to 24-year-olds have a Montana driver's license, while nearly 95% of the over-18 population possesses one. Aug. 22, 2022, Trial Tr. 1358:16-25 (Mayer).

295. Over 10,000 students attend public universities in Montana from out of state. *Id.* at 1361:16-21 (Mayer). For those who register to vote in Montana, being unable to use student ID or an out-of-state driver's license to vote without additional documents poses a particular burden. *Id.* at 1362:12-1363:2 (Mayer).

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V. Election Practices

296. In most counties, the Clerk and Recorder is also the Elections Administrator. *See* Aug. 22, 2022, Trial Tr. 1486:4-7 (Plettenberg). Bradley Seaman described that being the elections administrator for Missoula County is "more than [a] full-time" position. Aug. 18, 2022, Trial Tr. 1032:3-5 (Seaman).

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297. In rural counties, Election Administrators can hold multiple positions at once. *See e.g.*, Aug. 23, 2022, Trial Tr. 1546:11-25 (Custer). Some larger counties have the financial ability to appoint an election administrator because there are elections happening all the time in larger counties—not just primary and general elections. *Id*. at 1572:2-8 (Custer).

298. Montana has long had two registration periods. During regular registration, which lasts until 30 days before an election, voters can register in person, by mail, by fax, or by sending a clear digital image of their signed registration application to their election official via email. § 13-2-301, MCA; Mont. Admin. R. 44.3.2003; Aug. 18, 2022, Trial Tr. 904:16-23 (Seaman). For the "late registration" period, voters may only register in-person at their election official's office. §§ 13-2-301, 13-2-304, MCA; Mont. Admin. R. 44.3.2015.

299. As a matter of election administration, the processes for registering voters during the regularly registration period and the late registration period are nearly identical. Aug. 18, 2022, Trial Tr. 909:17-910-1

(Seaman). The only difference is that, during the late registration period, election officials simultaneously issue registration applications and absentee ballots for the upcoming election. *Id*. at 909:24-910:08 (Seaman). Montana allows voters to register to vote and vote on the same day at any time during the late registration period. Aug. 19, 2022, Trial Tr. 1238:5-11 (Seaman).

300. Election Administrators' estimates as to how long it takes to register a person to vote vary: Doug Ellis estimated it takes approximately twenty minutes to complete the process, Aug. 23, 2022, Trial Tr. 1682:23-1683:20 (Ellis); Rep. Custer estimated it takes between two and ten minutes, Aug. 23, 2022, Trial Tr. 1571:7-16 (Custer); Bradley Seaman estimated it takes between three to five minutes to register a person to vote. Aug. 18, 2022, Trial Tr. 909:8-12 (Seaman). And, Bret Rutherford testified it can take up to fifteen minutes. Aug. 24, 2022, Trial Tr. 2063:17-2065:4 (Rutherford).

301. County election officials do not confirm the eligibility information on voter registration forms because Montana is a self-affirming state. Aug. 18, 2022, Trial Tr. 907:19-23 (Seaman). When registering, registrants sign an affirmation on the bottom of the registration form, stating that under penalty of perjury, they meet Montana's eligibility requirements. *Id*. at 907:24-908:2 (Seaman). The only verification county election officials do is confirm that the check boxes on the registration form are checked. *Id*. at 908:3-5 (Seaman).

302. Voter confirmation cards are provided in person or by mail to all newly registered voters. Aug. 18, 2022,

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Trial Tr. 1033:8-20 (Seaman). A voter confirmation card is a gender affirming form of identification as long as it reflects the voter's correct name. Aug. 19, 2022, Trial Tr. 1178:5-12 (Reagor).

303. Prior to Election Day, election administrators must conduct voter list maintenance, absentee voter maintenance, process petition signatures, order supplies and prepare equipment. Aug. 18, 2022, Trial Tr. 930:18-931:11 (Seaman).

304. During the month before an election, election administrators recruit aides and assistants, mail out ballots, receive ballots, track ballots, verify signatures, certify and test equipment, prepare equipment for polling places, and certify ballots. Aug. 18, 2022, Trial Tr. 931:12-933:9 (Seaman).

305. Prior to running an election, election administrators hire additional staff to assist with running the election and staff polling locations. *See* Aug. 23, 2022, Trial Tr. 1661:7-13 (Ellis). It can be difficult to find poll workers for election day. Aug. 24, 2022, Trial Tr. 2048:12-24 (Rutherford).

306. On Election Day, election administrators typically start their day early because they are in charge of all the polling places and need to deliver voting machines to the precincts, test the machines, set the machines up, and swear in poll workers. Aug. 23, 2022, Trial Tr. 1674:9-1675:13 (Ellis); Aug. 18, 2022, Trial Tr. 936:4-937:17 (Seaman). Additionally, the election administrator has to

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be available to answer questions and run various election-related errands. Aug. 23, 2022, Trial Tr. 1566:2-1568:3 (Custer).

307. To register a new voter on Election Day, staff must check their ID, give them a voter registration card, input their information into the database, determine which precinct they are in, issue a ballot for that precinct and then distribute and receive that ballot. Aug. 23, 2022, Trial Tr. 1682:1-22 (Ellis).

308. To register a voter from a different county as a new registrant on Election Day requires staff identify the voter in the database, check to see if they have been issued a ballot by the other county. If the ballot has been issued, staff must call the issuing county to determine whether the ballot has been voted or not. If the ballot has not been voted, the issuing county will cancel the ballot and the voter, and the new county will issue the voter a ballot for their precinct. Aug. 23, 2022, Trial Tr. 1683:3-21 (Ellis). Mr. Rutherford noted it can take up to fifteen minutes to void a ballot when processing a person who has moved from one county to another as a new registrant on Election Day. Aug. 24, 2022, Trial Tr. 2064:20-2065:4 (Rutherford).

309. Bringing in temporary employees to work on Election Day does not alleviate the burdens posed by Election Day Registration because it takes a while for workers to be trained and understand all of the processes. Aug. 23, 2022, Trial Tr. 1634:12-19 (Custer).

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Appendix B

310. Election Day is the busiest day in the Clerk and Recorder's office. Aug. 24, 2022, Trial Tr. 2053:10-12 (Rutherford).

311. Yellowstone County moved elections operations to the Metra Park partially due to the amount of people showing up at the election's office at the courthouse to take advantage of Election Day Registration. Aug. 24, 2022, Trial Tr. 2056:17-2057:7 (Rutherford).

312. In 2016, Yellowstone County received three times as many late registrations as they did in 2012. Aug. 24, 2022, Trial Tr. 2065:9-14 (Rutherford). To handle that many election day registrations, Yellowstone County election staff issued provisional ballots to election day registrants and processed their registrations during the four days after the election. *Id.* at 2065:15-2066:17 (Rutherford). Of all the ballots issued Yellowstone County at the Metra on Election Day in 2020, two-thirds were late registrations. *Id.* at 2069:1-3 (Rutherford).

313. Election Administrators work long hours on Election Day. Representative Custer testified that if she got home at 2 a.m. it was a good day. Aug. 23, 2022, Trial Tr. 1568:4-7 (Custer). Mr. Ellis testified that, during his first election, he worked from 5 a.m. until 4 a.m. the next morning. Aug. 23, 2022, Trial Tr. 1674:1-3 (Ellis). Ms. Tucek testified that on Election Day in 2020, she had completed her responsibilities as the election administrator for Petroleum County by 8:30 p.m. but had to remain at the office until after 11 p.m. because other counties were reporting that they had long lines of voters

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waiting to register and she needed to be able to void a ballot if a voter from Petroleum County attempted to register in a new county. Aug. 23, 2022, Trial Tr. 1739:3-1740:7 (Tucek). Mr. Seaman generally works from 5 a.m. to midnight on federal general election days. Aug. 17, 2022, Trial Tr. 1039:17-21 (Seaman).

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VI. The Contested Laws

A. HB 176

314. In 2005, the Montana Legislature passed EDR into law. PTX013; Agreed Fact No. 28. EDR's enactment meant that the late registration period included Election Day. § 13-2-301, MCA (2021); Mont. Admin. R. 44.3.2015 (2021). As even the Secretary admits, EDR was an improvement in Montana's election processes. Aug. 25, 2022, Trial Tr. 2232:5-15 (James).

315. Montana's Constitutional Convention Delegates stated that "if the Legislature provides for a system of poll booth registration, they're not locked in . . . but the Legislature is mandated, also, that they shall insure the purity of elections, and . . . with that language, we've avoided the objectionable parts of the minority report, still give the people the idea that we are for liberalization of the voting procedure and make it workable." Mont. Const. Convention Tr., at 450 (Feb. 17, 1972).

316. EDR has helped boost voter turnout in Montana. Representative Custer testified that election administrators "were just overwhelmed at how many

people used it." Aug. 23, 2022, Trial Tr. 1564:10-11 (Custer). Lines at Metra Park in Yellowstone County specifically for EDR voters indicate that many voters rely on EDR. Aug. 24, 2022, Trial Tr. 2087:20-24 (Rutherford). In 2000, only 59.9 percent of registered voters in Montana voted. PTX188. By 2016, that number had jumped to 74.4 percent, and in 2020, 81.3 percent of registered voters participated in the election. PTX188.

317. Since 2006, when EDR first became available, and the enactment of HB 176, more than 70,000 Montanans relied on EDR to successfully cast a ballot. Aug. 22, 2022, Trial Tr. 1314:6-8 (Mayer); Aug. 23, 2022, Trial Tr. 1565:6-11 (Custer); Aug. 15, 2022, Trial Tr. 119:12-19 (McCool); PTX219.

318. Election Day has become the most utilized day for late voter registration. Aug. 22, 2022, Trial Tr. 1314:11-16 (Mayer). In the 2020 general election, for example, half of all late registrants registered to vote on Election Day. PTX219; Aug. 16, 2022, Trial Tr. 379:24-380:7 (Street). This is a consistent pattern across years. *Id.* at 380:8-21 (Street). In almost every election since 2006, the number of Montanans who registered on Election Day nearly matched the number who registered during the other 29 days of late registration combined. Aug. 22, 2022, Trial Tr. 1314:9-16 (Mayer); PTX219. Indeed, 23 times as many people used EDR as made use of late registration on the average pre-election day of the late registration period. Aug. 16, 2022, Trial Tr. 379:4-9 (Street). In 2018, for example, an average of 515 Montanans registered to vote each day during the late registration period before

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the general election, but 8,053 registered on Election Day. *See* PTX219.

319. EDR's popularity has only grown over time: in 2006, 4,351 Montanans registered on Election Day as compared to more than 12,000 in 2016. PTX219; PTX220. Indeed, Mr. Rutherford testified that Yellowstone County was forced to move centralized elections services from the county building to Metra Park because there were so many voters utilizing EDR. Aug. 24, 2022, Trial Tr. 2081:4-11 (Rutherford).

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320. "EDR has the largest effect on increasing turnout" than any other singular elections administrative practice. Aug. 22, 2022, Trial Tr. 1307:10-12 (Mayer). EDR has been repeatedly shown to increase voter turnout. Aug. 16, 2022, Trial Tr. 374:1-10, 377:1-7 (Street). Nationally, studies have shown that EDR boosts voter participation between two and seven percentage points. Aug. 22, 2022, Trial Tr. 1307:3-6 (Mayer); *see also* Aug. 16, 2022, Trial Tr. 377:1-7 (Street). There is a clear consensus in the empirical political science literature that EDR is likely to increase voter turnout, and repealing EDR is likely to reduce voter turnout. Aug. 15, 2022, Trial Tr. 115:8-12 (McCool); Aug. 16, 2022, Trial Tr. 374:1-10, 377:1-7 (Street). EDR's causal effect on turnout is "one of . . . the more widely agreed [upon] patterns in the study of American elections." Aug. 16, 2022, Trial Tr. 377:18-22 (Street).

321. Montana-specific studies have shown that EDR has boosted turnout by 1.5 percentage points. Aug. 22, 2022, Trial Tr. 1308:12-19 (Mayer). EDR increases voter turnout more than any other single voting procedure

because it reduces the cost of voting by combining both registration and voting into a single administrative step, and it allows voters who are not activated early in the election period the opportunity to register and vote when attention to the election has peaked on Election Day. Aug. 15, 2022, Trial Tr. 115:13-116:8 (McCool); Aug. 16, 2022, Trial Tr. 330:25-331:17 (Street); Aug. 22, 2022, Trial Tr. 1308:15-1309:9 (Mayer), *id.* at 1455:11-1458:16 (Franks-Ongoy).

322. As a result, EDR is particularly popular with young voters and in areas with high student and military populations. Young voters in Montana have used EDR at much higher rates than older voters. *See* Aug. 22, 2022, Trial Tr. 1328:18-1329:1 (Mayer). The precincts with the highest number of voters who have used EDR are in Great Falls, home to Malstrom Air Force base, Missoula, home to the University of Montana, and Bozeman, home to Montana State University. Aug. 22, 2022, Trial Tr. 1336:21-1337:20 (Mayer); *see also* Aug. 18, 2022, Trial Tr. 927:24-928:2 (Seaman) (noting that "Missoula is pretty transitory, so we have a lot of voters who moved out, graduated college and moved").

323. And Montanans living on-reservation make disproportionate use of EDR compared to those living off-reservation, with the prevalence of EDR increasing in on-reservation precincts with greater Native American populations. Aug. 16, 2022, Trial Tr. 355:6-23 (Street).

324. Voters provide the same information on Election Day as they do during the regular registration

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period. At both times, voters must provide three things: (1) identifying information, including the voter's name, current address, birth date, and either their driver's license number or social security number; (2) eligibility information, including that the voter will be at least 18 years old by the time of the next election and has been a resident of Montana for at least 30 days; (3) an affirmation, under the penalty of perjury, that the information provided is correct. Aug. 18, 2022, Trial Tr. 906:8-908:8 (Seaman).

325. In Montana, voters self-affirm their eligibility to vote. *Id.* at 907:23 (Seaman); Aug. 23, 2022, Trial Tr. 1610:20-23 (Custer). Accordingly, the only verification election officials do of voter eligibility is ensuring that voters provided the required eligibility information on their voter registration form and signed an affirmation under the penalty of perjury. Aug. 18, 2022, Trial Tr. 907:23-908:17 (Seaman); Aug. 23, 2022, Trial Tr. 1608:21-24 (Custer).

326. Unlike eligibility, a registering voter's identity is checked against external information. Aug. 18, 2022, Trial Tr. 911:16-912:5 (Seaman). Election officials enter the identifying information from a registration application into the statewide voter database, which automatically verifies that information against the Social Security Administration's database and DMV information. *Id.*; Aug. 23, 2022, Trial Tr. 1585:7-21 (Custer)

327. EDR is more secure than registration outside the late registration period, as voters using EDR must affirm in person before an election official and under

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penalty of perjury that the information on their application is true. Aug. 18, 2022, Trial Tr. 909:18-21 (Seaman); *see also* Aug. 22, 2022, Trial Tr. 1508:5-1510:22 (Plettenberg) (noting many safeguards in place for ensuring the integrity of votes cast using EDR). That face-to-face interaction that is itself a barrier to fraud. PTX070 at 47:16-48:8, 51:13-52:3.

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328. Additionally, only during the late registration period, including on Election Day, the statewide registration system flags whether an in-person applicant is registered elsewhere or has already received an absentee ballot. PTX070 at 51:21-52:3, 76:8-24. As a result, voters who were registered elsewhere previously or had already received an absentee ballot are prevented from casting more than one ballot. Aug. 18, 2022, Trial Tr. 912:19-913:3 (Seaman). But they are not disenfranchised either. On Election Day, election officials issue such voters a provisional ballot, which is counted only when election officials have been able to confirm it is the voter's only cast ballot. *Id.* at 912:19-23 (Seaman). That Election Day process ensured that when a voter "may have had the opportunity to vote," their ballot was "not counted until [election officials] confirm that [the voter] got to vote once." *Id.* at 912:24-913:3 (Seaman).

329. On Election Day, voters may only register at their county election office, or another location designated by the county election administrator. *See, e.g.*, *id.* at 913:17-24 (Seaman) (noting that voters in Missoula County may register at the main election center or the Confederated Salish and Kootenai Tribe satellite office); Aug. 23, 2022,

Trial Tr. 1692:1-11, 1710:7-23 (Ellis); *id*. at 1767:24-1768:7 (Tucek); Eisenzimer Dep.[9] 28:18-29:5.

330. While voters seeking to register to vote on Election Day may have to wait in line to do so in counties where EDR is most popular, those lines do not impact voters who are already registered. *See generally id.*; *see also* Aug. 18, 2022, Trial Tr. 919:9-21 (Seaman); Aug. 23, 2022, Trial Tr. 1572:19-1573:2 (Custer). When EDR lines do form, election administrators take steps to mitigate them. Aug. 18, 2022, Trial Tr. 915:6-916:21 (Seaman). And the voters waiting in those lines embraced the experience. *Id.* at 917:15-918:8 (Seaman). Mr. Seaman testified that, when he checked on voters waiting in line to register during the 2020 general election, he saw voters who "had a boombox with them." *Id.* at 917:15-16 (Seaman). He said that he heard from voters, "I knew I would be here. I knew this would be a long time. But it is important." *Id.* at 917:18-20 (Seaman). According to Mr. Seaman, that was "a unique experience because it felt like . . . community involvement in the election process." *Id.* at 918:4-6 (Seaman). Mr. Seaman saw voters who "had the opportunity to [register and vote on Election Day] and were appreciative of that opportunity." *Id.* at 918:7-8 (Seaman).

331. Further, when EDR lines have occurred, it has not impacted the ability of election administrators to administer elections. *Id*. at 920:6-19 (Seaman) (noting that lines do not impact his staff's ability to perform Election

9. Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. F-1 (Deposition of Monica Eisenzimer) ("Eisenzimer Dep.").

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Day tasks in a timely manner); *id.* 921:25-922:13 (Seaman) (noting that lines do not cause his staff to make more mistakes on Election Day); *id.* 922:14-17 (Seaman) (noting that lines do not create opportunities for voter fraud); *see also* PTX070 at 86:10-18, 96:10-19 (Ms. Plettenberg testifying that EDR does not cause election officials to make mistakes); Aug. 23, 2022, Trial Tr. 1573:3-11 (Custer).

332. Montanans have directly demonstrated their support for EDR. In the 2014 election, Montanans rejected a ballot measure intended to repeal EDR. PTX180; Aug. 23, 2022, Trial Tr. 1563:14-22 (Custer) (describing 2014 legislative referendum to end EDR that was "soundly defeated"). The measure failed by more than 14 percentage points. PTX180; Aug. 18, 2022, Trial Tr. 899:24-900:6 (Seaman).

333. Since its enactment, EDR has served as voters' "final safeguard." Aug. 18, 2022, Trial Tr. 903:6-7 (Seaman).

334. HB 176 was a priority bill for Secretary Jacobsen and her Office. Aug. 25, 2022, Trial Tr. 2229:19-22 (James); PTX062. It was among her three highest priorities in the 2021 Legislative Session. *Id.*; *see also* Aug. 23, 2022, Trial Tr. 1558:10-14, 1561:24-1562:7 (Custer) ("I noticed that [Secretary Jacobsen] came and she testified on them and told us . . . in person, herself which was great, that you know, those were her . . . babies.").

335. The Secretary's Office was the primary drafter of HB 176. Aug. 25, 2022, Trial Tr. 2235:12-2236:7 (James).

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336. HB 176 changed the close of the late registration period from 8 p.m. on Election Day to noon the day before the election. Dkt. 207, Final Pretrial Order ¶ 6.

337. HB 176 was introduced by Representative Sharon Greef in Montana's House of Representatives at the Secretary's request on January 15, 2021. *Id.* at 2234:25-2235:6, 2237:25-2238:3 (James); PTX015; PTX001.

338. The Secretary's Office drafted talking points for Representative Greef, identifying for the bill sponsor the supposed interests served by HB 176. PTX066; Aug. 25, 2022, Trial Tr. 2237:1-2242:4 (James). Those talking points also listed supposed "common voter problems" that HB 176 would purportedly resolve, but at least some of those problems would not, in fact, be affected by eliminating EDR. *Id.* at 2239:6-2240:17 (James). The night before a critical hearing on HB 176, Representative Greef implored the Secretary and her staff to text or email each member of her committee to help push the bill through executive committee. PTX077.

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339. The Secretary's Office attempted to recruit people to testify in support of HB 176. Aug. 25, 2022, Trial Tr. 2243:15-24, 2246:23-2247:5 (James); PTX068.

340. On January 21, 2021, the House's State Administrative Committee held a hearing on the bill. PTX070. At the hearing, Secretary Jacobsen and Mr. Corson spoke in favor of the bill. *Id.* at 4:15-6:22. Most speakers vociferously opposed the bill. *See generally* PTX070; *see also* PTX068; PTX069; Aug. 25, 2022, Trial Tr. 2246:23-2248:5 (James). Mr. Ellis spoke in favor of

the bill—but only because the Secretary of State's Office solicited his involvement the night before the hearing. Aug. 25, 2022, Trial Tr. 2248:2-18 (James); Aug. 23, 2022, Trial Tr. 1724:6-12 (Ellis). Mr. Ellis was the only election administrator who spoke in favor of HB 176 at the hearing. Aug. 25, 2022, Trial Tr. 2251:11-15 (James).

341. The Legislature pointed to college students in reasoning that HB 176 was necessary. Representative Custer recalled Representative Hinkle's testimony in favor of House Bill 176, where he described seeing long lines at the county courthouse and commented "that there were some nonprofits working the line, and that wasn't in our favor, meaning the Republican Party favor." Aug. 23, 2022, Trial Tr. 1576:20-24 (Custer).

342. This is consistent with the general sentiment of the majority caucus in the Montana Legislature: "the general feeling in the caucus is that college students are—tend to be liberal. So that's the concern with them voting, having all of them vote here." *Id.* at 1581:12-15 (Custer); *cf.* Aug. 19, 2022, Trial Tr. 1196:14-18 (Hopkins) (noting that voting data suggests precincts on college campuses disproportionately include voters who support Democratic candidates and values).

343. While the proponents of HB 176 gave fuzzy rationale for its supposed necessity, including invocations of "election integrity," the opponents clearly outlined the specific dangers to electoral participation of repealing EDR, including the disproportionate impacts on indigenous and youth voters. *See generally* PTX070.

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344. In particular, Jordan Thompson, Keaton Sunchild, Danielle Vazquez, Lauri Kindness, and Daliyah Killsback all spoke in opposition to HB 176. PTX069; PTX070.

345. Mr. Thompson spoke on behalf of CSKT, stating that the tribe opposed the bill because it wanted to keep elections accessible to all Montanans and noting the 2014 referendum in which more than 57% of Montanans rejected repealing EDR. PTX070 at 15:24-16:23.

346. Mr. Sunchild, Political Director of WNV, testified to the factual predicates that make EDR so important to Montana's Native American voters including the large reservations that require traveling long distances to vote and register in person. Further, he testified that there was a tradition of voting in person in Indian Country and that first time voters would register and vote on Election Day. *Id.* at 17:1-18.

347. Ms. Kindness detailed her own work as a WNV organizer on the Crow Reservation. She testified that in the past election her team set up a mobile location across from the Big Horn County Courthouse, the only location where voters could register to vote on Election Day. Western Native Vote had registration cards at the location and assisted voters with their registrations. Her team also picked up voters from their homes and drove them to the courthouse to vote and register. Her team assisted more than 150 voters with their registration on Election Day. Ms. Kindness also discussed how difficult voting already is for so many Native voters and that taking

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away EDR would add another barrier to a system that already disenfranchises Native voters. *Id.* at 37:13-39:3.

348. Ms. Vazquez and Ms. Killsback also testified to how Native American voters would be disproportionately hurt by the EDR repeal. *Id.* at 31:23-32:12, 41:24-42:19.

349. Opponents testified that Native American voters rely on EDR given the other barriers to voting, including distance to voter registration locations and the cost of travel. Many other opponents, like Ruthie Barbour of Forward Montana, testified that HB 176 would have a particularly damaging effect on Montana's Native American voters. *Id.* at 39:9-41:19.

350. Opponents also testified that young voters would be negatively impacted by ending EDR, explaining to the Legislature that young voters move more frequently (as they are less likely to own homes) and when voters move, they must update their registration information before they can cast their ballot and have it counted. *Id.* at 21:5-23.

351. Ms. Plettenberg testified on behalf of the Montana Association of Clerks and Recorders and Election Administrators. *Id.* at 45:4-12. She testified that EDR's repeal would result in fewer people being able to vote, noting that about 200 people had used EDR in her county (Ravalli) alone on Election Day, and those people would not have been able to vote with HB176 in place. *Id.* at 55:1-12, 86:22-87:8. She flagged that even those who still could vote under HB 176 might be faced with potentially

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far distances to travel. *Id.* at 55:7-12. She also testified that the same safeguards that exist before Election Day were in place for verification of a voter's registration and identity on Election Day. *Id.* at 62:11-14, 76:12-24, 87:19-88:15. Mr. Corson corroborated Ms. Plettenberg's testimony that the same safeguards exist pre-Election Day as on Election Day. *Id.* at 46:22-48:8, 76:12-17. However, from an administrative perspective, Ms. Plettenberg supported closing the late registration period at noon on the Friday before Election Day. Aug. 22, 2022, Trial Tr. 1495:17-1496:2 (Plettenberg).

352. Ultimately, the Montana Association of Clerk and Recorders and Election Administrators remained neutral on HB 176. Aug. 22, 2022, Trial Tr. 1488:1-5 (Plettenberg). Ms. Plettenberg surveyed the members of the Montana Association of Clerks and Recorders as to whether they supported, opposed, or were neutral towards closing the late registration period at noon the Friday before Election Day. *Id.* at 1488:14-1489:15 (Plettenberg). Twenty-five counties supported closing the late registration period on the Friday before Election Day. *Id.* at 1494:12-16 (Plettenberg). Twenty-two counties were neutral as to whether to close the late registration period at noon the Friday before Election Day. *Id.* at 1494:17-20 (Plettenberg). Eight counties opposed moving the close of the late registration period to noon the Friday before Election Day. *Id.* at 1494:21-24 (Plettenberg).

353. At the Senate State Administration hearing on February 15, 2021, Representative Greef testified that: "Elections don't just pop up out of the blue and surprise

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us. If we are a responsible voter, we study the ballot ahead of time and we also know if we need to register to vote . . . They wait to register to vote because they can." *Id*.

354. Senator Greg Hertz testified he voted in favor of HB 176 because he had heard from election administrators that they were having difficulty administering elections on Election Day. Aug. 24, 2022, Trial Tr. 1802:17-23 (Hertz).

355. Senator Hertz testified that he voted in favor of HB 176 to give election administrators more time to tabulate results on Election Day because any time there is a delay in counting the public grows concerned and that hinders the integrity of Montana's election process. Aug. 24, 2022, Trial Tr. 1804:23-1805:16 (Hertz).

356. Representative Custer, who had been the election administrator for Rosebud County for 36 years, testified that if she had voted on HB 176 based on her experience as an election administrator in a small county without much help, she would have voted in favor of it. Aug. 23, 2022, Trial Tr. 1616:4-20 (Custer).

357. One of the claimed interests addressed by ending EDR with the passage of HB 176 related to concerns about long lines on election day. However, as described by Dr. Street, "Election Day registration has been in Montana[,] an option that people have[,] at the county elections office. Most in person ballots on Election Day are cast at precincts, polling places. So[,] if there is a line at the county elections office, that doesn't necessarily affect wait times or lines at all at the places where most

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Montanans are actually voting." Aug. 16, 2022, Trial Tr. 382:3-13 (Street). Moreover, "if there is a line at the county elections office, many of them are likely to be trying to use Election Day registration." *Id.* at 382:14-16 (Street). According to an elections administrator, Election Day registration must be at the Election Official's office, election center, or a satellite office, but voters cannot register to vote at a polling place. Aug. 18, 2022, Trial Tr. 914:16-21 (Seaman). Mr. Seaman described that lines do form at the election center on Election Day but these are voters who know they are in that line to partake in Election Day Registration. *Id.* at 914:22-915:5 (Seaman). Mr. Seaman described that, while there is a line for those registering at the election office, "[a]t the polling place, there is not a wait time." *Id.* at 919:9-24 (Seaman). Also that, "the voters who want to utilize same day voter registration, they're the ones that are choosing to utilize that opportunity, and they're the ones that are impacted by longer wait times." *Id.* at 920:1-4 (Seaman).

358. Ms. Plettenberg described that when there are lines at the Ravalli County elections office, the people in that line are there to late register because "if they're already registered, then [they] send them out to the polls so they don't have to wait in line." Aug, 22, 2022, Trial Tr. 1506:11-1507:2 (Plettenberg). Moreover, if there were lines at polling places in Ravalli County, EDR would not impact them because Election Day registrants are not registering at polling places. *Id.* at 1507:25-1508:4 (Plettenberg).

359. Mr. Rutherford described that when voting in Yellowstone County in person at the Metra, "there is a

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dedicated line for new registrations on Election Day[.]" Aug. 24, 2022, Trial Tr. 2083:8-11 (Rutherford).

360. There is empirical data "suggest[ing] that Montana actually does very, very well in managing voter wait times, and that voters in Montana don't wait in line for very long, and that their wait times are lower than wait times nationwide." Aug. 22, 2022, Trial Tr. 1350:6-19 (Mayer). Dr. Mayer concluded, concerning reducing lines at polling locations on Election Day, that eliminating EDR is "unlikely to have an effect for two reasons, one is, that there is evidence that people—-that wait times are already not a problem. And if we think about the shifting of the administrative burden, if that burden exists, it means it's just going to be moved from Election Day to the day before or the day before that." *Id.* at 1351:23-1352:8 (Mayer). Further that, "[t]here really shouldn't be a relationship between polling place voting wait times and election [] registration wait times. Those are two separate processes." *Id.* at 1352:19-22.

361. HB 176 was passed by the Montana Legislature and signed into law by the Governor on April 19, 2021. It was effective upon enactment. Dkt. 207, Final Pretrial Order ¶ 1.

B. SB 169

362. Montana adopted voter identification laws in 2003 to comply with federal mandates requirement all states to enact voter identification laws. 2003 Montana Laws Ch. 475 (HB 190). The law, as it existed for nearly

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two decades, allowed voters to prove their identity with many forms of ID, including out-of-state driver's licenses and student IDs. § 13-13-114(1)(a), MCA (2005) (requiring voters to provide a photo ID, including but not limited to "a valid driver's license, a school district or postsecondary education photo identification, or a tribal photo identification"). Moreover, pre-SB 169 regulations specified that all photo IDs were "presumed to be current and valid." ARM 44.3.2102(6)(c) (2021); Aug. 23, 2022, Trial Tr. 1587:24-1588:15 (Custer) (describing practices pre-SB 169 and explaining that election officials did not check expiration dates on any identification documents presented to them).

363. Under the previous law, if a voter could not provide photo ID, they could instead provide any one of several categories of identifying documents, such as "a current utility bill, bank statement, paycheck, notice of confirmation of voter registration . . . government check, or other government document that shows the elector's name and current address." § 13-13-114(1)(a), MCA (2005).

364. If a voter lacked a photo ID, they could use a Polling Place Elector Identification Form (the "pink sheet"). Aug. 18, 2022, Trial Tr. 983:2-14, 984:16-23 (Seaman). Mr. Seaman described the pink sheet: on it, "the voter will provide us with their name, their current address, and then their identifying information, so that driver's license number or Social Security number. And . . . we . . . call into the office and using that same system we used before to verify that identifying information, we can verify that voter." *Id.* at 983:2-11 (Seaman). The pre-SB

169 Polling Place Elector Identification Form was a true failsafe for voters lacking identification because it was, on its own, sufficient identification at the polls once verified by election officials, and thus allowed the voters to cast a regular ballot. *See id.* at 983:2-14, 984:16-23 (Seaman); *see also* ARM §§ 44.3.2110(2)(b) (2013), 44.3.2102(9) (2010).

365. Students are generally less likely to have a drivers' license or state ID. Aug. 22, 2022, Trial Tr. 1358:16-25, 1359:17-20 (Mayer). Moreover, students living on-campus or in shared living situations often do not receive utility bills, have bank statements addressed to their school addresses, have any reason to have a government issued check, or have a job for which they receive paychecks. FMF 30(b)(6) Dep. 155:8-25; MontPIRG 30(b)(6) Dep. 95:15-24; Reese-Hansell Dep.[10] 51:7-13, 51:18-52:9, 59:10-60:9; PTX094 at 12:22-13:13.

366. The Montana youth voting rate steadily increased in recent years, with record-breaking youth turnout in recent elections. FMF 30(b)(6) Dep. 107:18-23.

367. Following the historically high turnout of young voters in the 2020 general election, the Montana Legislature passed SB 169, which imposes additional requirements on Montana voters who seek to use a student ID or out-of-state driver's license to vote. § 13-13-114, MCA (2021).

10. Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. J-1 (Deposition of Amara Reese-Hansell) ("Reese-Hansell Dep.").

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368. On January 28, 2021, Senator Mike Cuffe introduced SB 169. Dkt. 207, Final Pretrial Order ¶ 8.

369. On February 3, 2021, the Senate Committee on State Administration conducted a hearing to consider SB 169. Dkt. 207, Final Pretrial Order ¶ 9.

370. On February 19, 2021, the House Committee on State Administration conducted a hearing to consider SB 169. Dkt. 207, Final Pretrial Order ¶ 10.

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371. SB 169 was the Secretary's top priority for the 2021 legislative session. *See* Aug. 23, 2022, Trial Tr. 1561:20-1562:7 (Custer) (describing the effort to revise voter ID law as one of Secretary Jacobsen's "babies"); Aug. 25, 2022, Trial Tr. 2227:22-2229:15 (James); PTX062; PTX094 at 5:9-12 (Secretary Jacobsen stating "Voter ID is my number one priority this legislative session").

372. The Secretary felt that student identification needed to be demoted from a primary to a secondary form of identification for purposes of voting. Aug. 24, 2022, Trial Tr. 1865:25-1866:2 (Hertz).

373. The Secretary's Office was actively involved in getting SB 169 passed. Aug. 25, 2022, Trial Tr. 2258:12-25 (James). The Secretary's Office drafted the initial draft of SB 169 and was involved in subsequent revisions. *Id.* at 2258:15-17 (James); Aug. 23, 2022, Trial Tr. 1586:11-20 (Custer).

374. The Secretary supported SB 169 because it brought consistency among identification requirements. Trial Tr. 2158:4-14.

375. The Secretary had heard concerns from voters regarding the lack of regulations governing voter ID requirements; for example, the Secretary had heard concerns that the identification required to obtain a library card was more strict than the identification required to vote. Trial Tr. 2161:6-9.

376. When first introduced, SB 169 was "not very well thought out." Aug. 23, 2022, Trial Tr. 1582:1-5 (Custer); *see* PTX330. Representative Custer identified several problems with the bill, but the most jarring was that the initial draft placed non-verifiable forms of photo identification before driver's licenses and Social Security numbers. Aug. 23, 2022, Trial Tr. 1584:4-16 (Custer). Verifiable forms of ID can be run against an existing database. *Id.* at 1585:7-21 (Custer). ID numbers on driver's licenses and Social Security numbers are quicker and easier to verify than other forms of ID. *Id.*

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377. The initial draft of SB 169 also created two classes of identification and excluded student ID from the standalone photo ID category. PTX330; Aug. 23, 2022, Trial Tr. 1592:14-21 (Custer). A bipartisan group including Representative Custer, the Secretary of State's Office, an attorney from the Governor's Office, and Senate and House leadership, worked for nearly a month to significantly revise the bill. Aug. 23, 2022, Trial Tr. 1585:25-1588:5 (Custer); PTX331. Representative

Custer also described pressure to move the bill forward quickly saying, "They were on us," and describing a push to "hurry up and get this ID law in." Aug. 23, 2022, Trial Tr. 1589:10-17 (Custer).

378. The amended version removed reference to the word "valid" that used to modify the term "photo identification." *Id.* at 1587:24-1588:5 (Custer). This change incorporated usual practices among poll workers, who did not check whether photo or other forms of ID were valid. *Id.* at 1587:24-1588:15 (Custer). Deleting the word "valid" brought the law into conformance with election workers' normal conduct. *Id.* The amended version also intentionally included Montana University System-issued student ID in the standalone category of photo ID. *Id.* at 1585:24-1586:10 (Custer). The goal was "to make the best ID law in the land" and to "make it fair and workable." *Id.* at 1586:18-20 (Custer). That amended version passed out of committee. *Id.* at 1590:6 (Custer).

379. The Speaker of the House then carried an amendment on the House floor to make student IDs a secondary form of voter ID. *Id.* at 1590:2-1592:13 (Custer) (explaining that it is "highly unusual" for the Speaker to carry an amendment on the House floor); PTX332.

380. Representative Custer was "appalled" by the floor amendment to SB 169. Aug. 23, 2022, Trial Tr. 1592:22-24 (Custer). The prior version was the result of hard work and was meant to be "the best photo ID law in the nation without . . . discriminating against anybody." *Id.* at 1593:1-2 (Custer). In her view, moving Montana student

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ID—a form of ID that may be a person's "only form of ID when they're a first-time voter"—was clear discrimination. *Id.* at 1593:4-5 (Custer). Indeed, Representative Custer predicted that SB 169 would "probably go to court" as a result. *Id.* at 1593:6-8 (Custer).

381. Speaking in favor of the amendment, Speaker Galt remarked, "[I]f you're a college student in Montana and you don't have a registration, a bank statement, or a W-2, it makes me kind of wonder why you're voting in this election anyway." He concluded that young voters have "little stake in the game." Aug. 22, 2022, Trial Tr. 1365:18-1366:7 (Mayer); Aug. 23, 2022, Trial Tr. 1595:15-1596:7 (Custer).

382. Senator Hertz testified that he voted in favor of SB 169 because he believed it helped election administrators understand the different forms of identification that individuals could use to vote. Aug. 24, 2022, Trial Tr. 1810:8-17 (Hertz).

383. Senator Hertz testified that constituents told him they supported strong voter ID laws in advance of his vote on SB 169. Aug. 24, 2022, Trial Tr. 1811:24-1812:4 (Hertz).

384. Senator Hertz testified that SB 169 increases public confidence in Montana's elections because it helps ensure that the individuals who are voting are actually the people who are supposed to be voting, and they are voting in the correct state and district. Aug. 24, 2022, Trial Tr. 1913:18-24 (Hertz).

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385. SB 169 amended the primary ID requirement by making government-issued federal or Montana ID primary, and all other ID non-primary. Currently, a voter must show an election judge: a Montana driver's license, Montana state identification card issued pursuant to 61-12-501, military identification card, tribal photo identification card, United States passport, or Montana concealed carry permit; or (A) a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address; and (B) photo identification that shows the elector's name, including but not limited to a school district or postsecondary education photo identification. § 13-13-114 (i-ii), MCA.

386. SB 169 removed conditional language that resulted in people being able to use expired versions of documents for identification purposes. Aug. 25, 2022, Trial Tr. 2159:6-22 (James).

387. Under SB 169, voters can no longer use out-of-state driver's licenses or Montana college or university IDs to vote unless they also present additional documentary proof, such as: "a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address." § 13-13-114(1)(ii)(A), MCA.

388. The purpose of showing ID at the polls is so election judges can tell who you are. Aug. 23, 2022, Trial Tr. 1591:8-18 (Custer).

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389. The purpose of requiring an ID when you vote is to identify the voter specifically to the voter roll and increase the likelihood that the person is entitled to vote and eligible to vote. Aug. 25, 2022, Trial Tr. 2168:12-25 (James).

390. Election judges appreciated the changes made by SB 169. Aug. 23, 2022, Trial Tr. 1763:24-1764:2 (Tucek).

391. The drafting process for SB 169 was bipartisan and the intent was to make the best ID law in the land and one that was fair and workable. Aug. 23, 2022, Trial Tr. 1586:11-20 (Custer).

392. Many witnesses testified that they have only voted absentee in Montana elections and, as a result, have never had to show any identification to vote in Montana elections. Ms. Sinoff has always voted by absentee ballot since she registered to vote in 2018. Sinoff Dep. 62:7-63:25. Ms. Dozier has always voted absentee. Dozier Dep. 24:2-25:8, 41:11-13. Ms. Reese-Hansell has always voted absentee. Reese-Hansell Dep. 20:17-21:6.

393. A student ID is not indicative of a student's residency. Aug. 19, 2022, Trial Tr. 1242:11-13 (Hopkins).

394. Ms. Sinoff began attending Montana State University and obtained a student ID in the fall of 2017 but did not consider Montana to be her residence at that time. Sinoff Dep. 34:1-8. Ms. Sinoff obtained a Montana driver's license, and registered her vehicle in Montana, in order to gain residency for the purposes of obtaining

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in-state tuition. Sinoff Dep. 33:1-13. Prior to 2019, Ms. Sinoff considered California to be her home state. Sinoff Dep. 33:14-17.

395. A student who resides in Montana and drives is required to obtain a Montana driver's license. Aug. 19, 2022, Trial Tr. 1242:14-17 (Hopkins).

396. There are many activities that college students must do that require a form of ID other than a student ID. Aug. 19, 2022, Trial Tr. 1244:10-13 (Hopkins).

397. Ms. Sinoff testified that she has never seen anyone use their student ID as an acceptable form of identification for something serious. Sinoff Dep. 53:8-10. She never believed her student ID was an acceptable form of identification for anything other than getting into the gym. Sinoff Dep. 52.15-19.

398. Student identification cards can be used with the voter registration card the Secretary's office sends to each registered voter.

399. Montana voter registration cards explicitly state: "This card paired with a photo ID containing your name may be used as identification when you vote."

400. A driver's license is an indicator of residency. Trial Tr. 1242:11-13.

401. After SB 169, a person may use an expired or void Montana driver's license to vote. Trial Tr. 1087:18-1088:6.

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402. A student ID card with a federal application for student aid would be acceptable ID at the polls. Trial Tr. 1089:16-25.

403. Any document with a name and photo along with the Polling Place Elector ID form is sufficient ID to vote. Trial Tr. 1090:5-9.

404. Isaac Nehring voted early, in person, the day he turned 18. Trial Tr. 1113:16-17, 1116:20-24. He had a driver's license, a passport, had a bank account, and received a paycheck, all before he turned 18. 1129:15-1130:8.

405. Mitch Bohn testified that he has had a Montana driver's license since he was 18 and that he does not know any Montana adults over the age of 18 who do not have a Montana driver's license. Trial Tr. 187:17-24. Mr. Bohn never used his college ID to vote. Trial Tr. 189:10-11. Mr. Bohn affirmed that it would be weird if a college student did not have a driver's license and that "[f]or the most part, anyone over 18 has one." Trial Tr. 189: 12-18.

406. No witness testified in this case that they have ever used a student ID to vote or would need to use a student ID to vote.

407. Mr. Bohn testified that he has no personal experience on which to challenge the constitutionality of SB 169. Trial Tr. 190:3-5.

408. Shawn Reagor has never had a problem voting with gender-affirming identification, and has no

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knowledge of any specific transgender individual being unable to vote because of identification. Trial Tr. 1171:16-18. Mr. Reagor votes absentee and does not have to present any identification in order to do so. Trial Tr. 1174:4-11.

409. Gender affirming identification has three components: the person's correct name, an accurate picture, and an accurate gender marker. Trial Tr. 1158:18-23, 1177:18-24.

410. Obtaining a gender affirming ID can be as simple as updating the photo on a photo ID. Trial Tr. 1177:6-9.

411. Some legislators enacted SB 169 to prevent illegal voting, increase voter confidence in elections, and make it easier for election administrators to administer elections. Trial Tr. 1245:9-20.

412. Election experts have concluded that voter identification laws increase voter confidence in elections. Trial Tr. 1960:3-6.

413. SB 169 makes it easier for Native Americans to vote. Trial Tr. 1244:17-1245:4.

414. Before SB 169, a tribal member could not use an expired tribal ID to vote. Trial Tr. 743:20-22.

415. Plaintiff's claim that student identification cards are easier to forge than government issued identification such as a passport or Montana driver's license.

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416. Individuals that come to Montana from other states for college can be misled to believe that they can vote in Montana elections even if they do not consider Montana their home state. Sinoff Dep. 60:12-22.

417. Plaintiffs have not identified a single individual who was unable to vote due to SB 169. Trial Tr. 1245:21-24.

C. HB 530, § 2

418. Before HB 530, § 2, an individual voter in Montana could, at their discretion, opt to have someone collect their ballot and deliver it to a mailbox or polling place. Thus, it was a voluntary act on the part of each voter as to whether they want to accept the services of a ballot collector. *See generally* Aug. 15, 2022, Trial Tr. 152:8-16 (McCool). If a voter chooses to have their ballot collected by another person, they do not have to travel to a mailbox or polling site. Ballot collection eliminates travel time and costs—which is crucial for those who lack the time and financial resources to travel to a polling place, elections office, or post office, those who live far away from those locations, those who lack access to a vehicle or gas money, and those who do not receive home mail delivery. *Id*. at 121:25-122:7, 124:18-125:8 (McCool); *id*. at 229:1-14 (Weichelt); Aug. 16, 2022, Trial Tr. 534:6-538:20 (Gray); *id*. at 333:1-334:14, 334:17-335:6, 335:14-17, 337:9-338:5, 355:24-362:5, 371:15-372:20, 397:15-398:2, 437:19-438:23 (Street); Aug. 17, 2022, Trial Tr. 720:17-723:4 (Spotted Elk).

419. Organizations like WNV, MNV, and MDP have engaged in organized paid ballot collection for multiple

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election cycles over many years. PTX262; Aug. 17, 2022, Trial Tr. 835:8-13 (Horse); Perez Dep. 240:10-21; Aug. 15, 2022, Trial Tr. 142:17-143:3 (McCool); Aug. 19, 2022, Trial Tr. 1182:9-14 (Hopkins). These organizations pay their organizers an hourly wage to engage in numerous forms of GOTV work, including ballot collection and delivery. Aug. 17, 2022, Trial Tr. 855:1-8 (Horse); Aug. 19, 2022, Trial Tr. 1202:1-7 (Hopkins).

420. There has never been a formal complaint lodged against any paid ballot collector or organization engaging in paid ballot collection based on fraud, coercion, or intimidation. Aug. 16, 2022, Trial Tr. 541:24-542:4 (Gray); Aug. 17, 2022, Trial Tr. 727:4-7 (Spotted Elk); *id*. at 859:24-860:18 (Horse); Aug. 19, 2022, Trial Tr. 1258:13-17 (Hopkins); Aug. 24, 2022, Trial Tr. 2093:17-22 (Rutherford). Indeed, the co-sponsor of HB 530, Senator Hertz, is not aware of any misconduct related to ballot collection on Native American reservations in Montana or of any voter interference occurring on Native American reservations in Montana. Aug. 24, 2022, Trial Tr. 1906:22-1907:18 (Hertz).

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421. In fact, the rate of voter fraud is actually higher in states that ban ballot assistance, rather than those the permit ballot assistance. Aug. 15, 2022, Trial Tr. 137:4-10 (McCool).

422. Nevertheless, in recent history there have been numerous attempts to ban or restrict ballot collection in Montana. *See* PTX003; PTX010; PTX014. These efforts operate to suppress the voting rights of certain segments of the population—most particularly, Native Americans,

voters with disabilities, and young people. *See*, *e.g.*, Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Stapleton* ("*WNV I*"), No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020).

423. In 2017, the Montana Legislature placed BIPA—which severely restricted ballot collection—on the 2018 ballot. PTX014. BIPA prohibited the knowing collection of a ballot, unless the collector was the voter's acquaintance, family member, caregiver, household member, Postal Service worker, or election official. Only Postal Service workers or election officials could collect more than six ballots. §§ 13-35-703, MCA; 13-35-704, MCA. BIPA included a per-ballot fine for any ballots collected outside of the proscriptions of the law. *Id.*

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424. At several legislative hearings on BIPA, the Legislature heard testimony that BIPA would be extremely burdensome for Montana's Native American voters. For example, at the Senate State Administration Committee hearing held on March 22, 2017, Plaintiff CSKT testified that BIPA did "not align with how many of us in my community vote [given the] barriers to voting for tribal people. . . . [and BIPA's] limit to who can pick up a ballot . . . creates even more obstacles to voting for us." PTX038 at 13:13-21. Plaintiff CSKT further testified that "[g]roups like Western Native Voice goes out and collects ballots for Natives [and that BIPA] could eliminate that vital service for Native people." *Id.* at 13:24-14:2.

425. Ms. McCue also testified against BIPA on behalf of the Montana Association of Clerk and Recorders

at the same Senate hearing. *Id.* at 6:15-20. She testified that BIPA was unnecessary to prevent unsolicited ballot collection and undelivered ballots. *Id.* at 7:5-8 (noting that "election administrators generally do not find there to be any problems with ballot interference in Montana"). She further testified that BIPA targets voters who "would do things right rather than those who would do things wrong." *Id.* at 7:15-16.

426. Voters can track their ballots by going online or calling local election officials to make sure collected ballots were in fact delivered. Agreed Fact No. 30. To the extent others perceived a problem with unlawful ballot interference, including failure to deliver a collected and voted ballot or other harassment of voters in an effort to collect a ballot, Montana's laws already punished individuals for coercing voters or for preventing other voters from casting their ballots. PTX038 at 9:24-10:2; *see also*, *e.g.*, § 27-1-1501, MCA *et seq.*

427. At the April 6, 2017, House Judiciary Committee hearing, WNV testified that "ballot collection is one of the main components of our GOTV program. It ensures that everyone who wants to vote has that ability. In election years, we hired ten community organizers across the state, that includes all seven reservations and three major urban areas. Each organizer participates in a total of five days of training before they begin our Get Out to Vote program. So, they are well-trained and do a great job of collecting ballots." PTX040 at 17:7-16. The Montana Association of Clerk and Recorders again testified against BIPA before the House Judiciary Committee, further

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underscoring that the clerks did not support prohibitions on ballot collection and did not believe that organized ballot collection was a problem in Montana. *Id.* at 7:15-10:7.

428. On November 6, 2018, voters approved BIPA. On March 12, 2020, a group of plaintiffs representing a cohort of Montana's tribal nations and organizations that serve Montana's tribal nations filed suit challenging BIPA in Yellowstone County based on the harm to Native American voters. After a three-day trial, Judge Fehr found that BIPA violated the plaintiffs' right to vote, freedom of association, and due process, and permanently enjoined BIPA's enforcement. Judge Fehr's 61-page order meticulously detailed how BIPA's restriction on ballot collection "disproportionately harms . . . Native Americans in rural tribal communities" because "Native Americans living on reservations rely heavily on ballot collection efforts in order to vote in elections," in large part "due to lack of traditional mailing addresses, irregular mail services, and the geographic isolation and poverty that makes travel difficult" for these Native American voters. *WNV I*, at 48, ¶ 20.

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429. Likewise, in an action filed by MDP and others, Judge Donald Harris found that BIPA's restriction on ballot collection "burden[ed] the right to vote" for Native Americans and those living in rural tribal communities "by eliminating important voting options that make it easier and more convenient for voters to vote," thereby "increasing the costs of voting." *Driscoll v. Stapleton* ("*Driscoll I*"), No. DV 20 408, 2020 WL 5441604 (Mont. Dist. Ct. May 22, 2020); *see also Driscoll v. Stapleton*

("*Driscoll II*"), No. DV 20 408, slip op. (Mont. Dist. Ct. Sept. 25, 2020).

430. The Montana Supreme Court upheld the preliminary injunction against BIPA that MDP obtained in the *Driscoll* case, finding that restricting ballot collection "will disproportionately affect the right of suffrage for . . . Native Americans." *Driscoll v. Stapleton* ("*Driscoll III*"), 2020 MT 247, ¶ 21, 401 Mont. 405, 473 P.3d 386.

431. Following these District Court orders holding BIPA unconstitutional, the Secretary presented no evidence that the Legislature considered what was unconstitutional about BIPA or made any effort to craft HB 530 to remediate the access issues identified by the courts. To the contrary, the one legislator that the Secretary called to testify at trial stated that he did not study impediments on Native American voters' access to the franchise, did not consider the impact on Native American voters when ballot collection is restricted, did not read the opinions finding BIPA unconstitutional, made no effort to learn why BIPA was held unconstitutional, but nonetheless supported HB 530, § 2, and advocated for its passage on the Senate floor. Aug. 24, 2022, Trial Tr. 1903:18-1904:7, 1906:14-1911:19 (Hertz).

432. On February 12, 2021—less than six months after BIPA was permanently enjoined—a new ballot collection ban was introduced in the Montana House. PTX003. This bill, HB 406, would have effectively revived BIPA, with minor modifications that did not correct its constitutional infirmities. *Compare* PTX003 *with* PTX014.

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433. Numerous groups testified against HB 406, including Ms. Plettenberg on behalf of the Montana Association of Clerks and Recorders and representatives of Plaintiffs' groups. PTX096 at 16:24-18:4; PTX107 at 33:16-22. Further, the chief legal counsel for the Office of Commissioner of Political Practices testified against the bill, motivated by her position that HB 406 was, like BIPA, unconstitutional. PTX096 at 4:7-6:11.

434. Although HB 406 ultimately did not pass, an amendment to a separate election bill—HB 530, § 2—constituted a third attempt to revive BIPA. *Compare* PTX009 *with* PTX014; *see also* PTX016; PTX018. The text of this amendment came directly from Spenser Merwin, then-Executive Director of the Montana Republican Party, who emailed nearly identical language to Senator Greg Hertz on Friday, April 23, 2021. PTX124; Aug. 24, 2022, Trial Tr. 1875:6-1876:5 (Hertz). Senator Hertz forwarded that email and its attachments to Senator Steve Fitzpatrick, one of the primary sponsors of HB 530, that afternoon. Aug. 24, 2022, Trial Tr. 1876:12-14 (Hertz); PTX124. That same day, the Senate "blasted" the bill to the Senate floor so that it did not have to go through committee and was passed without the opportunity for public testimony. Aug. 24, 2022, Trial Tr. 1886:6-1887:4 (Hertz); PTX126; PTX018; Aug. 23, 2022, Trial Tr. 1559:2-6 (Custer) (explaining that the amendment that became § 2 of HB 530 was "jammed in at the last minute," and was not added to the bill until after it was out of committee and had been debated by the House). Senator Fitzpatrick introduced the amendment on Monday, April 26, and the full Legislature passed the bill as amended the next day,

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April 27, 2021. Aug. 24, 2022, Trial Tr 1886:9-20 (Hertz); PTX018.

435. When debating the amendment to HB 530 on the floor of the Senate, Senator Hertz referred to the legislation as a "good bill" without considering its constitutionality in light of past legal challenges to ballot collection laws. Aug. 24, 2022, Trial Tr. 1908:25-1910:7 (Hertz). Senator Hertz did not consider the reliance of Montana's Native American populations on ballot collection nor the disproportionate effect a ballot collection ban would have on those communities before voting to approve the legislation. *Id.* at 1910:8-1911:19 (Hertz).

436. The amendment to HB 530, which became HB 530, § 2, included another ballot collection restriction. PTX010.

437. The amendment provided:

a. (1) On or before July 1, 2022, the secretary of state shall adopt an administrative rule in substantially the following form:

   i. (a) For the purposes of enhancing election security, a person may not provide or offer to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots.

   ii. (b) "Person" does not include a government entity, a state agency as defined in 1-2-116,

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a local government as defined in 2-6-1002, an election administrator, an election judge, a person authorized by an election administrator to prepare or distribute ballots, or a public or private mail service or its employees acting in the course and scope of the mail service's duties to carry and deliver mail.

b. (2) A person violating the rule adopted by the secretary of state pursuant to subsection (1) is subject to a civil penalty. The civil penalty is a fine of $100 for each ballot distributed, ordered, requested, collected, or delivered in violation of the rule.

PTX009; PTX010.

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438. Since the amendment was added after the committee process, there was no ability for the public to provide testimony regarding the amendment. Aug. 23, 2022, Trial Tr. 1560:13-17 (Custer); Aug. 24, 2022, Trial Tr. 1887:3-1888:2 (Hertz).

439. During the April 26, 2021, Senate floor session, Senator Fitzpatrick conceded that the amendment was added "late." PTX129 at 3:19-20. The sole piece of evidence cited by the sponsor for the amendment was an instance of alleged fraud that occurred in North Carolina several years ago, *id.* at 3:24-4:2—the same incident was cited by the State as a reason for BIPA and found unpersuasive by Judge Fehr and Judge Harris given the long and

unproblematic history of ballot collection in Montana and the absence of fraud in the state. Aug. 24, 2022, Trial Tr. 1821:8-9 (Hertz); *WNV I*; *Driscoll II*.

440. Senator Bryce Bennett spoke in opposition to the amendment, noting that the amendment to HB 530, § 2 was an "attempt to try and highjack a bill" and that it provided "no definitions." PTX129 at 4:15-6:4; *see also* Aug. 23, 2022, Trial Tr. 1561:11-16 (Custer). He further noted that the amendment was bringing back a policy found unconstitutional by the Montana courts and already rejected by the Legislature in the current session. PTX129 at 4:21-25.

441. In response to Senator Bennett' s concerns that the policy was unconstitutional, Senator Hertz responded, claiming that the issues with ballot collection were "tightened up," *id.* at 6:6-8, but Senator Hertz had done no investigation into why BIPA was found unconstitutional, Aug. 24, 2022, Trial Tr. 1911:12-19 (Hertz), demonstrating that his assertion was unfounded.

442. The very next day, April 27, 2021, the House held a floor session during which Representative Wendy McKamey, the original sponsor of HB 530, conceded that she had not requested the amendment adding a ballot collection ban. PTX133 at 2:12-15. Representative McKamey failed to provide any anecdotal or statistical evidence to support a need for a new ballot collection ban and even misrepresented the state of the law in Montana (testifying incorrectly that "for years we've allowed up to six ballots to be collected by an individual"). *Id.* at 2:12-4:12.

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443. In opposition, Representative Denise Hayman testified that the amendment is "a backdoor version" of BIPA, and that reinstituting such restrictions would increase voter confusion, as well as increase the workload of election officials. *Id.* at 4:16-23.

444. Representative Tyson Running Wolf also testified in opposition to the HB 530, § 2 amendment, indicating that he had supported HB 530 without the newly offered amendment. *Id.* at 5:17-21. He explained that the new Section 2 of HB 530 "effectively ends the legal practice of ballot collection," which is heavily relied upon by Native American voters in Montana and would result in "en masse" disenfranchisement. *Id.* at 5:23-6:3. In his words, "[b]allot collection is a lifeline to democracy for rural indigenous communities" because of social and economic barriers such as long distances to election offices and lack of access to transportation in Indian Country. *Id.* at 6:16-18.

445. Representative McKamey failed to rebut or even acknowledge these impacts in her closing remarks on the legislation before it went to a vote. *Id.* at 7:10-8:19.

446. Representative Running Wolf's testimony on the impact of ballot collection prohibitions on Native Americans in Montana was highly consistent with both the legislative testimony the Legislature heard during BIPA and the multiple court decisions striking down BIPA as unconstitutional. *Compare Id.* at 5:23-6:18 *with* PTX038-PTX041; *WNV I*; *Driscoll II*.

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447. HB 530, § 2 is, in fact, even more restrictive than BIPA. Not only does it restrict paid ballot collection, but it also restricts distribution, ordering, requesting, and delivering ballots. PTX010; *see also* Aug. 16, 2022, Trial Tr. 333:13-19, 356:8-24, 388:2-7 (Street).

448. HB 530—including the amendment prohibiting paid ballot collection that became § 2—was signed into law by the Governor on May 14, 2021. PTX018.

449. Under HB 530, § 2, the Secretary of State is charged with engaging in the administrative rulemaking process and implementing a rule in accordance with HB 530, § 2 by July 1, 2022. PTX010.

450. There is no identifiable policy, standard, or rule in HB 530 § 2 that informs the administrative rule regarding the meaning of "pecuniary benefit." Aug. 25, 2022, Trial Tr. 2225:1-17 (James) (indicating the Secretary is unable to identify any policy, standard, or rule in HB 530 § 2 that informs the administrative rule regarding the meaning of pecuniary benefits).

451. The Secretary's designee confirmed that the administrative rule corresponding to HB 530, § 2 would be required to be within the confines of the statute. *Id.* at 2217:11-17 (James).

452. Regardless of any administrative rule that the Secretary might adopt, payment of a pecuniary benefit for collecting ballots would directly contradict the language of HB 530, § 2. *Id.* at 2220:20-25 (James). Moreover, paid

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ballot collection could violate HB 530, § 2, prior to the issuance of any administrative rule. *Id.* at 2221:1-4.

453. The Secretary's designee confirmed that the Secretary's Office had not analyzed whether HB 530, § 2 would have any particularized impact on some groups versus others. *Id.* at 2221:25-2222:3 (James). He also confirmed that the Secretary's Office had not conducted any analysis on the impact of HB 530, § 2 on voter turnout. *Id.* at 2221:21-24 (James).

454. Even though the Secretary has not yet drafted the rules required by HB530, § 2, the text of the statute itself makes mandatory a rule that does not allow anyone to "provide or offer to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots." PTX009. The statute requires that the administrative rule the Secretary ultimately adopts must be "in substantially the same form" as HB 530, § 2. *Id.*

455. Upon enactment, HB 530, § 2 had an immediate chilling effect on certain Plaintiffs' plans for the upcoming election cycle, stopping their ability to offer ballot collection as a service to the communities that they serve. Aug. 17, 2022, Trial Tr. 852:12-22, 854:6-14 (Horse); Perez Dep. 250:24-251:18; *see also* Aug. 16, 2022, Trial Tr. 437:11-18 (Street).

456. The elimination of paid ballot collection increases voter costs for voters residing on reservations because they live farther from post offices, which are an

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important part of the election process in Montana. Aug. 15, 2022, Trial Tr. 120:10-24, 121:25-122:7, 125:7-21 (McCool); *Id*. at 228:18-229:10 (Weichelt).

457. WNV and MDP have both conducted GOTV activities throughout the state of Montana, and both groups have previously relied on paid staff to offer ballot assistance to Montana voters. PTX262; Aug. 17, 2022, Trial Tr. 833:15-20 (Horse); Aug. 19, 2022, Trial Tr. 1201:10-1203:2 (Hopkins). Both organizations intend to continue to engage paid staff to offer ballot assistance to Montana voters if the practice remains legal. Aug. 17, 2022, Trial Tr. 849:9-25 (Horse); Aug. 19, 2022, Trial Tr. 1221:4-1222:6 (Hopkins).

458. The passage of HB 530, § 2 caused WNV to stop its ballot collection activity, a critical component of its work. Perez Dep. 250:24-251:18; Aug. 17, 2022, Trial Tr. 851:15-24 (Horse).

459. While certain people or groups might be able to conduct ballot collection without payment, WNV, which conducts a large amount of the ballot collection on reservations in Montana, relies specifically on paid organizers to conduct this work. Aug. 17, 2022, Trial Tr. 853:10-23 (Horse); Perez Dep. 189:9-11, 191:8-192:2.

460. WNV specifically hires organizers from the communities in which they do their work, Aug. 17, 2022, Trial Tr. 730:20-731:3 (Spotted Elk); *id.* at 821:2-12 (Horse)—*i.e.*, from the on-reservation Native American population who have much lower income levels and

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higher poverty rates than the rest of the state, Aug. 15, 2022, Trial Tr. 93:3-7 (McCool). WNV would be unable to undertake its work if it was forced to rely only upon those who are able to forgo wages. Aug. 17, 2022, Trial Tr. 821:2-12 (Horse), Perez Dep. 191:8-192:2.

461. WNV considers paid ballot collection to be a political statement because it is a critical way for Native American voters to have their voices heard in the electoral process. Aug. 17, 2022, Trial Tr. 834:12-22 (Horse). Ballot collection is central to WNV's mission. *Id.* at 834:23-25.

462. Likewise, if HB 530, § 2 had not been enjoined, it would have prevented MDP from engaging in ballot collection activity, a key part of its GOTV activities. Aug. 19, 2022, Trial Tr. 1221:4-1222:6 (Hopkins). MDP relies upon paid employees and volunteers who are reimbursed for certain expenses. For example, in 2020, MDP hired several staffers from tribal communities to offer ballot collection services on reservations. *Id.* at 1201:15-20, 1203:3-6 (Hopkins).

463. HB 530, § 2 does not only burden Plaintiffs or the voters they serve. Other groups of voters rely on organized ballot collection, too. For example, Montanans with disabilities, including those in congregate care, often need assistance with registering to vote, requesting an absentee ballot, and returning an absentee ballot. Aug. 22, 2022, Trial Tr. 1450:5-1453:24 (Franks-Ongoy). Voters with disabilities may not be able to rely on caregivers or family members to assist them in obtaining and returning their ballots, and they may lack the ability to leave a congregate

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care facility—either because they are committed or because they lack accessible transportation—as well as the ability to mail ballots themselves. *Id.* at 1462:10-1463:12 (Franks-Ongoy).

464. DRM helps voters with disabilities both in and outside of congregate care vote by distributing, ordering, requesting, collecting, and delivering ballots by helping voters complete absentee ballot request forms and collecting and returning completed absentee ballots. *Id.* at 1460:6-21 (Franks-Ongoy). When DRM engages in these assistance activities, it sometimes does so as a voter's agent, as permitted by Montana law. *Id.* at 1459:17-1460:25 (Franks-Ongoy); *see also* § 13-1-116(4)(a), MCA (allowing voters unable to provide a signature to designate an agent to assist them "throughout the registering and voting process"); § 13-13-213(2), MCA (permitting agent designated under § 13-1-116 or other third party to collect and return elector's absentee ballot application). DRM also engages in these activities at times when it has not been appointed the voter's agent. Aug. 22, 2022, Trial Tr. 1459:22-1460:5 (Franks-Ongoy). DRM's staff members assist voters as part of their salaried jobs. *Id.* at 1464:14-1465:7 (Franks-Ongoy). Additionally, DRM receives a grant specifically to assist voters with disabilities in the voting process—including in obtaining and returning absentee ballots. *See id.* at 1464:12-1465:14 (Franks-Ongoy). DRM is concerned that its ballot assistance activities are prohibited by HB 530, § 2. *Id.* And without DRM's ballot assistance activities, many of the voters with disabilities that DRM otherwise would have assisted in voting would not vote at all. *Id.* at 1464:2-6 (Franks-Ongoy).

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VII. State's Interests

465. There is no evidence of significant or widespread voter fraud in Montana, let alone any fraud that HB 176, SB 169, or HB 530, § 2 would remedy. Aug. 15, 2022, Trial Tr. 127:20-131:21 (McCool); Aug. 24, 2022, Trial Tr. 2026:10-14, 2027:16-2028:16, 2029:6-2030:11 (Trende); Aug. 23, 2022, Trial Tr. 1547:1-22 (Custer) (after seeing Secretary Stapleton's ad referencing election fraud after 36 years serving as Rosebud County's top election official, "I felt like I had been punched in the gut"); *id.* at 1547:9-14, 1549:12-1553:24 (Custer) (listing and describing election security protocols).

466. Voter fraud in Montana is vanishingly rare. A comprehensive database from the conservative thinktank the Heritage Foundation—which has "a very expansive definition of voter fraud," Aug. 15, 2022, Trial Tr. 128:11-129:14 (McCool); *see also* Aug. 22, 2022, Trial Tr. 1379:20-1380:8 (Mayer) (explaining that the Heritage Foundation database "establishes an upper band of the potential cases of voter fraud")—found just one voter fraud conviction in Montana out of millions of votes in Montana cast in the past four decades. Aug. 15, 2022, Trial Tr. 129:18-130:6 (McCool). That case had nothing to do with EDR, third-party ballot assistance, or student IDs. *Id.*; Aug. 22, 2022, Trial Tr. 1380:25-1381:2, 1382:6-1383:23 (Mayer); *see also* Aug. 24, 2022, Trial Tr. 2029:13-19 (Trende).

467. In 2020, the then-Montana Secretary of State completed a post-election audit and identified no problems. Aug. 15, 2022, Trial Tr. 130:11-16 (McCool).

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468. In connection with the BIPA litigation, two county election administrators—at least one of whom was speaking about the entire state of Montana—said that they knew of no instances of voter fraud. *Id.* at 130:17-131:4 (McCool).

469. Neither the sponsors of the challenged laws, nor any proponents of the bill, provided any evidence of voter fraud in Montana. Aug. 15, 2022, Trial Tr. 131:5-13, 131:18-20 (McCool). Indeed, Senator Hertz agreed that Montana has a long history of secure and transparent elections, including before the three challenged bills were passed into law. Aug. 24, 2022, Trial Tr. 1828:14-24 (Hertz); *see also* Aug 23, 2022, Trial Tr. 1602:7-17 (Custer) (asked whether the challenged laws promote election security, Representative Custer answered: "I don't think [the challenged laws] did anything. . . . Because we didn't have a problem in the first place. Not that we can't look at things and make improvements, but I don't see that these did a thing.").

470. There is no evidence of any voter fraud in Montana associated with EDR, student IDs, or third-party ballot assistance, and not even the Secretary's own witnesses believe voter fraud is a problem in Montana. Aug. 18, 2022, Trial Tr. 922:14-17 (Seaman); Aug. 22, 2022, Trial Tr. 1380:12-20 (Mayer) (explaining that there is no causal connection between photo ID and voter fraud in Montana); Aug. 23, 2022, Trial Tr. 1549:7-11, 1574:4-7 (Custer); *id.* at 1718:20-24, 1721:2-5, 1721:16-20 (Ellis); *id.* at 1775:9-1777:2 (Tucek); Aug. 24, 2022, Trial Tr. 1889:24-1890:7, 1891:4-7 (Hertz); *id.* at 2091:10-2092:1 (Rutherford); Aug.

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25, 2022, Trial Tr. 2210:4-8, 2213:14-2216:20, 2262:18-20 (James); Eisenzimer Dep. 83:20-22; PTX094 at 22:5-21 (Secretary's Election Director admitting to same during legislative hearings on SB 169).

471. The Secretary's own expert witness agrees that voter fraud is not a substantial problem in Montana. Aug. 24, 2022, Trial Tr. 2027:22-2028:16 (Trende).

472. The Secretary has provided no evidence that voter fraud is a substantial problem in Montana, nor that there exists any connection between voter fraud and the voting restrictions at issue in this case. And indeed, all evidence presented in this case is to the contrary. *See, e.g.*, Aug. 15, 2022, Trial Tr. 126:14-137:23 (McCool); Aug. 22, 2022, Trial Tr. 1368:2-5, 1372:6-11, 1379:2-1380:20 (Mayer); Aug. 23, 2022, Trial Tr. 1720:19- 1721:5 (Ellis); Aug. 23, 2022, Trial Tr. 1775:9-1777:2 (Tucek); Aug. 24, 2022, Trial Tr. 2027:22-2028:16 (Trende); Eisenzimer Dep. 83:20-22.

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473. Even if there were any evidence of voter fraud or coercion—which there is not, related to EDR, ballot collection, student identification, or otherwise—the challenged laws are not necessary because Montana has several other existing statutes that already criminalize such activity. Aug. 16, 2022, Trial Tr. 387:11-390:16 (Street); *see also* § 13-35-201 *et seq.*

474. Montana makes it a crime to: "knowingly violate[] a provision of the election laws" of Montana, § 13-35-103, MCA; show another individual a marked

ballot or solicit a voter to show them their market ballot, § 13-35-201(1), (3). MCA; to use "force, coercion . . . or undue influence" or "duress" to interfere with another's vote, § 13-35-218, MCA; to destroy anyone's ballot, § 13-35-206(4), MCA; to use "deceptive election practices" such as knowingly causing a false statement to be made or voting someone else's ballot, § 13-35-207, MCA; or vote more than once in an election, § 13-35-210(1), MCA. *See* Aug. 16, 2022, Trial Tr. 390:11-16 (Court taking judicial notice of these laws).

475. The criminal penalties for violating these laws are substantial, including misdemeanor or felony charges, imprisonment for up to 10 years, or fines up to $50,000. § 13-35-201 *et seq.*; § 45-7-208, MCA.

476. The Secretary provides no evidence that the existing laws are somehow insufficient to protect against voter fraud or coercion.

477. The rate of voter fraud is also infinitesimally small in the United States more broadly. Aug. 15, 2022, Trial Tr. 131:22-133:1 (McCool).

478. According to the conservative Heritage Foundation, which has "a very expansive definition of voter fraud," *id.* at 128:11-129:14 (McCool), voter fraud constitutes about 0.00006% of the total votes cast in the United States, *id.* at 131:22-132:12 (McCool).

479. A recent analysis of three states with all vote-by-mail elections calculated that the number of "possible

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cases" of voter fraud—a figure which includes allegations, not just convictions or confirmed cases—was 0.0025 percent of all votes cast. *Id*. at 132:13-133:1 (McCool).

480. Montana has not had any student ID-related election fraud in the nearly two decades since such IDs have been permitted as voter identification. Aug. 18, 2022, Trial Tr. 983:15-19 (Seaman); Aug. 22, 2022, Trial Tr. 1380:12-20 (Mayer); Aug. 23, 2022, Trial Tr. 1776:4-19 (Tucek); Aug. 24, 2022, Trial Tr. 1891:4-7 (Hertz); *id*. at 2091:21-23 (Rutherford); Aug. 25, 2022, Trial Tr. 2262:25-2263:7 (James).

481. Missoula County, home to the University of Montana, has had no problems with voters using student IDs at the polls, Aug. 18, 2022, Trial Tr. 982:9-13 (Seaman), and Mr. Seaman is unaware of any instances of voter fraud in Missoula County, let alone any fraud associated with the voter ID process, *id.* at 983:15-19 (Seaman). There is no evidence of any problems with the use of student IDs at the polls anywhere in Montana.

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482. Numerous election administrators testified that they did not have any knowledge of fraud related to voter ID. *Id.*; Aug. 23, 2022, Trial Tr. 1776:4-19 (Tucek); Aug. 24, 2022, Trial Tr. 2091:21-23 (Rutherford).

483. There is no evidence that SB 169 will protect against voter fraud. Aug. 22, 2022, Trial Tr. 2026:10-14 (Trende). And legislators who supported the bill can cite no evidence beyond their own feelings. Aug. 24, 2022, Trial Tr. 1865:1-6 (Hertz).

484. The record supports the conclusion that voter ID laws neither reduce fraud nor improve voter confidence. Aug. 16, 2022, Trial Tr. 392:5-18 (Street); Aug. 22, 2022, Trial Tr. 1371:24-1372:11 (Mayer) (explaining that evidence relied upon by the Secretary's expert even finds no relationship between voter ID laws and curbing voter fraud); Aug. 24, 2022, Trial Tr. 2024:15-2025:23 (Trende) (Secretary's own expert agreeing with these conclusions); *id.* at 1889:21-23 (Hertz) (Senator Hertz agreeing that he has no data on voter confidence in Montana).

485. There is no evidence that student IDs or out-of-state driver's licenses are less secure or more susceptible to forgery than the primary forms of ID under SB 169, and in any event, there is no evidence that anybody has ever forged a student ID or an out-of-sate driver's license to vote in Montana. Aug. 25, 2022, Trial Tr. 2262:18-2263:14 (James).

486. Nor is there any evidence that HB 530, § 2 will effectuate the state's asserted interest in preventing voter fraud. Aug. 15, 2022, Trial Tr. 137:21-23 (testifying that "[t]here is no connection" between third-party ballot collection and voter fraud) (McCool).

487. In *Driscoll*, the Secretary at that time "did not present evidence in the preliminary injunction proceedings of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana." *Driscoll III*, ¶ 22. The same is true here.

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Appendix B

488. The Secretary cites no evidence of any connection between ballot assistance and voter fraud in Montana.

489. Although the Secretary argues that banning EDR promotes election integrity, she presented no evidence of any connection between EDR and fraud. "There is no connection" between EDR and voter fraud. Aug. 15, 2022, Trial Tr. 137:18-20 (McCool); *see also* Aug. 24, 2022, Trial Tr. 2029:9-12 (Trende). Mr. Seaman testified that he is "unaware of any instances of voter fraud in Missoula County." Aug. 18, 2022, Trial Tr. 983:18-19 (Seaman). He also testified that voters waiting in line to register, at the election center on Election Day, does not create additional opportunities for voter fraud. *Id*. at 922:14-17 (Seaman). The lack of connection between fraud and EDR was echoed in the testimony of other election administrators. *See* Aug. 23, 2022, Trial Tr. 1549:7-11, 1574:4-7 (Custer); *id*. at 1718:20-23 (Ellis); *id*. at 1775:9-20 (Tucek); Aug. 24, 2022, Trial Tr. 2091:14-17 (Rutherford).

490. In fact, while voter fraud is extraordinarily rare, the rate of voter fraud is actually higher in states that *ban* third-party ballot collection than it is in states that permit it. Aug. 15, 2022, Trial Tr. 136:14-137:14 (McCool).

491. Ms. Tucek testified that she was unaware of any voter fraud in either of those counties related to absentee ballots, and that the absentee balloting process throughout the state of Montana is "secure." Aug. 23, 2022, Trial Tr. 1775:21-1776:3, 1776:20-1777:2 (Tucek).

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Appendix B

492. Mr. Ellis testified that he is not aware of any instance of a voter intimidation or coercion, nor any instances of voter fraud involving absentee ballots generally. *Id*. at 1720:19-1721:5 (Ellis).

493. Mr. Seaman testified that he is unaware of any ballot tampering or fraudulent interference with mail ballots in Missoula County. Aug. 18, 2022, Trial Tr. 1005:17-21 (Seaman).

494. Mr. Rutherford testified that he was not aware of any evidence of fraud or intimidation related to ballot assistance. Aug. 24, 2022, Trial Tr. 2091:18-20 (Rutherford).

495. There is no evidence to suggest that paid ballot collection would lead ballot collectors to tamper with ballots. Aug. 16, 2022, Trial Tr. 387:11-390:16 (Street).

496. The Secretary's claim that HB 176 furthers a compelling state interest by easing administrative burdens is not supported by the evidence.

497. The process of registering a new voter is not itself burdensome, though it does necessarily take time and require know-how. Even so, election administrators estimate that registering a new voter takes a short amount of time. Aug. 18, 2022, Trial Tr. 909:8-12 (Seaman) (registering a voter in person takes three to five minutes); Aug. 23, 2022, Trial Tr. 1768:24-1769:1 (Tucek) (registering new voter "[u]sually" takes "less than five minutes"); *id.* at 1571:7-13 (Custer) (registering voter takes two to ten

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minutes depending on the experience of person handling the registration); *id.* at 1713:17-1714:9 (Ellis) (registering a voter takes 10-15 minutes); Aug. 24, 2022, Trial Tr. 2098:2-23 (Rutherford) ("worst case scenario" takes up to 15 minutes to register a voter, but typically less); Eisenzimer Dep. 50:5-7 (registering a new voter on Election Day "takes between five to ten minutes"); *see also* Aug. 24, 2022, Trial Tr. 1840:13-1841:8 (Hertz).

498. If EDR leads to additional work for election administrators, it is only because it boosts voter turnout. Aug. 24, 2022, Trial Tr. 1901:7-10 (Hertz). As noted by Ms. McCue when she testified in opposition to HB 176, "any time someone registers and vote[s], it's more work for us." PTX091 at 11:5-6; *see also* Aug. 23, 2022, Trial Tr. 1574:16-21 (Custer) (recalling her testimony about HB 176: "I just, in my good conscience, can't vote for something that I know really isn't going to make elections more secure. It might make a little less work for the people in the offices on Election Day, but that's what they signed up for"). Ms. McCue also testified that ending EDR was "not . . . helpful administratively" and "will not help [her]" in her job administering elections. PTX091 at 10:10, 11:1-2.

499. Mr. Seaman testified that his staff was "prepared to accommodate Election Day registration" and that EDR "is the final safeguard" and a "critical part of our democracy" to ensure that everyone is able to cast their vote. Aug. 18, 2022, Trial Tr. 903:4-13 (Seaman).

500. Mr. Seaman has far fewer full-time staff per voter than rural counties. There are five full-time staff

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in Missoula County, including Mr. Seaman himself, *id.* at 900:24-25 (Seaman), serving 88,848 registered voters, PTX190.001. Accordingly, Missoula County has more than 17,769 registered voters per staff member. *See id.*; *see also* Aug. 23, 2022, Trial Tr. 1774:23-1775:4 (Tucek). In Broadwater County, Mr. Ellis had six full-time staff members, Aug. 23, 2022, Trial Tr. 1707:7-9 (Ellis), serving 5,017 registered voters, *id.* at 1692:16-21, which means that, under his reign, Broadwater County had 836 registered voters per staff member, *see id.*—more than 21 times fewer than in Missoula County. Fergus County has 7,480 registered voters and two staff members, PTX190.001; Aug. 23, 2022, Trial Tr. 1773:7-10 (Tucek), meaning that the county has 3,740 registered voters per staff member, Aug. 23, 2022, Trial Tr. 1773:11-14 (Tucek)—more than four times fewer than in Missoula County. And Petroleum County has just 382 registered voters with two staff members, PTX190.001, meaning that Petroleum County has only 191 registered voters per staff member, Aug. 23, 2022, Trial Tr. 1770:10-17 (Tucek)—more than 93 times fewer than in Missoula County.

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501. Further, there is no evidence of any errors resulting from registering voters on Election Day. Aug. 23, 2022, Trial Tr. 1575:6-10 (Custer); Aug. 22, 2022, Trial Tr. 1515:24-1516:2 (Plettenberg); PTX070 at 86:10-18, 96:10-19 (Ms. Plettenberg testifying on behalf of the Montana Association of Clerks and Recorders regarding HB 176).

502. There are, however, errors that occur with voter registration *before* Election Day. EDR gives voters and election administrators the opportunity to fix any mistakes up to the last minute. It is a failsafe against

disenfranchisement. Aug. 17, 2022, Trial Tr. 679:5-680:1 (Iwai); *id.* at 661:3-9 (Denson); Aug. 18, 2022, Trial Tr. 898:4-7 (Seaman); *id.* at 1115:1-6 (Nehring) (EDR is an important fallback option).

503. Specifically, EDR allows voters to update their registration without complicated rules about which subset of changes are permissible and which are not.

504. EDR also ameliorates any technical glitches the State may experience in transmitting registration information because it allows Montanans to register and vote even if their registration was not finalized.

505. On Election Day, Montanans may only register and vote at the offices of county election administrators or a centrally designated location—not at polling locations. Mont. Admin. R. 44.3.2015(1)(b)(iv); Aug. 16, 2022, Trial Tr. 382:5-20 (Street); Aug. 23, 2022, Trial Tr. 1767:24-1768:11 (Tucek); Aug. 25, 2022, Trial Tr. 2239:17-21 (James); Eisenzimer Dep. 28:18-29:5. And in the few instances where EDR has occurred at a polling place, election administrators set up different lines for individuals who needed to register. Aug. 24, 2022, Trial Tr. 2081:21-25, 2083:3-20, 2084:3-7 (Rutherford); Aug. 25, 2022, Trial Tr. 2239:22-2240:6 (James).

506. The same safeguards for verifying a voter's registration and identity that exist before Election Day remain available to election administrators on Election Day through the MT Votes system. Aug. 22, 2022, Trial Tr. 1508:6-21 (Plettenberg).

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507. Eliminating EDR and moving the deadline for voter registration to noon the day before Election Day will not eliminate any administrative burdens associated with EDR but rather just shift them to an earlier date. On the days leading up to the election, election administrators are "really busy." Aug. 23, 2022, Trial Tr. 1702:9-12 (Ellis). During the days leading up to the election, election administrators are sending out and receiving back absentee ballots, handling spoiled ballots, and recruiting and training election judges. *Id.* at 1700:12-1701:1 (Ellis). In fact, this administrative work has already been completed by Election Day—"the bird has flown out of the nest." Aug. 18, 2022, Trial Tr. 947:24-948:22 (Seaman) (noting that "the planning and prep work is the critical part of the election").

508. This shift in time will only reduce the burden on election officials if it results in fewer Montanans voting. *See* Aug. 24, 2022, Trial Tr. 2089:19-25 (Rutherford); Aug. 18, 2022, Trial Tr. 1011:9-12 (Seaman); PTX091 at 11:4-6 (Ms. McCue testifying about HB 176 that "any time someone registers and vote[s], it's more work for us. That's the job.").

509. Representative Custer testified that for her, in rural Rosebud County, the implementation of EDR had no ultimate impact on her Election Day schedule. Aug. 23, 2022, Trial Tr. 1570:24:1571:1 (Custer). Both before and after EDR, she generally got home around 2 a.m. during major elections, *id.* at 1568:4-12 (Custer), which happened "[t]wice a year, every other year," *id.* at 1568:18 (Custer). From her perspective, it was just "part of [the]

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job. It was expected," *id*. at 1568:21 (Custer), and it was like "[a]ny big event . . . like a wedding. . . . You plan, plan, plan everything goes off like clockwork and then you are exhausted," *id.* at 1569:7-9 (Custer). Variables that could really impact Election Day included "turnout," "whether it's a two-page ballot because you can only run one sheet of paper through the counter at a time," "breakdowns on your machine," and other similar things. *Id.* at 1569:19-1570:5 (Custer).

510. There are myriad ways for the State to reduce administrative burdens on elections officials without the disenfranchising effects of ending EDR, including hiring more poll workers on Election Day, offering simpler or more frequent training to election administrators, and modernizing election equipment. *See*, *e.g.*, *id*. at 1573:25-1574:2 (Custer) (listing "better training, better equipment, those kind of things and streamlining some of the . . . protocols" as ways to make Election Day more efficient). Mr. Ellis testified that adding additional resources and/or staff would alleviate his concerns about any administrative burdens stemming from EDR. *Id*. at 1708:6-10 (Ellis); *see also* Aug. 24, 2022, Trial Tr. 2090:2 (Rutherford) (describing administrative burdens as "a resource thing").

511. There is no evidence that the Legislature or the Secretary considered any of these options as an alternative to ending EDR. Aug. 25, 2022, Trial Tr. 2256:3-10 (James).

512. EDR has not resulted in delays in tabulating election results. *See* Aug. 18, 2022, Trial Tr. 944:20-945:8 (Seaman) (testifying that EDR doesn't impact

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tabulating votes); Aug. 23, 2022, Trial Tr. 1717:4-1718:8 (Ellis) (testifying that Broadwater County always tabulated results on the night of Election Day and was never criticized for producing late election results). Mr. Rutherford testified that, even in elections with widespread late registration, Yellowstone County has always met its statutory deadlines for finalizing election results. Aug. 24, 2022, Trial Tr. 2078:20-2079:2 (Rutherford). In fact, Mr. Rutherford also testified that during the June 2022 primary, he would not have had to stay at his office any later had EDR been in place. *Id*. at 2089:14-18 (Rutherford). The Secretary cannot point to a single instance where an election administrator was unable to report election results in a timely fashion due to EDR.

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513. If anything, HB 176 might create further administrative burdens for election administrators—as Ms. Tucek testified, "it's confusing to constantly try to keep up with new laws passed by the Montana legislature." Aug. 23, 2022, Trial Tr. 1779:7-10 (Tucek); *see also see* Aug. 23, 2022, Trial Tr. 1565:10-15 (Custer) (noting that voters have relied on EDR for years, "[a]nd all of a sudden one day they wake up and it's changed and they can't"). And elections officials in many counties have already had to spend time turning away individuals looking to register and vote on Election Day. *See* Aug. 18, 2022, Trial Tr. 973:2-19 (Seaman); Aug. 22, 2022, Trial Tr. 1459:7-13 (Franks-Ongoy); Aug. 23, 2022, Trial Tr. 1766:24-1767:14, 1768:12-21 (Tucek); Aug. 24, 2022, Trial Tr. 2088:8-2089:3 (Rutherford).

514. The Secretary's claim that HB 176 furthers a compelling state interest by reducing lines at polling locations is not supported by the evidence.

515. EDR does not and cannot increase lines at most polling locations because EDR occurs at a centrally designated location, often county clerk's offices, not at polling places. *See* Mont. Admin. R. 44.3.2015(1)(b)(iv); Aug. 16, 2022, Trial Tr. 382:5-20 (Street); Aug. 23, 2022, Trial Tr. 1767:24-1768:7 (Tucek); Eisenzimer Dep. 28:18-29:5. Any lines at a county elections office do not affect the wait times for the polling locations where most Montanans vote. *See id.* In the few instances where EDR occurs at a polling place, there are separate lines for voters who wish to register on Election Day and those who are already registered and just wish to cast their ballot. Aug. 24, 2022, Trial Tr. 2081:21-25, 2083:3-20, 2084:3-7 (Rutherford).

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516. Voters who are not trying to make use of EDR do not typically wait in line to vote on Election Day. Aug. 22, 2022, Trial Tr. 1507:6-24 (Plettenberg); Aug. 23, 2022, Trial Tr. 1572:15-1573:11 (Custer); *id.* at 1686:8-11, 1710:16-18 (Ellis).

517. Multiple current and former election administrators testified that any lines at the county election office largely affect EDR voters, who would be unable to vote absent the ability to register on Election Day, and that EDR has no effect on lines at polling places, where the vast majority of in-person voting occurs. Aug. 18, 2022, Trial Tr. 919:9-21 (Seaman); Aug. 22, 2022, Trial Tr. 1505:5-1508:5 (Plettenberg); Aug. 23, 2022, Trial

Tr. 1572:15-1573:11 (Custer); *id.* at 1686:8-11, 1710:16-18 (Ellis), *id.* at 1767:24-1768:11 (Tucek); Aug. 24, 2022, Trial Tr. 2083:8-11, 2084:3-7 (Rutherford).

518. It was known to the Legislature that repealing EDR and moving the last day to register to vote would not reduce lines, but simply make them longer on an earlier date in the early-voting period. The Lewis and Clark County Elections Supervisor testified before the Legislature that HB 176 "doesn't get rid" of any long lines, but "just moves them" to the new, earlier late registrant deadline. PTX091 at 36:17-22.

519. Moving the deadline for late registration simply shifts the burdens associated with registering voters to an earlier date, which will force election administrators to contend with voters who arrive moments before noon on the Monday before Election Day, to attempt to draw lines about who is in line at noon on Monday as well as at 8 pm on Tuesday, and to simultaneously manage the voter confusion that will arise as a result of a noon deadline, instead of one at the end of the day that coincides with the polls closing.

520. The Secretary provided no evidence that EDR itself causes long lines, even at the county seat. Registering a voter at any time, including on Election Day, does not take a long time. Aug. 23, 2022, Trial Tr. 1768:24-1 (Tucek) (registering new voter "[u]sually" takes "less than five minutes"); Aug. 23, 2022, Trial Tr. 1571:7-13 (Custer) (registering voter takes two to ten minutes depending on the experience of person handling the registration); Aug. 24, 2022, Trial Tr. 2098:2-23 (Rutherford) ("worst case

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scenario" takes up to 15 minutes to register a voter, but typically less); Eisenzimer Dep. 50:5-7 (registering a new voter on Election Day "takes between five to ten minutes"). And Mr. Rutherford testified that despite having "triple the amount of late registrations" in the 2016 general election as his county did in the 2012 general election, the lines in that 2016 general election were significantly shorter than they were in 2012, Trial Tr. 2060:18-2066:11 (Rutherford).

521. Voter wait times in Montana are low: 100 percent of voters in 2020 reported waiting in line on Election Day for less than 30 minutes, and in 2016, only 2.3% reported waiting in line for more than 30 minutes. Aug. 22, 2022, Trial Tr. 1351:5-22 (Mayer); *see also* Aug. 23, 2022, Trial Tr. 1573:5-22 (Custer) (describing an instance when 8 people arrived on a bus as memorable but ultimately still quick and uneventful); *id.* at 1769:2-12 (Tucek) (lack of evidence of long lines in two Montana counties); *id.* at 1685:10-15 (Ellis) (defining a long line as 6 to 10 voters). Montana's wait times are far lower than the national average. Aug. 16, 2022, Trial Tr. 384:25-385:1 (Street).

522. Indeed, in 2020, only 10% of all in-person voters in Montana waited more than ten minutes to vote in 2020. *Id.* at 384:18-20 (Street). Only 1% of all Montana voters waited more than ten minutes to vote in 2020. *Id.* at 384:20-24 (Street).

523. Over the last decade, while EDR grew in popularity, wait times at the polls in Montana have *decreased*. *Id.* at 385:6-7 (Street).

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524. All data indicate that EDR is not associated with long wait times in Montana. Aug. 22, 2022, Trial Tr. 1351:23-1352:22 (Mayer).

525. The purpose of reducing wait times is to prevent people from dropping out of line and thus being unable to vote. HB 176 is thus completely self-defeating as to its stated purpose, since the people actually waiting in any lines at issue need to make use of EDR in order to be able to vote. Aug. 23, 2022, Trial Tr. 1686:8-11, 1710:16-18 (Ellis); Aug. 24, 2022, Trial Tr. 2081:21-25, 2083:3-20, 2084:3-7 (Rutherford).

526. The Secretary's invocation of lines in Indian Country is likewise self-defeating. The lines discussed by WNV were lines at the county election office, PTX317, necessary for those people to be able to register to vote and vote *at all*. In other words, that line does not affect non-EDR voters.

From the foregoing Findings of Fact, the Court hereby makes the following:

CONCLUSIONS OF LAW

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

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Appendix B

I. The Elections Clause of the United States Constitution

528. The Secretary's argument that this Court may not review the Challenged Laws relies on an incorrect reading of the Elections Clause of the federal Constitution that would unmoor any legislative action related to voting from the very Constitution that even creates the Montana Legislature.

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529. The Secretary's attempt to insulate the Legislature's actions from judicial review violates nearly a century of Supreme Court precedent. *See Ariz. State Legis. V. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817-18 (2015) ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."); *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964) ("[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state [election] laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction."); *Smiley v. Holm*, 285 U.S. 355, 368 (1932) (holding that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the *Constitution of the state* has provided") (emphasis added).

530. The Secretary's argument also disregards the fundamental separation of powers. *See Brown v. Gianforte*, 2021 MT 149, ¶ 24, 404 Mont. 269, 281, 488

P.3d 548, 556 ("Since *Marbury*, it has been accepted that determining the constitutionality of a statute is the exclusive province of the judicial branch."); *Powder River Cnty. V. State*, 2002 MT 259, ¶ 112, 312 Mont. 198, 231, 60 P.3d 357, 380 ("Each branch of government is made *equal*, coordinate, and independent." (emphasis added)); *In re License Revocation of Gildersleeve* (1997), 283 Mont. 479, 484, 942 P.2d 705, 708 (finding Montana's "Constitution vests in the courts the *exclusive* power to construe and interpret legislative Acts").

531. The Court rejects the Secretary's argument that the Elections Clause of the United States Constitution shields the challenged laws from judicial scrutiny. Even if this Court were to adopt the Secretary's interpretation, the challenged laws apply equally to state and local elections, where the Elections Clause does not apply.

II. Article IV, § 3

532. Article IV, § 3 of the Montana Constitution does not shield the challenged laws from judicial scrutiny.

533. Pursuant to Article IV, § 3, the Legislature "shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process."

534. While the Legislature has authority to provide for a system of poll booth registration, the laws passed by the Legislature in order to provide that system are

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still subject to judicial review. The delegates considered the Legislature should not be "locked in" upon providing "a system of poll booth registration" and thus changed the language from "shall provide for a system of poll booth registration" to "may provide . . . " Mont. Const. Convention, 450. However, that does not mean the Legislature has power to take away EDR without that power being subject to judicial review and interpreted in conjunction with the fundamental rights guaranteed to Montanans in the Constitution. Specifically, the Legislature's authority under Article IV, § 3 "cannot logically be read to nullify the fundamental right to vote in free and open elections separately and principally enshrined in Article II, Section 13." *Montana Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 36. As described by the Montana Supreme Court:

> Indeed, first among the fundamental rights expressly guaranteed in the Montana Constitution are popular sovereignty and self-government. Mont. Const. art. II, § 1 ("All political power is vested in and derived from the people."); Mont. Const. art. II, § 2 ("The people have the exclusive right of governing themselves as a free, sovereign, and independent state."). These provisions establish that government originates from the people and is founded on their will only. Protection of our Article II fundamental rights ensures that, among other things, government is indeed founded upon the will of the people only.

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Montana Democratic Party v. Jacobsen, 2022 MT 184, ¶ 36.

535. "Since *Marbury*, it has been accepted that determining the constitutionality of a statute is the exclusive province of the judicial branch. It is circular logic to suggest that a court cannot consider whether a statute complies with a particular constitutional provision because the same constitutional provision forecloses such consideration." *Gianforte*, ¶ 24.

536. The State's authority to regulate elections must be exercised "within constitutional limits." *Larson v. State ex rel. Stapleton*, 2019 MT 28, ¶ 21, 394 Mont. 167, 184, 434 P.3d 241, 253; *see also Wheat v. Brown*, 2004 MT 33, ¶ 27, 320 Mont. 15, 22-23, 85 P.3d 765, 770 ("[T]he people, through the legislature, have plenary power, except in so far as inhibited by the Constitution.") (internal quotation marks and citations omitted); *State v. Savaria* (1997), 284 Mont. 216, 223, 945 P.2d 24, 29 (The Legislature may only exercise whatever discretion it has "subject . . . to constitutional limitations.").

537. Indeed, "Montana's Constitution is a prohibition upon legislative power, rather than a grant of power." *Bd. Of Regents of Higher Educ. V. State by & through Knudsen*, 2022 MT 128, ¶ 11, 409 Mont. 96, 103, 512 P.3d 748, 751.

538. Further, the same constitutional provision the Secretary cites also gives the Legislature the right to regulate absentee ballots, *see* Mont. Const. art. IV, § 3,

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yet the Montana Supreme Court found that the State could not exercise this right in a way that infringes on the constitutional right to vote, *Driscoll III*, ¶ 23 (holding that the State's regulation of absentee ballot collection "may unconstitutionally burden the right of suffrage, particularly with respect to Native American[s] . . . "). Under the Secretary's reading, the Legislature had the same discretion to pass BIPA as it did HB 176 and HB 530, § 2. Yet in *Driscoll*, the Montana Supreme Court upheld the preliminary injunction enjoining BIPA, declining to "set forth a new level of scrutiny" for right-to-vote claims, assessing the law's burden on Native American voters, and then assessing the State's interest in the law. *Id.* ¶ 20.

539. Moreover, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 261, 109 P.3d 219, 222 (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)); *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 665 (1966) (finding that while "the right to vote in state elections is nowhere expressly mentioned . . . once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment").

540. The Court holds that Article IV, § 3 of the Montana Constitution does not shield the challenged laws from judicial review.

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III. Standing

541. The Secretary raised—in the Final Pretrial Order, in many depositions, and many times throughout the duration of the litigation in this matter—the issue of standing. The Secretary "contends Plaintiffs lack standing to challenge the laws challenged in this lawsuit." (Final Pretrial Order, ¶ 23). The Secretary did not address the issue of standing in her proposed findings and conclusions. Plaintiffs addressed, in great depth, the reasons why they do have standing in their proposed findings and conclusions. The Court agrees, as evidenced by its previous rulings, with Plaintiffs arguments and analysis as outlined in ¶¶ 572-614 of their proposed findings of fact and conclusions of law. As the Court has repeatedly held, upon receipt of the same standing arguments made by the Secretary throughout the duration of this case, each Plaintiff has standing to pursue their claims. (*See* Dkt. 32, Dkt. 124).

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IV. Legal Standards

542. "Statutes enjoy a presumption of constitutionality, and the party challenging a statute's constitutionality bears the burden of proving it unconstitutional beyond a reasonable doubt." *Bd. of Regents of Higher Educ. of Mont. v. State*, 2022 MT 128, ¶ 10, 409 Mont. 96, ¶ 10, 512 P.3d 748, ¶ 10 (citing *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 174 P.3d 469). The question of the "constitutionality of a statute is a question of law." *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, ¶ 12, 174 P.3d 469, ¶ 12 (citing *State v. Stanko*, 1998 MT 321, P 14,

292 Mont. 192, P 14, 974 P.2d 1132, P 14). "The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action . . . " *Powder River Cty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, ¶ 73, 60 P.3d 357, ¶ 73 (citations omitted).

543. "When interpreting constitutional provisions, we apply the same rules as those used in construing statutes." *Brown v. Gianforte*, 2021 MT 149, ¶ 33, 404 Mont. 269, ¶ 33, 488 P.3d 548, ¶ 33 (citing *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058). Additionally, "a fundamental rule of constitutional construction is that we must determine the meaning and intent of constitutional provisions from the plain meaning of the language used without resort to extrinsic aids except when the language is vague or ambiguous or extrinsic aids clearly manifest an intent not apparent from the express language." *Nelson*, 2018 MT 36, ¶ 16, 390 Mont. 290, ¶ 16, 412 P.3d 1058, ¶ 16. Moreover, "[t]he intent of the Framers controls the Court's interpretation of a constitutional provision." *Nelson*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058.

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544. Plaintiffs bring facial challenges to HB 176, SB 169, and HB 530.

545. A facial challenge "'to a legislative act is of course the most difficult challenge to mount successfully'" because the challenger "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."' *Mont. Cannabis Indus. Ass'n v. State*

(MCIA II), 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

546. To prevail on a facial challenge, Plaintiffs must prove that "'either that no set of circumstances exists under which the statute would be valid or that the statute lacks a plainly legitimate sweep.'" *State v. Smith*, 2021 MT 148, ¶ 56, 488 P.3d 531 (citations omitted).

547. The Court has already held in this matter that burdens on fundamental rights, such as the right to vote, trigger strict scrutiny, and the Court reiterates that holding here.

548. The Court's ruling is consistent with unbroken Montana Supreme Court precedent finding that "strict scrutiny [is] used when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights." *Driscoll III*, ¶ 18; *see also Mont. Cannabis Indus. Ass'n v. State* ("*MCIA*"), 2016 MT 44, ¶ 16, 382 Mont. 256, 263, 368 P.3d 1131, 1139 (similar); *State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 207, 113 P.3d 281, 288; *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 154, 104 P.3d 445, 449-50; *Butte Cmty. Union v. Lewis* (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311.

549. The right to vote is enshrined under the Montana Constitution's Declaration of Rights and provides that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const. art. II, § 13.

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550. Since the right to vote is found within the Declaration of Rights, it is a fundamental right. *Riggs*, ¶ 47; *see also Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, 352, 325 P.3d 1204, 1210; *see also WNV I*, at 44, ¶ 2 (noting that the right to vote is a fundamental right); *Driscoll II*, at 23, ¶ 5 (same).

551. The Secretary concedes that the right to vote is fundamental under the Montana Constitution. Def's Br. in Supp. of Renewed Mot. Summ. J. at 15 (Dkt. 155); *see also Willems*, ¶ 32; *Oberg v. Billings* (1983), 207 Mont. 277, 280, 674 P.2d 494, 495.

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552. The Secretary provides no binding authority supporting her argument that the right to vote should be treated differently than other constitutionally enumerated rights. Rather, she urges the Court to instead rely on federal cases: *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), to adopt the flexible federal "balancing test," known as *Anderson-Burdick*.

553. Yet the Montana Supreme Court has long applied strict scrutiny to right-to-vote challenges, including in those cases decided after federal courts adopted *Anderson-Burdick*. *See Finke*, ¶ 15; *Johnson v. Killingsworth* (1995), 271 Mont. 1, 4, 894 P.2d 272, 243-74.

554. As recently as two years ago, the Montana Supreme Court expressly declined the Secretary's request to "set forth a new level of scrutiny" and apply the federal *Anderson-Burdick* framework to right to vote claims. *Driscoll III*, ¶ 20.

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555. "In interpreting the Montana Constitution, the Montana Supreme Court has repeatedly refused to 'march lock-step' with the United States Supreme Court, even where the state constitutional provision at issue is nearly identical to its federal counterpart." *State v. Guillaume*, 1999 MT 29, ¶ 15, 293 Mont. 224, 231, 975 P.2d 312, 316. The Montana Supreme Court has never been afraid to "walk alone" in terms of its divergence from federal constitutional interpretation. *State v. Long* (1985), 216 Mont. 65, 69, 700 P.2d 153, 156; *City of Missoula v. Duane*, 2015 MT 232, ¶ 16, 380 Mont. 290, 294, 355 P.3d 729, 732 (collecting cases where Montana Supreme Court declined to subject constitutional rights to a relaxed federal standard). This is in part because the Montana Supreme Court has recognized that "the rights and guarantees afforded by the United States Constitution are minimal, and that states may interpret provisions of their own constitutions to afford greater protection than the United States Constitution." *Guillaume*, ¶ 15.

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556. And in fact, Montana is not "walking alone" in applying strict scrutiny, rather than *Anderson-Burdick*, to laws that implicate the right to vote. Many states around the country apply strict scrutiny to laws that implicate or burden their respective states' constitutional right to vote. For example, in *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000), the Idaho Supreme Court rejected *Anderson-Burdick* and held that "[b]ecause the right of suffrage is a fundamental right, strict scrutiny applies." The Court distinguished *Anderson-Burdick* because "*Burdick* did not deal with the Idaho Constitution and instead was decided under the United States Constitution." *Id.*

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557. The supreme courts in other states—including Illinois, North Carolina, Washington, and Kansas—have done likewise. *See Tully v. Edgar*, 664 N.E.2d 43, 47 (Ill. 1996) ("Where challenged legislation implicates a fundamental constitutional right, however, such as the right to vote, the presumption of constitutionality is lessened and . . . the court will examine the statute under the strict scrutiny standard."); *see also Harper v. Hall*, 868 S.E.2d 499, 543 (N.C. 2022); *Madison v. State*, 163 P.3d 757, 767 (Wash. 2007); *Moore v. Shanahan*, 486 P.2d 506, 511 (Kan. 1971).

558. The right to vote is foundational. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Larson*, ¶ 81 (McKinnon, J., dissenting) (citations omitted). The Secretary's suggestion that this Court break from precedent and afford lesser protections for this fundamental right is antithetical to Montana's Constitution.

559. Strict scrutiny review of a statute "requires the government to show a compelling state interest for its action." *Mont. Env't Info. Ctr.*, ¶ 61 (quoting *Wadsworth v. State* (1996), 275 Mont. 287, 302, 911 P.2d 1165, 1174). "In addition to the necessity that the State show a compelling state interest for invasion of a fundamental right, the State, to sustain the validity of such invasion, must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Id.* (quoting *Wadsworth*, 275 Mont. at 302).

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560. Even if the Court were to apply *Anderson-Burdick*, that test "requires strict scrutiny" when, as here, "the burden imposed [by the law] is severe." *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018). Even when a challenged law constitutes a less-than-severe burden, the *Anderson-Burdick* balancing test does not convert to ordinary rational-basis review. *See Soltysik v. Padilla*, 910 F.3d 438, 448-49 (9th Cir. 2018). Voting laws that impose a less-than-severe but more-than-minimal burden "require an assessment of whether alternative methods would advance the proffered governmental interests." *Id*. at 445 (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1114 n.27 (9th Cir. 2011)). "[W]hether an election law imposes a severe burden is an intensely factual inquiry." *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 387 (9th Cir. 2016) (internal quotation marks omitted).

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561. *Anderson-Burdick* is a "sliding scale test, where the more severe the burden, the more compelling the state's interest must be, such that 'a state may justify election regulations imposing a lesser burden by demonstrating the state has important regulatory interests.'" *Soltysik*, 910 at 444 (quoting *Ariz. Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016)).

562. When evaluating the state's regulatory interest, *Anderson-Burdick* serves as a "means-end fit framework" that requires the state's purported interested in the challenged law to be more than "speculative concern." *See Soltysik*, 910 F.3d at 448-49; *see also Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016).

563. At the second step of the *Anderson-Burdick* inquiry, even regulations that impose less than "severe" burdens on the right to vote require more than a speculative state interest and are still subject to a more exacting level of scrutiny than rational basis review. Even a "minimal" burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Ohio NAACP*, 768 F.3d at 538 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008)); *Soltysik*, 910 F.3d at 449; *Pub. Integrity All.*, 836 F.3d at 1025 (rejecting the notion that *Anderson-Burdick* calls for "rational basis review").

564. Regardless of the extent of the burden, the state must "articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses the interest put forth." *Ohio NAACP*, 768 F.3d at 545; *see also Anderson*, 460 U.S. at 789.

565. Moreover, courts applying *Anderson-Burdick* must consider not only the impacts on the electorate as a whole, but also on the discrete subgroups of voters who are most impacted. *See Crawford*, 553 U.S. at 198, 201 (controlling op.) ("The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a [photo ID]."); *see also Pub. Integrity All.*, 836 F.3d at 1024 n.2 (noting courts should consider "not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe"). The severity of the burden is greater

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when it disproportionately falls upon populations who already face greater barriers to participation and are less likely to be able to overcome those increased costs. *See Ohio NAACP*, 768 F.3d at 545 (finding significant burden that fell disproportionately on African American, lower-income, and homeless voters likely to use the voting opportunities eliminated by challenged law).

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A. HB 176

i. Right to Vote

566. By eliminating EDR, HB 176 severely burdens the right to vote of Montana voters, particularly Native American voters, students, the elderly, and voters with disabilities.

567. The uncontested factual record shows that: (1) EDR has been widespread in Montana; (2) Native Americans face disproportionate and severe voter costs due to dramatic socioeconomic and logistical disparities; (3) in part due to the higher voter costs they face, Native American voters disproportionately rely on EDR and thus will be burdened disproportionately by its elimination; and that (4) young voters in Montana also disproportionately rely on EDR.

568. The Secretary's appeal to non-binding, out-of-state cases about late registration is unavailing in part because those cases concerned whether a state that has *never before* offered EDR has an affirmative obligation to provide EDR. None of those non-binding

cases involved the question presented here—namely, whether under Montana's Constitution, the state may, without constitutional constraints, *eliminate* EDR where a significant number of historically disenfranchised voters have come to rely upon it over the past 15 years.

569. Once the state decides to offer a voting opportunity, the elimination of that voting opportunity is subject to constitutional limitations. *See Big Spring*, ¶ 18.

570. The burdens imposed by the elimination of EDR are not justified by any compelling—or even legitimate—state interests. Removal of EDR does not enhance election integrity because the verification process applied to late registration applications differs from that applied to regular registration applications only in that it includes *additional* security measures.

571. HB 176 also does not combat voter fraud. EDR has not been implicated in a single instance of voter fraud in Montana since its inception.

572. The Secretary has failed to provide any evidence that HB 176 will have any impact on voter confidence, and all available data suggests it will not.

573. HB 176 does not reduce administrative burdens or wait times, and even if it did, it is not narrowly tailored.

574. Removing one and half days during which Montanans could register to vote and cast their vote is a severe burden on the right to vote. HB 176 denies

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Montanans their right to vote for one and a half days during each election cycle. It would be unconstitutional to deny Montanans the right to bear arms for one and a half days. *See* Mont. Const., Art. II § 12. It would be unconstitutional to deny Montanans the right to freedom of religion for one and a half days. *See* Mont. Const., Art. II § 5. It would be unconstitutional to deny Montanans the rights of the accused for one and a half days. *See* Mont. Const., Art. II § 24. And it would be unconstitutional to deny Montanans their right of privacy for one and a half days. *See* Mont. Const., Art. II § 10.

575. Because HB 176 burdens the right to vote and does not further a compelling state interest through the least onerous path, it is unconstitutional and must be permanently enjoined.

576. Were the Court to accept the Secretary's invitation to import the *Anderson-Burdick* standard, the outcome would be the same, as that test "requires strict scrutiny" when, as here, "the burden imposed [by the law] is severe." *Short*, 893 F.3d at 677.

577. And even were the Court to determine the burden is less than severe, under *Anderson-Burdick*, the State must still demonstrate a fit between the legitimate government interest and the law in question.

578. For reasons discussed above, the Secretary here has failed to demonstrate why the elimination of EDR is actually necessary to serve the interests she articulates. As a result, even if the Court applied the *Anderson-Burdick* test, HB 176 would fail.

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ii. Equal Protection

579. HB 176 violates Plaintiffs' right to Equal Protection. Article II, § 4 of the Montana Constitution guarantees that no person shall be denied the equal protection of the laws. Mont. Const. art. II, § 4. Notably, Montana's equal protection guarantee "provides for even more individual protection" than the federal Constitution. *Cottrill v. Cottrill Sodding Serv.* (1987), 229 Mont. 40, 42, 744 P.2d 895, 897.

580. "When presented with an equal protection challenge, we first identity the classes involved and determine whether they are similarly situated." *MCIA*, ¶ 15 (quoting *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 23, 354 Mont. 133, 139, 227 P.3d 42, 48) (internal quotation marks omitted). Similarly situated classes are identified by "isolating the factor allegedly subject to impermissible discrimination; if two groups are identical in all other respects, they are similarly situated." *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 19, 402 Mont. 277, 291, 477 P.3d 1065, 1073. If it is determined that "the challenged statute creates classes of similarly situated persons, we next decide whether the law treats the classes in an unequal manner." *MCIA*, ¶ 15.

581. A facially neutral classification may still constitute an equal protection violation where "in reality it constitutes a device designed to impose different burdens on different classes of persons." *Snetsinger*, ¶¶ 16-17 (internal citations and alterations omitted); *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 9-10,

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420 P.3d 528, 535. As such, Plaintiffs are *not* required to make a showing of discriminatory purpose to establish an equal protection violation.

582. When evaluating whether a facially neutral statute violates equal protection, the Montana Supreme Court has established a two-part test. First, courts "identify the classes involved and determine whether they are similarly situated" despite differing burdens. *Snetsinger*, ¶ 16 (internal citation omitted). Second, courts "determine the appropriate level of scrutiny" to apply to the challenged law. *Id.* ¶ 17.

583. As to the first step of the analysis, Native American voters and non-Native American voters are otherwise similarly situated, but HB 176 levies disproportionate burdens on Native American voters compared to non-Native American voters. *See Snetsinger*, ¶ 16. EDR is disproportionately utilized by Native Americans to mitigate high poverty rates; lack of residential mail; poor roads; long distances to post offices and county seats; lack of access to vehicles, gasoline, and car insurance; housing instability; and poor internet access. Native American voters on-reservation also use EDR at higher rates than the general population. Removal of EDR disproportionately and detrimentally impacts Native Americans ability to vote compared to non-Natives.

584. Similarly, young voters, who rely on EDR at much higher rates because they are more likely to be first-time voters and move more often, are treated differently from similarly situated voters, as HB 176 levies disproportionate burdens on young voters.

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585. Even if discriminatory purpose were required—and it is not—the evidence indicates that the Legislature enacted HB 176 to reduce voting by young people for perceived political benefit and that the Legislature was well aware that HB 176 would have a disproportionate negative impact on Native American voters and young voters, and nonetheless intentionally repealed a critical method for accessing voting relied upon by those groups.

586. As to the second step, strict scrutiny applies when a suspect class or fundamental right is affected. *Snetsinger*, ¶ 17. Here, as noted above, HB 176 implicates the fundamental right to vote and cannot satisfy strict scrutiny.

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B. HB 530

i. Ripeness

587. Even though the Secretary has not yet adopted an administrative rule as directed in HB 530, § 2, the statute is ripe for review.

588. "The basic purpose of the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 54, 365 Mont. 92, 116, 278 P.3d 455, 472.

589. "Ripeness asks whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication. . . . " *Id.* ¶ 54.

590. The issue presented by HB 530, § 2 is not an abstract disagreement. It is clear that the statute forbids and imposes a civil penalty for numerous types of ballot assistance.

591. Plaintiffs have established that they have already been injured by HB 530, § 2 given that they have already determined that they cannot continue with activities their organizations have previously engaged in because those activities may be subject to civil penalties, and they have to spend limited resources to educate voters, staff, and volunteers about the change in the law.

592. Further, the statute requires that the Secretary adopt an administrative rule "in substantially" the same form as the statutory text. As such, Plaintiffs and this Court have every reason to believe that the administrative rule will prohibit paid staff from engaging in ballot assistance activities and impose a civil penalty for violation of that rule.

593. The effects of HB 530, § 2 on Plaintiffs are in no way speculative. The statute in fact has already harmed Plaintiffs, as discussed above, and will do so in the future unless permanently enjoined.

ii. Right to Vote

594. HB 530, § 2 disproportionately and severely burdens the fundamental right to vote for Plaintiffs in violation of the Montana Constitution.

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595. Recently, multiple Montana district courts held that a similar restriction on ballot collection and conveyance unconstitutionally violated the fundamental right to vote as guaranteed by the Montana Constitution. *WNV I*, at 47-48, ¶¶ 14-21; *Driscoll II*, at 24, ¶ 8.

596. The evidence establishes that HB 530, § 2 "will disproportionately affect the right of suffrage for . . . Native Americans." *Driscoll III*, ¶ 21. Less than two years ago, the Montana Supreme Court determined that "the importance of absentee ballots and ballot-collection efforts is more significant for Native American voters than for any other group." *Id.* ¶ 6. The Court found that even before considering any prohibition on ballot collection, "Native American voters as a group face significant barriers to voting"—including "higher rates of poverty," distances "from county elections offices and postal centers," "limited access to transportation," "limited access to postal services," and "lack [of] a uniform and consistent addressing system." *Id.*

597. Little has changed in the intervening two years. Plaintiffs' unrebutted testimony reveals that a panoply of socioeconomic factors—the result of centuries of discrimination against Native Americans—make it more difficult for Native Americans living on reservations to register and vote. These include higher poverty and unemployment rates, worse health outcomes, worse educational outcomes, including much lower high school and college graduation rates, less internet access, lack of home mail delivery, less stable housing, higher homelessness rates, and overrepresentation in the criminal justice system.

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598. Native Americans living on reservation live, on average, farther away from the post office, DMV office, and county seats as compared to the general Montana population. Native Americans are also less likely to have access to working vehicles or money for gas to travel those distances. And Native Americans are disproportionately less likely to have home mail delivery.

599. Because Native American voters already face these high costs to voting—both in person and by mail—they rely more heavily on organizations to collect and convey their ballots than the general population. Consequently, restricting ballot collection "disproportionately harms . . . Native Americans in rural tribal communities" because "Native Americans living on reservations rely heavily on ballot collection efforts in order to vote in elections," in large part "due to lack of traditional mailing addresses, irregular mail services, and the geographic isolation and poverty that makes travel difficult" for these Native American voters. *WNV I*, at 48, ¶ 20.

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600. The factual record regarding the burdens on voters in this case is essentially identical to the one the Montana Supreme Court and two district courts had before them when they invalidated BIPA, a less onerous prohibition that targeted only ballot collection, not other forms of ballot assistance. And just as the Montana Supreme Court found fatal in *Driscoll*, the unrebutted evidence shows that "unequal access to the polls for Native American voters would be exacerbated by" a restriction on ballot collection. *Driscoll III*, ¶ 21. And once again, the Secretary "does not address [Plaintiffs']

evidence that the burden on Native American communities is disproportionate," and she "pointed to no evidence in the . . . record that would rebut the . . . finding of a disproportionate impact on Native American voters." *Id.*, ¶ 22.

601. HB 530, § 2 also severely burdens the right to vote for groups other than Native Americans. Indeed, thousands of voters have relied on ballot collection in Montana elections.

602. Many voters with disabilities rely on organized absentee ballot assistance, and their right to vote would be severely burdened were this option outlawed. These voters' mobility limitations make obtaining and returning absentee ballots challenging, and it can be difficult for them to stand in line at polling locations or elections offices. As a result, these voters have relied on organized ballot assistance.

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603. The Secretary cannot justify HB 530, § 2 under any standard because she "did not present evidence . . . of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana." *Driscoll III*, ¶ 22. The Secretary has not contested that the rate of voter fraud in Montana is infinitesimally small; that only one or two people in Montana have ever been convicted of voter fraud, and none in connection with ballot collection; and that while barely any voter fraud exists in the United States, more fraud exists in states that ban ballot assistance than in those that permit ballot assistance. The Secretary has no valid state interest in HB 530, § 2.

604. HB 530, § 2 is a solution in search of a problem. It furthers no legitimate, let alone compelling, state interest, and constitutes a disproportionate, severe, and unconstitutional burden on Plaintiffs' constitutional right to vote.

605. Even if this Court applied the federal *Anderson-Burdick* standard, HB 530, § 2 would still fail, as *Anderson-Burdick* "requires strict scrutiny" when "the burden imposed [by the law] is severe." *Short*, 893 F.3d at 677.

606. And even were the Court to determine the burden is less than severe, under *Anderson-Burdick*, the state must still demonstrate a fit between the legitimate government interest and the law in question.

607. As the evidence establishes no genuine state interest for HB 530, § 2, it fails under any level of scrutiny under the *Anderson-Burdick* balancing test.

608. The Secretary contests none of the substantial evidence of increased voter costs, nor offers any evidence to even suggest the supposed state interests are advanced by HB 530, § 2. *cf. Driscoll III*, ¶ 21.

609. In *Driscoll*, the Montana Supreme Court found that the Secretary could not justify BIPA under any standard because the Secretary "did not present evidence . . . of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana." *Driscoll III*, ¶ 22. So too here, the Secretary

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cannot justify this most recent iteration of ballot collection restrictions under any standard because she has failed to provide any evidence that Montana has a problem of voter fraud or voter confidence related to ballot collection, or that HB 530, § 2 would improve those purported problems.

610. HB 530, § 2 thus constitutes a disproportionate and unconstitutional burden on Plaintiffs' constitutional right to vote under any standard.

iii. Equal Protection

611. As with the other challenged laws, HB 530, § 2 violates Plaintiffs' right to Equal Protection.

612. The same two-step analysis applies to HB 530, § 2. As to the first prong, Native American voters and non-Native voters are otherwise similarly situated, but HB 530, § 2 levies disproportionate burdens on Native American voters compared to other voters. *Snetsinger*, ¶ 16.

613. As to the second, HB 530, § 2 implicates the fundamental right to vote and cannot satisfy strict scrutiny. *Snetsinger*, ¶ 17.

614. Even if discriminatory purpose were required—which it is not—there is significant evidence of discriminatory purpose. Following the *Western Native Voice* and *Driscoll* litigation in 2020, the Legislature was plainly on notice of the discriminatory impact of HB 530, § 2 and other ballot assistance bans.

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615. Moreover, HB 530, § 2's immediate predecessor in the 2021 legislative session, HB 406, did not advance in the Legislature following testimony by certain Plaintiffs, PTX096 at 8:9-9:7, 9:12-10:14, 12:8-14, 13:4-14:24, 15:4-16:7, and by the chief legal counsel for the Office of Commissioner of Political Practices, who warned of its unconstitutionality, *id*. at 4:9-5:4.

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616. After the failure of HB 406, and in the same legislative session in which protections for Native American voting rights were rejected, HB 530, § 2 was advanced at the last moment without any committee hearings or opportunity for public testimony. This irregular procedure is itself indicative of discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.").

iv. Freedom of Speech

617. HB 530, § 2 violates the fundamental right to freedom of speech of WNV, MNV, Blackfeet Nation, CSKT, FBIC, and MDP.

618. Article II, Section 7 of Montana's Constitution protects Plaintiffs' freedom of speech. Mont. Const. art. II, § 7; *see also Mont. Auto. Ass'n v. Greely* (1982), 193 Mont. 378, 388, 632 P.2d 300, 305.

619. Freedom of speech is a "fundamental" right and is "essential to the common quest for truth and the vitality

of society as a whole." *State v. Dugan*, 2013 MT 38, ¶ 18, 369 Mont. 39, 44, 303 P.3d 755, 761 (citations omitted).

620. Core political speech is accorded "the broadest protection." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995).

621. Like the circulation of an initiative petition for signatures, ballot collection activity is "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 422-23 (1988); *see also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (citing *Meyer* for this same proposition).

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622. Multiple Montana courts have recently found that the right to free speech includes communication and coordination with voters for ballot collection purposes. *WNV I*, at 49, ¶ 27 (quoting *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988)); *Driscoll II*, at 24, ¶ 9.

623. "The constitutional guaranty [sic] of free speech provides for the opportunity to persuade to action, not merely to describe facts." *Greely*, 193 Mont. at 387, 632 P.2d at 305.

624. WNV, MNV, and Tribal Plaintiffs' public endeavors to collect and convey ballots for individual Native American voters living on rural reservations are an integral part of their message that the Native American vote should be encouraged and protected, and that voting is important as a manner of civic engagement.

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625. MDP's public endeavors to collect and convey ballots for voters are an integral part of its message that individual engagement in democracy and access to the ballot should be encouraged and protected and that voting is important as a manner of civic engagement.

626. By collecting and conveying ballots, WNV, MNV, Tribal Plaintiffs, and MDP are engaged in the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," which is at the heart of freedom of expression protections. *Dorn v. Bd. of Trustees of Billings Sch. Dist. No. 2* (1983), 203 Mont. 136, 145, 661 P.2d 426, 431 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

627. Whether individuals should submit their ballots and ultimately participate in an election is a "matter of societal concern that [Plaintiffs] have a right to discuss publicly without risking [] sanctions." *Meyer*, 486 U.S. at 421; *see also Buckley*, 525 U.S. at 186 (quoting *Meyer*, 486 U.S. at 422).

628. Prohibiting payment to individuals who undertake ballot collection restricts expression in multiple ways. "First, it limits the number of voices who will convey [Plaintiffs'] message and the hours they can speak and, therefore, limits the size of the audience they can reach." *Meyer*, 486 U.S. at 422-23. It also limits speech to the wealthy, that is, those who are able to forgo remuneration for hours of work.

629. Like petition gathering, day-to-day community organizing, which for Plaintiffs includes ballot collection

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and assistance, "is time-consuming and it is tiresome so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.'" *Id.* at 423-24.

630. That Plaintiffs "remain free to employ other means to disseminate their ideas does not take their speech" through ballot assistance outside of constitutional protection. *Id.* at 424. The Montana guarantee of freedom of speech "protects [Plaintiffs'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.*

631. Thus, the efforts of WNV, MNV, Blackfeet Nation, CSKT, FBIC, and MDP must be afforded the broadest judicial protection, and HB 530, § 2 is an unconstitutional burden on these Plaintiffs' speech rights.

v. Due Process

632. HB 530, § 2 violates Plaintiffs' fundamental right to due process.

633. The Montana Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." Mont. Const. art. II, § 17.

634. A statute is unconstitutionally vague and void on its face if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *State v. Dugan*, ¶ 66 (quoting *City of Whitefish v. O'Shaughnessy*

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(1985), 216 Mont. 433, 440, 704 P.2d 1021, 1025). "Vague laws may trap the innocent by not providing fair warning." *City of Whitefish*, 216 Mont. at 440, 704 P.2d at 1025.

635. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Dugan*, ¶ 66 (quoting *City of Whitefish*, 216 Mont. at 440, 704 P.2d at 1025).

636. When a vague law "abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *City of Whitefish*, 216 Mont. at 440, 704 P.2d at 1025-26.

637. HB 530, § 2 prohibits a person from "provid[ing] or offer[ing] to provide, [or accepting], a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots."

638. The statutory text of HB 530, § 2 is unclear in at least three different ways.

639. First, "pecuniary benefit" has not been defined in the statute at all. And the dictionary definition of "pecuniary" is unclear. *See Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/pecuniary (last visited Aug. 6, 2022) (defining "pecuniary" as 1. "consisting of or measured in money" and 2. "of or relating to money"). It is entirely unclear

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whether the prohibition applies only to collectors who are paid per ballot or also to anyone who is not paid per ballot but whose paid employment includes ballot collection or assistance among other tasks. It is also unclear whether the prohibition extends to individuals who receive non-monetary benefits, such as gift cards, gas, or food in exchange for providing ballot assistance.

640. Because the definition of "pecuniary benefit" is unclear, so too is whether Plaintiffs' activities would be permitted to continue under HB 530, § 2. For example, CSKT conducted taco feeds where ballot collection occurred, and paid employees staffed the feeds. With "pecuniary benefit" undefined, it is unclear whether these paid employees—whose duties encompassed more than just ballot collection—would be permitted to assist with ballots.

641. Second, the statute leaves unclear whether, if an individual "distribut[es]," "request[s]," "collect[s]," and "deliver[s]" a single ballot for pecuniary gain, that individual would be subject to multiple fines or just one.

642. Third, while HB 530, § 2 explicitly exempts from its prohibitions "a government entity," the statute does not define what constitutes an exempt "government entity." It may or may not include the sovereign tribal governments and organizers paid to engage in ballot collection efforts by those tribes.

643. The CSKT tribal council has already explained that because HB 530 fails to adequately define the scope of

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its government exemption, "CSKT is likely to be confused about who is restricted from picking up and dropping off ballots and the lack of clarity makes it difficult for CSKT to know whether it would run afoul of the law." CSKT 30(b)(6) Dep. Ex. 58[11] (Resolution of the Governing Body of CSKT (Ex. A to McDonald Affidavit)); CSKT 30(b)(6) Dep. 105:16-19.

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644. Without clear definitions and the imposition of a $100 per ballot fine, without the preliminary injunction in place, WNV had to cease all its paid ballot collection operations. Aug. 17, 2022, Trial Tr. 851:15-24 (Horse); Perez Dep. 250:24-251:18.

645. MDP similarly would not engage in ballot collection if HB 530 is in place because it is not clear to them if the law prohibits their ballot collection activity, and they will not do it if there is "any kind of risk of legal liability." Aug. 19, 2022, Trial Tr. 1220:1-13 (Hopkins).

646. Notably, the Secretary has had countless opportunities throughout this litigation to provide clarity as to the many statutory ambiguities Plaintiffs have raised. She has failed to clarify *any* of them, including at trial, stating only that the administrative rulemaking process might provide the necessary clarity and that Plaintiffs' claims are speculative until administrative rules are in place. By her own terms, then, the Secretary

11. Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. I-2 (Designated Exhibits to the Deposition of Robert McDonald as 30(b)(6) designee for the Confederated Salish and Kootenai Tribes).

concedes that the plain text of HB 530, § 2—a statute that is currently and actively chilling Plaintiffs from participating in constitutionally protected activity—is ambiguous.

647. Thus, HB 530, § 2's prohibition on ballot collection violates due process and is void for vagueness.

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vi. Article V, § 1

648. In the alternative, if the Secretary is correct that HB 530, § 2 is not ripe for review because the substance of the final rule is "speculation," then it would constitute an unlawful delegation of legislative power. *See* Mont. Const. art. V, § 1.

649. Pursuant to Article V, Section 1, of the Montana Constitution, "[t]he legislative power is vested in a legislature consisting of a senate and a house of representatives." The Montana Supreme Court has outlined that "[w]hen the Legislature confers authority upon an administrative agency, it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power which has been made to the administrative agency." *Douglas v. Judge* (1977), 174 Mont. 32, 38, 568 P.2d 530, 533 (citing *Bacus v. Lake County*, 138 Mont. 69, 354 P.2d 1056). These policies, reasons, standards, or guides, must be "sufficiently clear, definite, and certain to enable the agency to know its rights and obligations." *White v. State* (1988), 233 Mont. 81, 88, 759 P.2d 971, 975. The law must leave "nothing with respect to a determination of what is the law" in order to

be a proper delegation. *Id*. If the Legislature fails to do so, "its attempt to delegate is a nullity." *Bacus*, 138 Mont. at 79, 354 P.2d at 1061.

650. The only guidance provided in HB 530, § 2 by the Legislature is that the rule adopted by the Secretary must be "in substantially" the same form as the version proffered by the Legislature and the Legislature provided a definition for "person."

651. The Secretary failed to identify any policy, standard, or rule to guide the regulations implementing HB 530, § 2. Aug. 25, 2022, Trial Tr. 2225:1-17 (James).

652. Additionally, by providing no definition, let alone a policy, standard, or rule for the term "pecuniary benefit," HB 530, § 2 leaves the Secretary to determine what the law is. The Secretary must decide whether "pecuniary benefit" includes, for example, an organizer's regular base salary, and whether HB 530, § 2 prevents someone like an aide or nurse, who is paid to assist elderly or disabled voters, from helping their patients request, receive, or return their absentee ballots.

653. Without an objective standard for the Secretary to follow, the Secretary must decide the scope of HB 530, § 2's prohibition without the required policy, standard, or rule to use for guidance. Such a delegation violates Article V, Section 1 of the Montana Constitution, and HB 530, § 2 is therefore void.

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C. SB 169

i. Right to Vote

654. Plaintiffs allege SB 169 impermissibly interferes with the right to vote guaranteed by Article II, § 13, of Montana's Constitution.

655. Plaintiffs contend Article II, § 13, prohibits the Legislature from determining that student identification cards cannot be used as stand-alone forms of identification sufficient, by themselves, to allow an individual to prove their identity at a polling location and cast a ballot.

656. Article IV, § 3, of Montana's Constitution explicitly requires the Legislature to pass laws governing the requirements for voter registration and the administration of elections.

657. Further, Article IV, § 3, of Montana's Constitution also mandates that the Legislature must "insure the purity of elections and guard against abuses of the electoral process."

658. The language of Article II, § 13, which states "[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage" must be interpreted in conjunction with the provisions of Article IV, § 3. *Howell v. State*, 263 Mont. 275, 286, 868 P.2d 568, 575 (Mont. 1994).

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659. Thus, when read together with the provisions of Article IV, Article II, § 13 cannot be interpreted to prohibit the Legislature from restricting primary ID to government-issued Montana or federal ID to prove their identity at a polling place and cast a ballot.

660. For this reason, SB 169 does not impermissibly interfere with any right granted by Article II, § 13.

ii. Equal Protection

661. As described above, under Article II, § 4 of the Montana Constitution, "no person shall be denied equal protection of the laws." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, ¶ 28, 325 P.3d 1211, ¶ 28. "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment." *Goble*, ¶ 28 (quoting *Rausch v. State Comp. Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, ¶ 18, 114 P.3d 192, ¶ 18)(internal quotations omitted). The three-step process undertaken when analyzing an equal protection claim begins first with identifying "the classes involved and determin[ing] if they are similarly situated[.]" *Goble*, ¶ 28. "The goal of identifying a similarly situated class is to isolate the factor allegedly subject to impermissible discrimination." *Id*. at ¶ 29.

662. The Secretary contends that "young voters" is not an adequately defined class. This is incorrect. MDP and Youth Plaintiffs have defined the class "in a way which will effectively test the statute without truncating

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the analysis." *Goble*, ¶ 34. Young voters and voters in all other age groups are otherwise similarly situated, but SB 169's prohibition on out-of-state driver's licenses or Montana college or university IDs—two forms of ID which had been accepted for years without resulting in a single known instance of fraud or any other problem—disproportionately and disparately burdens young voters. Plaintiffs presented significant evidence as described above showing that young voters are less likely to possess the primary forms of identification made primary with the passage of SB 169 and are additionally less likely, due to their mobility, to have the secondary forms of identification required to be presented in conjunction with a student ID or out-of-state driver's license.

663. The second step in the equal protection analysis is to "determine the appropriate level of scrutiny to apply to the challenged legislation[.]" *Goble*, ¶ 28. As described above, the Court does not find that SB 169 burdens Plaintiffs fundamental right to vote. Because no fundamental right or suspect class is affected, the appropriate level of scrutiny to apply to SB 169 is the rational basis test. *Snetsinger*, ¶ 17.

664. The third step in the equal protection analysis "is to apply the appropriate level of scrutiny to evaluate the constitutional challenge." *Goble*, ¶ 36. "Under the rational basis test, the law or policy must be rationally related to a legitimate government interest." *Snetsinger*, ¶ 19 (citing *McDermott v. State Dep't of Corr.*, 2001 MT 134, ¶ 32, 305 Mont. 462, ¶ 32, 29 P.3d 992, ¶ 32).

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665. The "interests" the Secretary and the Legislature had in the implementation of SB 169 include an interest in addressing voter fraud. There have been no instances of voter fraud concerning the use of student IDs in Montana. Additionally, there is no evidence that SB 169 will protect against future voter fraud. Experts testified in this case that there is no relationship between voter ID laws and reducing or stopping voter fraud.

666. The Secretary and the Legislature were interested in improving voter confidence with the passage of SB 169. Experts testified in this case that voter ID laws do not improve voter confidence. SB 169 is not rationally related to this interest given that at the same time the Legislature demoted two forms of identification with photo identification, the Legislature promoted concealed-carry permits. "Concealed-carry permits in Montana are neither uniform nor strict photographic identification. Rather, they are administered on a county-by-county basis and are not required by Montana statute to bear a photograph with the permit-holder's likeness." *Montana Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 30.

667. The Secretary and the Legislature were interested in ensuring the reliability, integrity, and fairness of Montana's election processes. SB 169 is not rationally related to this interest given its targeting of young voters and does not enhance Montana's election processes given the testimony of Mr. Seaman describing that SB 169 significantly complicated the process of determining whether the voters are presenting adequate identification to cast their vote.

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668. Plaintiffs have presented evidence concerning the significance of having the option to use a student ID as a primary form of voter identification for young voters due to the likelihood that young voters will not have access to the other forms of primary or secondary identification as now required by SB 169.

669. SB 169 unconstitutionally burdens Plaintiffs' right to equal protection of the laws by treating similarly situated groups unequally. SB 169 violates the Equal Protection Clause by imposing heightened and unequal burdens on Montana's youngest voters.

670. It is no accident that the Legislature passed SB 169 just months after Montana's youngest voters turned out to vote at record rates. Montana's legislators passed the bill to prevent some young Montanans from exercising their right to vote, in direct contravention of Montana's Equal Protection Clause. One of the drafters of SB 169 even testified against the amendment to SB 169 relegating student IDs to a secondary form of identification describing that she was not going to support it "because it's discriminatory." Aug. 23, 2022, Trial Tr. 1593:17-21 (Custer). Additionally, by requiring a student ID be presented in conjunction with other documents the Legislature essentially required that young voters "have to have a job or have been paying taxes in order to . . . vote. That went out in the 60s when . . . you used to have to own personal property in order to vote . . . " Aug. 23, 2022, Trial Tr. 1596:8-12 (Custer).

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671. The Court finds that SB 169 does not meet the rational basis test because and SB 169 is not rationally related to the alleged government interests.

672. The Montana Legislature passed SB 169 with the intent and effect of placing increased barriers on young Montana voters. The law is, in other words, a "device designed to impose different burdens on different classes of persons." *Spina*, ¶ 85.

673. Thus, the Court finds that SB 169 unconstitutionally violates Plaintiff's constitutional right to equal protection.

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

ORDER

IT IS HEREBY ORDERED:

1. Judgment is hereby found in favor of the Consolidated Plaintiffs that HB 176 violates their constitutional right to vote.

2. Judgment is hereby found in favor of the Consolidated Plaintiffs that HB 176 violates their constitutional right to equal protection.

3. HB 176 is unconstitutional and is hereby permanently enjoined.

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Appendix B

4. Judgment is hereby found in favor of the MDP Plaintiffs and WNV Plaintiffs that HB 530, § 2 violates their constitutional right to vote.

5. Judgment is hereby found in favor of the MDP Plaintiffs and WNV Plaintiffs that HB 530, § 2 violates their constitutional right to equal protection.

6. Judgment is hereby found in favor of the MDP Plaintiffs and WNV Plaintiffs that HB 530, § 2 violates their constitutional right to freedom of speech.

7. Judgment is hereby found in favor of the MDP Plaintiffs and WNV Plaintiffs that HB 530, § 2 violates their constitutional right to due process.

8. In the alternative, judgment is hereby found in favor of the MDP Plaintiffs that HB 530, § 2 violates Article V, Section 1 of the Montana Constitution and is therefore void.

9. HB 530, § 2 is unconstitutional and is hereby permanently enjoined.

10. Judgment is hereby found in favor of MDP Plaintiffs and Youth Plaintiffs that SB 169 violates their constitutional right to equal protection.

11. SB 169 is unconstitutional and is hereby permanently enjoined.

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Appendix B

12. With the entry of the permanent injunction concerning HB 530, § 2, HB 176, and SB 169, the preliminary injunction entered by the Court on April 6, 2022 (Dkt. 124) and modified on April 22, 2022 (Dkt. 142) is hereby vacated.

DATED September 30, 2022

/s/ Michael G. Moses
District Court Judge

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APPENDIX C — Order, Defendant's Motion for Summary Judgment, Montana Thirteenth Judicial District Court, Yellowstone County, Filed July 27, 2022

MONTANA THIRTEENTH
JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

Consolidated Case No.: DV 21-0451

MONTANA DEMOCRATIC PARTY, MITCH BOHN,

Plaintiffs,

WESTERN NATIVE VOICE, MONTANA NATIVE VOTE, BLACKFEET NATION, CONFEDERATED SALISH AND KOOTENAI TRIBES, FORT BELKNAP INDIAN COMMUNITY, AND NORTHERN CHEYENNE TRIBE,

Plaintiffs,

MONTANA YOUTH ACTION, FORWARD MONTANA FOUNDATION, AND MONTANA PUBLIC INTEREST RESEARCH GROUP,

Plaintiffs,

v.

CHRISTI JACOBSEN, IN HER OFFICIAL CAPACITY AS MONTANA SECRETARY OF STATE,

Defendant.

Filed July 27, 2022

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Appendix C

ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND YOUTH PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

Judge Michael G. Moses

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The Defendant, Montana Secretary of State Christi Jacobsen ("the Secretary") moved for summary judgment on all counts of all Plaintiffs' complaints. (Dkt. 78, Dkt. 79, Dkt. 154, Dkt. 155). Along with this motion, the Secretary submitted her Statement of Undisputed Facts (Dkt. 80; Dkt. 156). Consolidated Plaintiffs Montana Democratic Party and Mitch Bohn ("MDP"); Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe ("WNV"); and Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group ("MYA") (collectively, "Plaintiffs") submitted their responses. (Dkt. 117; Dkt. 120; Dkt. 166; Dkt. 168). Plaintiffs also submitted their response to the Secretary's Statement of Undisputed Facts. (Dkt. 119; Dkt. 169). The Secretary submitted her reply. (Dkt. 181). Plaintiffs Forward Montana Foundation, Montana Youth Action, and Montana Public Interest Research Group (collectively, "Youth Plaintiffs") submitted a cross motion for summary judgment. (Dkt. 117; Dkt 118; Dkt 152; Dkt. 153). The Secretary submitted her response brief. (Dkt. 161). Youth Plaintiffs submitted their reply. (Dkt. 181). The Court held a hearing concerning these motions on July 11, 2022. (Dkt. 187).

Appendix C

The Court has considered the briefs, evidence presented, and oral arguments made by counsel. These motions are ripe for decision.

FACTUAL BACKGROUND

During 2021, the Montana Legislature passed four laws: House Bill 176 ("HB 176"), Senate Bill 169 ("SB 169), House Bill 506 ("HB 506"), and House Bill 530 ("HB 530"). HB 176 amends § 13-2-304, MCA, by moving the deadline to register for the election to "noon the day before the election." Thus, HB 176 removed election day registration, which had been in effect for more than fifteen years. SB 169 amended § 132-110, MCA, and, *inter aria*, relegated the use of a student ID, to that of a secondary form of identification that must be presented in conjunction with "a current utility bill, bank statement, paycheck, government check, or other government document that shows the individual's name and current address" in order to register to vote. Prior to SB 169, a student ID was acceptable as a primary ID and no additional documentation was necessary to register to vote. HB 506 amended § 13-2-205, MCA, and requires that ballots cannot issue to voters until they meet residence and age requirements. Lastly, HB 530 provides that:

> [T]he secretary of state shall adopt an administrative rule in substantially the following form:
>
> (a) For the purposes of enhancing election security, a person may not provide or offer

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to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots.

(b) "Person" does not include a government entity, a state agency as defined in 12-11b, a local government as defined in 2-6-1002, an election administrator, an election judge, a person authorized by an election administrator to prepare or distribute ballots, or a public or private mail service or its employees acting in the course and scope of the mail service's duties to carry and deliver mail.

(2) A person violating the rule adopted by the secretary of state pursuant to subsection (1) is subject to a civil penalty. The civil penalty is a fine of $100 for each ballot distributed, ordered, requested, collected, or delivered in violation of the rule.

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LEGAL STANDARDS

A. Summary Judgment

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), M.R.Civ.P. In a summary judgment

proceeding, "[t]he evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences are to be drawn in favor of the party opposing summary judgment." *Thornton. v. Flathead County*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395. A trial on the merits is always preferable to summary judgment "if a controversy exists over a material fact." *Richards v. JTL Group*, 2009 MT 173, ¶ 12, 350 Mont. 516, 212 P.3d 264. "In evaluating cross motions for summary judgment, the District Court . . . must evaluate each party's motion on its own merits." *Hajenga v. Schwein*, 2007 MT 80, ¶ 19, 336 Mont. 507, ¶ 19, 155 P.3d 1241, ¶ 19; *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, ¶ 7, 403 P.3d 664, ¶ 7.

The initial burden is on the movant to prove the nonexistence of all genuine issues of material fact and entitlement to judgment as a matter of law. *Estate of Willson v. Addison*, 2011 MT 179, ¶ 13, 361 Mont. 269, 258 P.3d 410; *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 29, 356 Mont. 417, 234 P.3d 79. The moving party has the burden of extinguishing "'any real doubt as to the existence of any genuine issue of material fact' by making a 'clear showing as to what the truth is.'" *Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 12, 380 Mont. 495 (quoting *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 36, 345 Mont. 12, 192 P.3d 186).

Once the movant has satisfied this initial burden, the nonmoving party must "prove, by more than mere denial and speculation, that a genuine issue of material fact exists and that the moving party is not entitled to judgment

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as a matter of law." *Ehrman v. Kaufman*, 2010 MT 284, 10, 358 Mont. 519. It is essential that the nonmoving party "present facts of a substantial nature showing that genuine issues of material fact remain for trial." *Cape v. Crossroads Corr.* Ctr., 2004 MT 265, ¶ 12, 323 Mont. 140, 99 P.3d 171. "To raise a genuine issue of material fact, the proffered evidence must be 'material and of a substantial nature, not fanciful, frivolous, gauzy or merely suspicious." *Estate of Willson*, 114 (quoting *Elk v. Healthy Mothers, Healthy Babies, Inc.*, 2003 MT 167, ¶ 16, 316 Mont. 320, ¶ 16, 73 P.3d 795, ¶ 16).

B. Constitutional Issue

Statutes enacted by the Legislature "are presumed to be constitutional, and it is the duty of this Court to avoid an unconstitutional interpretation if possible." *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, ¶ 32, 488 P.3d 548, ¶ 32 (quoting *Hernandez v. Bd. of Cty. Comm'rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, ¶ 15, 189 P.3d 638, ¶ 15) (internal quotations omitted). Constitutional challenges to statutes require that the challenging party prove that the statute is "unconstitutional 'beyond a reasonable doubt' and, if any doubt exists, it must be resolved in favor of the statute." *Hernandez*, ¶ 15 (quoting *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, ¶ 13, 15 P.3d 877, ¶ 13).

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DISCUSSION

A. Issues the Court has previously ruled on

1. Standing

The Secretary, for the third time, argues that Plaintiffs do not have standing. The Court has previously ruled on this issue. The Secretary conceded during oral argument that she is merely preserving the issue of standing for appeal, which the Secretary has now achieved thrice over. The Court addressed this issue first in its Order Re Defendant's Motion to Dismiss (Dkt. 32) and second, in its Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motions for Preliminary Injunctions. (Dkt. 124 at ¶¶ 7-32). The Court hereby incorporates both its Order Re Defendant's Motion to Dismiss and its Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motions for Preliminary Injunctions. The Court has previously ruled that Plaintiffs have standing. The Secretary has raised no new arguments in support of her contention that warrant further analysis by the Court. Thus, the Court again finds based on the reasons stated in its Order Re Defendant's Motion to Dismiss and its Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motions for Preliminary Injunctions that all Plaintiffs have standing.

2. Ripeness of HB 530

The Secretary again argues that HB 530 is not ripe for judicial review because it directs the Secretary to adopt

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a rule that is "in substantially the same form" as that presented in HB 530. In addition to the same arguments already made, the Secretary adds that the Court "does not—and cannot—know what specific types of ballot assisting activities ultimately will be prohibited, or how such a rule might actually affect Plaintiffs." (Dkt. 155 at 46).

However, as previously described in ¶ 47-48 of its Conclusions of Law granting Plaintiffs' Motions for Preliminary Injunctions, Plaintiffs already provided evidence that HB 530 was causing Plaintiffs to stop their ballot collection activities. The Secretary's cite to testimony that Plaintiffs have testified that HB 530 is not being enforced against them as proof of no injury is concerning given that was the expected result of the preliminary injunction. Moreover, the plain language of HB 530 is clear that whatever rule ultimately does get adopted, it will reach ballot collection activities and impose a civil penalty. Thus, the effects of HB 530 are not "speculative." In sum, the Court finds that HB 530 is ripe.

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B. The Elections Clause of the U.S. Constitution

The Secretary asserts she is entitled to judgment as a matter of "United States constitutional law" because "[t]he Court may not interfere with the Legislature's constitutional obligation to regulate federal elections because that authority has been strictly delegated to the Legislature—not the State at large—by the U.S. Constitution." (Dkt. 155 at 57-58). The Secretary further describes, that because SB 169, HB 176, HB 506, and HB

530 were enacted by the Legislature "pursuant to authority delegated to it exclusively by the U.S. Constitution" that Plaintiffs' requested relief inappropriately conflicts with "the Legislature's constitutional obligation to regulate elections." (Dkt. 155 at 58-59).

The U.S. Supreme Court has already rejected the Secretary's interpretation of the Elections Clause. Specifically, the Court described, "[w]e find no suggestion in the Federal constitutional provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the **constitution of the State** has provided that laws shall be enacted." *Smiley v. Holm* (1932), 285 U.S. 355, 367- 68, 52 S. Ct. 397, 399 (emphasis added); *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n* (2015), 576 U.S. 787, 817-18, 135 S. Ct. 2652, 2673 (stating "[n]othing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."); *Harper v. Hall* (2022), 380 N.C. 317, 391, 868 S.E.2d 499, 551 (describing a similar argument made under the Elections Clause was "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences.").

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In sum, the Court finds that the Elections Clause does not prohibit judicial override of the challenged state laws as represented by the Secretary and that the Secretary is not entitled to "judgment as a matter of United States constitutional law." (*See* Dkt. 155 at 59).

C. HB 506

The Secretary submitted her Motion for Summary Judgment as to all claims made by all Plaintiffs. Youth Plaintiffs submitted their Cross Motion for Summary Judgment on Counts Three, Four, and Five of their Complaint. Youth Plaintiffs' Complaint, originally filed in DV 21-1097 prior to consolidation, alleges in Count Three that HB 506 "impermissibly restricts Plaintiffs' fundamental right of suffrage, Mont. Const., art., II, § 13, by making it more difficult for a subset of registered voters to access their ballots." (DV 21-1097, Dkt. 1 at 38-39). In Count Four, Youth Plaintiffs allege that "HB 506 impermissibly violates Plaintiffs' fundamental right not to be discriminated against on the basis of youth, Mont. Const., art. II, § 15, by making it more difficult for young people just becoming adults to access their ballots." *Id.* at 40. Lastly, in Count Five, Youth Plaintiffs allege "HB 506 violates Plaintiffs' right to equal protection of the laws, set forth as part of the right to individual dignity. Mont. Const., art. II, § 4." *Id.* at 41.

In regard to Counts Three through Five of Youth Plaintiffs' Complaint, both the Secretary and Youth Plaintiffs assert there are no genuine issues of material fact precluding summary judgment and thus the Court "is not called upon to resolve factual disputes, but only to draw conclusions of law[.]" *Bud-Kal v. City of Kalispell*, 2009 MT 93, ¶ 15, 350 Mont. 25, ¶ 15, 204 P.3d 738, ¶ 15 (citing *Merlin Myers Revocable Trust v. Yellowstone County*, 2002 MT 201, ¶ 12, 311 Mont. 194, 53 P.3d 1268).

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As described above, "legislative enactments are presumed constitutional, and the party challenging a statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt." *Alexander v. Bozeman Motors, Inc.*, 2012 MT 301, ¶ 27, 367 Mont. 401, ¶ 27, 291 P.3d 1120, ¶ 27 (citing *Elliot v. State Dept. of Revenue*, 2006 MT 267, ¶ 11, 334 Mont. 195, 146 P.3d 741; *Stavenjord v. Mont. State Fund*, 2003 MT 67, ¶ 45, 314 Mont. 466, 67 P.3d 229). 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.'" *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, ¶ 14, 368 P.3d 1131, ¶ 14 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008)).

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HB 506 amends § 13-2-205(2), MCA, to provide that "[u]ntil the individual meets residence and age requirements, a ballot may not be issued to the individual and the individual may not cast a ballot." Youth Plaintiffs and the Secretary agree that, prior to HB 506, election administrators in Montana were "providing absentee ballots to individuals who did not yet meet Montana's age or residency requirements, and some election administrators were waiting until those individuals satisfied Montana's age or residency requirements before providing them with absentee ballots." (Dkt. 169 at 192).

The Secretary submits three primary arguments as to why summary judgment as to the claims regarding the

constitutionality of HB 506 is appropriate. The Secretary first offers that Youth Plaintiffs cannot show HB 506 causes injury to them because the right to vote absentee is not encompassed by the right of suffrage under Mont. Const., art. II, § 13. Next, the Secretary argues that Youth Plaintiffs equal protection claim fails because Youth Plaintiffs cannot show that HB 506 treats similarly situated groups unequally and even if they can, HB 506 would be subject to rational basis review and survive this constitutional muster. Lastly, the Secretary contends HB 506 does not violate Article II, § 15.

The Montana Constitution provides that 141 elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const., Art. II § 13. This constitutional right of suffrage is a fundamental right. *Wilterns v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, ¶ 32, 325 P.3d 1204, ¶ 32.

The Secretary asserts that HB 506 is not inconsistent with the right of suffrage because that right is "explicitly limited by the Montana Constitution's (i) voter qualification standards; and (ii) mandate that the Legislature set the 'requirements for residence, registration, absentee voting, and administration of elections.'" (Dkt. 155 at 38 (quoting Mont. Const. Art. IV, §§ 2-3)). The Secretary argues that the changes HB 506 made were necessary to ensure only qualified electors were receiving ballots and mailing them in. Moreover, the Secretary contends that even if the right of suffrage encompasses the right to vote absentee, that Youth Plaintiffs' constitutional challenge still fails because

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fundamental rights are not absolute, and the changes made by HB 506 are reasonable.

However, as pointed out by Youth Plaintiffs, HB 506 forecloses voters turning eighteen in the month before the election from an avenue of voting available to all others in the electorate on the basis of the date that their birthday falls. Specifically, under HB 506, everyone qualified to vote in the election, apart from these voters turning eighteen in the month before the election, has the opportunity to receive their ballot in the mail, consider their voting options, and return their ballot via mail or some other means. As illustrated by Youth Plaintiffs, HB 506 will require this specific subgroup of the electorate—those turning eighteen in the month before the election—to only have the opportunity to submit their vote in-person and, depending on when their birth date falls, they may have to have the knowledge they can pre-register to vote, given the interplay between HB 506 and HB 176 (which removes election day as an option for registering to vote in the election). Not only that, but this specific subgroup of the electorate is the only subgroup of the electorate required to vote in person based on HB 506.

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Thus, while the Secretary points to the fact that the Legislature is mandated to set requirements for absentee voting pursuant to Article IV, §§ 2-3, HB 506 mandates that some electors can vote absentee while others cannot. The Secretary counters with the fact that, as described in a concurring opinion, absentee voting is an "'indulgence" (Dkt. 155 at 41 (quoting *Crawford v. Marion Cty. Election Bd.* (2008), 553 U.S. 181, 209, 128 S. Ct. 1610, 1627 (Scalia,

J., concurring)). However, under HB 506, most of the electorate is permitted this "indulgence" while a few have been excluded from the opportunity to similarly indulge.

The Court finds, first, that HB 506 severely interferes with the right of suffrage given it prevents this subgroup of the electorate from exercising their right of suffrage in ways the remainder of the electorate is not similarly prevented. Specifically, HB 506 needlessly forces one subgroup of the electorate to vote in person and impermissibly denies this subgroup access to an avenue of voting that all others in the electorate can avail themselves of. Given the substantial interference with a fundamental right, the Secretary must, even under the *Anderson-Burdick* standard discussed below, "demonstrate that the challenged statute survives strict scrutiny." *Driscoll*, if 39. A statute only survives strict scrutiny if it is "narrowly tailored to further a compelling government interest." *Id.* at ¶ 40 (citing *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997); *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993)). Thus, even on a showing of a compelling government interest, the government "must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Wadsworth v. State* (1996), 275 Mont. 287, 911 P.2d 1165, 1174.

Rather than apply the constitutional analysis that Montana Courts have applied for decades, the Secretary asks the Court to apply a "flexible standard" adopted by federal courts referred to as the "*Anderson-Burdick* standard" from *Anderson v. Celebrezze* (1983), 460 U.S.

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780, 103 S. Ct. 1564, and *Burdick v. Takushi* (1992), 504 U.S. 428, 112 S. Ct. 2059. Under this standard, when voting rights are "subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063 (quoting *Norman v. Reed* (1992), 502 U.S. 279, 289, 112 S. Ct. 698, 705). However, when the restrictions imposed by the law are "'reasonable' and "'nondiscriminatory,' "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. 428, 434, 112 S. Ct. 2059, 2063 (quoting *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1569). When this issue came before the Montana Supreme Court during its review of a preliminary injunction, the Court declined to "set forth a new level of scrutiny[]" describing that "for purposes of resolving the instant preliminary injunction dispute, the level of scrutiny is not dispositive to the issues presented on appeal." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 20, 401 Mont. 405, ¶ 20, 473 P.3d 386, ¶ 20. Thus, the federal *Anderson-Burdick* standard has not been applied by Montana courts to date.

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The interests identified by the Secretary in support of HB 506 include that "providing ballots only to those individuals who meet the constitutional prerequisites to vote is clearly reasonable." (Dkt. 155 at 41). Moreover, that the State's interest "in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes. . . . " is "a compelling interest." *Id.* at 42 (quoting *Larson. v. State*, 2019 MT 28, ¶ 40, 394 Mont. 167, ¶ 40, 434 P.3d 241, ¶ 40). The Secretary cites to six specific interests furthered by HB 506:

Appendix C

> (1) It ensures all voters who turn 18 during the late-registration period are treated the same, regardless of the county in which they live;
>
> (2) It provides clarity to election administrators and the Secretary regarding the handling of absentee ballots for voters who turn 18 during the late registration period;
>
> (3) It ensures all Montana election administrators follow the same practices when mailing absentee ballots to voters who turn 18 during the late registration period;
>
> (4) It prevents 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;
>
> (5) It allows the Secretary to finalize election administration software coding for Montana's election system software; and
>
> ([6]) It helps ensure only qualified voters are voting in Montana elections, as defined by the Montana Constitution.

(Dkt. 155 at 42 (citations omitted)). These interests are compelling. However, as evidenced by the unadopted version of HB 506 that passed in the House of Representatives, there are less onerous ways to achieve the above

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objectives. Specifically, the unadopted version of HB 506 that was passed by the House provided that "[u]ntil the individual meets residence and age requirements, a ballot submitted by the individual may not be processed and counted by the election administrator." (*See* Dkt. 153, ex. B). This unadopted version of HB 506 would have permitted everyone in the electorate to have the same access to their ballots and to the "indulgence" that is absentee voting while ensuring electors turning eighteen in the month prior to the election are treated uniformly throughout the counties and meeting the other interests outlined by the Secretary. The version of HB 506 that the Legislature ultimately passed arbitrarily subjects a subgroup of the electorate to different requirements and irrationally forecloses an avenue of voting available to all others in the electorate.

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In sum, the Court finds that HB 506 does not meet strict scrutiny (which is also required under the *Anderson-Burdick* standard given the severe restriction) because it is not narrowly tailored as evidenced by the less restrictive version of HB 506 that was considered by the Legislature. Moreover, the Court finds that Youth Plaintiffs have proven beyond a reasonable doubt that HB 506 unconstitutionally infringes the fundamental right of suffrage. The Court will grant Youth Plaintiffs Cross Motion for Summary Judgment as to Count Three. Because the Court has found HB 506 unconstitutional under the right of suffrage, the Court need not address the Secretary's motion for summary judgment and Youth Plaintiffs Cross Motion for summary judgment as to Counts Four and Five of Youth Plaintiffs Complaint.

D. SB 169, HB 176, and HB 530

1. Article IV, § 3

The Secretary contends that summary judgment is appropriate as to HB 176 because first, pursuant to Article IV, § 3, the Legislature has the authority to enact or repeal election day registration ("EDR"), second, it does not violate the right to vote, and third, it is facially neutral and does not violate equal protection.

The Secretary has maintained that pursuant to Mont. Const. Art. IV, § 3, it is within the Legislature's discretion to enact or repeal EDR. Article IV, § 3 states: "[t]he legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process." Mont. Const., Art. IV § 3.

The Court has no doubt that the Legislature had the discretion to choose whether or not to enact EDR, however, the Montana Constitution does not speak to the Legislature's discretion to revoke EDR given its implementation for the past fifteen years and the significant evidence submitted by Plaintiffs showing that Montanans make significant use of EDR. Thus, judgment as a matter of law pursuant to Art. IV, § 3 is inappropriate at this stage.

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2. Right to Vote

Next, concerning the right to vote, under the standard applied in Montana, when the exercise of a fundamental right is interfered with, "[t]he most stringent standard, strict scrutiny, is imposed . . . " *Wadsworth*, 275 Mont. 287, 911 P.2d 1165, 1174. Strict scrutiny review of a statute "requires the government to show a compelling state interest for its action." *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 61, 296 Mont. 207, ¶ 61, 988 P.2d 1236, ¶ 61 (quoting *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 (internal quotations omitted)). "In addition to the necessity that the State show a compelling state interest for invasion of a fundamental right, the State, to sustain the validity of such invasion, must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Mont. Envtl. Info. Ctr.*, at ¶ 61 (quoting *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 (internal quotations omitted)). On the other hand, as described above, the Secretary requests the Court, concerning the right to vote, to apply the federal *Anderson-Burdick* standard.

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Plaintiffs have alleged that HB 176, HB 530, and SB 169 each unconstitutionally burden the right to vote. Under both the precedential standard and the *Anderson-Burdick* standard, the Court must "determine the level of scrutiny to apply to the infringement of that right." *Wadsworth*, 275 Mont. 287, 911 P.2d 1165, 1173; *see also*, *Nader v. Brewer* (9th Cir. 2008), 531 F.3d 1028, 1034 (describing under *Anderson-Burdick*, "the severity of the burden the election law imposes on the plaintiff's rights dictates

the level of scrutiny applied by the court."). In making that determination, the Court considers "the nature of the interest and the degree to which it is infringed." *Wadsworth*, 275 Mont. 287, 911 P.2d 1165, 1173 (quoting *Mem'l Hosp. v. Maricopa Cty.* (1974), 415 U.S. 250, 253, 94 S. Ct. 1076, 1080)(internal quotations omitted). Under *Anderson-Burdick,* "[t]he severity of the burden that an election law imposes 'is a factual question on which the plaintiff bears the burden of proof." *Feldman v. Reagan* (9th Cir. 2016), 843 F.3d 366, 387 (quoting *Democratic Party of Haw. v. Nago* (9th Cir. 2016), 833 F.3d 1119, 1122-24).

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In considering HB 176, HB 530, and SB 169 under either standard, it is evident there are genuine issues of material fact in dispute. For example, under SB 169, the Secretary's contentions that SB 169 made "minor" changes to the law and that voters have "a wide variety of options to identify themselves for voting purposes" is disputed by MDP and MYA with facts concerning the apparent likelihood of college-age students to possess these other forms of identification. (Dkt. 169 at ¶¶ 117-118). The reduction of the impact on voters by the option to fill out a "Declaration of Impediment for an Elector" affidavit is also disputed by MYA and MDP as they cite to the fact that that affidavit "is only available to voters who lack an accepted form of photo ID, not those who lack other forms of secondary ID." (*See* Dkt. 169 at ¶¶ 120-121.).

Under HB 176, the consideration of the burden on election staff is highly factually disputed given the statements from some administrators describing that HB

176 will assist in reducing the lines and election staff's workload on election day versus the statements from other administrators describing that ending election day registration would not assist their jobs in administering elections. (*See id.* at ¶¶ 50-56). Under HB 530, it is disputed as to whether HB 530 places restrictions on unpaid ballot collection given the language concerning receiving a "pecuniary benefit" for collecting a ballot. (*Id.* at ¶ 104). Not to mention, the burden on voters is disputed with the Secretary describing it "imposes little burden on voters" and Plaintiffs asserting it "places a substantial burden" given the reliance on ballot collection particularly by Native American voters and the high costs to voting that they face. (*Id.* at ¶¶ 105).

In sum, the above examples illustrate just a few genuine issues of material fact that are disputed in this case that preclude this Court from granting summary judgment. Specifically, there are genuine issues of material fact as relating to the nature and extent of the burdens imposed by HB 530, SB 169, and HB 176. Additionally, the Secretary's interests in enforcing these laws, whether they are subjected to heighted scrutiny under the precedential standard or *Anderson-Burdick*, are genuine issues of material fact precluding the Court from granting summary judgment.

3. Right to Equal Protection

The Secretary asserts summary judgment is appropriate as to Plaintiffs equal protection claims relating to SB 169, HB 176, and HB 530. Concerning

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SB 169, HB 176, and HB 530, the Secretary argues first that the laws treat all voters the same and second, that Plaintiffs cannot prove disparate impact or discriminatory intent.

The Equal Protection Clause of the Montana Constitution aims to "ensure that Montana's citizens are not subject to arbitrary and discriminatory state action." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 15, 382 Mont. 256, ¶ 15, 368 P.3d 1131, ¶ 15. The clause specifically declares: "[n]either the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." Mont. Const., Art. II § 4. Additionally, while the Legislature must be given deference when it enacts a law, "it is the express function and duty of this Court to ensure that all Montanans are afforded equal protection under the law." *Davis v. Union Pac. R.R.* (1997), 282 Mont. 233, 240, 937 P.2d 27, 31. Moreover, "[a] law or policy that contains an apparently neutral classification may violate equal protection if "in reality [it] constitutes a device designed to impose different burdens on different classes of persons." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, ¶ 16, 104 P.3d 445, ¶ 16 (quoting *State v. Spina*, 1999 MT 113, P85, 294 Mont. 367, P85, 982 P.2d 421, P85).

Concerning the challenged laws, the Secretary presents as factual the claim that "[t]he Montana Legislature did not enact the Legislation to 'harm or

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disadvantage any particular class or group of voters!" (Dkt. 169 at 162 (internal citations omitted)). The Secretary also asserts that "[t]he Legislation is nondiscriminatory." *Id.* at ¶ 63. Plaintiffs dispute these claims asserting that the first claim "refers only to the personal opinions of two legislators who do not claim to represent the views of the entire legislature" and that "HB 530 was passed in the waning days of the legislative session, with no hearing or opportunity for the public to be heard." *Id.* at ¶ 62. Moreover, Plaintiffs describe that concerning HB 530, "Nile legislature had knowledge that a very similar law was found by multiple courts less than two years prior to harm and disadvantage Native voters among others. The legislature also heard extensive testimony about how HB 176 and HB 530 would harm Native American voters." *Id.* at(¶ 62. Concerning the intent behind SB 169, Plaintiffs point out that "comments from the sponsor of SB 169 indicate an intent to reduce student voting." *Id.* at ¶ 62. These are just a few examples of the genuine issues of material fact concerning whether the challenged laws "constitute[] a device designed to impose different burdens on different classes of persons." *See Snetsinger*, ¶ 16. Even moving forward from that aspect of the equal protection analysis, as described above, there are genuine issues of material fact concerning the Secretary's interests in implementing these challenged laws.

Thus, the Court finds that there are genuine issues of material fact precluding summary judgment as to Plaintiffs claims concerning the right to equal protection.

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4. Free Speech & Vagueness

The remaining issues concern Plaintiffs claims that HB 530 violates their right to free speech and is unconstitutionally vague. The Secretary argues that HB 530 does not implicate the right to free speech because it does not prohibit the activity of collecting ballots but merely prohibits receiving a pecuniary benefit for doing so. Plaintiffs assert that the ballot collecting activities the organizations they represent engage in provides them with the opportunity to "express their beliefs in the importance of civic engagement" and for MDP, its GOTV efforts enable it to communicate its mission to voters. (Dkt. 168 at 20). Plaintiffs describe CSKT, WNV, and Blackfeet Nation all engage in ballot collecting and that they coordinate with each other to encourage civic engagement among their members. (Dkt. 166 at 16). When this issue was raised in another case, the District Court described that II* collecting and conveying ballots, [Plaintiffs] are engaged in the 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' which is at the heart of freedom of expression protections." Courts Findings of Fact, Conclusions of Law, and Order, *Western Native Voice*, ¶ 30, No. DV 20-0377 (quoting *Dorn v. Bd. Of Trustees of Billings Sch. Dist. No. 2* (1983), 203 Mont. 136, 145, 661 P.2d 426, 431).

Moreover, concerning the issue of vagueness, while the Secretary is correct in pointing out that the rule making process required in HB 530 has not been undertaken and could potentially resolve some of the alleged ambiguities, Plaintiffs point to the disputed issues of fact as to whether

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"pecuniary benefit" would encompass their activities. Moreover, it is disputed as to whether HB 530 places restrictions on unpaid ballot collecting activities given that "HB 530 restricts giving a 'pecuniary benefit' for collecting a ballot" which could encompass more than just monetary benefits. (Dkt. 169 at ¶ 104).

In sum, regarding claims concerning free speech and vagueness, there are genuine issues of material fact concerning the extent to which the constitutional rights are implicated that preclude summary judgment.

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

IT IS HEREBY ORDERED:

1. Youth Plaintiffs Cross Motion for Summary Judgment as to Count Three is **GRANTED;** this order constitutes a summary judgment that HB 506 is unconstitutional;

2. The Secretary's Motions for Summary Judgment are **DENIED. DATED** July 27, 2022

/s/ Michael G. Moses
District Court Judge

APPENDIX D — Excerpts from Appellant's Opening Brief, No. DA 22-0667, Supreme Court of the State of Montana, Filed May 1, 2023

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.

Filed May 1, 2023

APPELLANT'S OPENING BRIEF

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

*** Table of Contents omitted in this appendix***

* * *

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[87] **VI. The Elections Clause requires that the Legislature be allowed to enact reasonable election regulations.**

The Elections Clause establishes that the power to regulate the time, place, and manner of federal elections is reserved to state legislatures. U.S. Const. art. I, § 4, cl. 1. The Elections Clause is "broad" and recognizes that only state legislatures are authorized to provide "a complete code for congressional elections." *Ariz. V. Inter Tribal Council of Ariz.*, 570 U.S. 1, 8–9 (2013) (citations omitted). The Elections Clause is a limitation on the power of the executive and judicial branches of the State of Montana grounded in the separation of powers and the source of that legislative authority. *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting from denial of certiorari).

The four laws at issue in this case each regulate the time, place, and manner of elections in Montana, and fall squarely into the power conferred to the Legislature by the Elections Clause. Depriving the Legislature of the ability to regulate elections wholesale—by reflexively applying strict scrutiny to every law the touches the electoral process, for example—would result in a violation of the United States Constitution's explicit and mandatory delegation of authority to the Legislature to do just that.

* * * *

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APPENDIX E — Excerpts from Brief of Appellees Montana Democratic Party et al., No. DA 22-0667, Supreme Court of the State of Montana, Filed June 30, 2023

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. DA 22-0667

MONTANA DEMOCRATIC PARTY
AND MITCH BOHN

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, IN HER OFFICIAL CAPACITY AS MONTANA SECRETARY OF STATE,

Defendant and Appellant.

Filed June 30, 2023

BRIEF OF APPELLEES MONTANA DEMOCRATIC PARTY AND MITCH BOHN

*** Table of Contents omitted in this appendix***

* * *

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Appendix E

[41] **IV. The District Court correctly rejected the Secretary's Election Clause argument.**

The Secretary's suggestion that the District Court's injunction violates the U.S. Constitution's Elections Clause is foreclosed by *Moore v. Harper*, No. 21-1271, 2023 WL 4187750, at *10 (U.S. June 27, 2023).

* * * *

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APPENDIX F — Excerpts from Brief of Appellees Montana Youth Action et al., No. DA 22-0667, Supreme Court of the State of Montana, Filed June 30, 2023

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.

Filed June 30, 2023

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

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

*** Table of Contents omitted in this appendix***

* * *

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

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

Federal courts apply *Anderson-Burdick* to state laws that burden voting, balancing the states' role in regulating elections with the right-to-vote floor set out in the federal Constitution. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). As this Court has explained, however, "[a] party may establish sound and [16] articulable reasons . . . that the Montana Constitution contains unique language, not found in its federal counterpart, that dictates this Court should recognize [an] enhanced protection." *State v. Covington*, 2012 MT 31, ¶¶ 20–21, 346 Mont. 118, 272 P.3d 43; *see State v. Martinez*, 2003 MT 65, ¶ 51, 314 Mont. 434, 67 P.3d 207 ("[W]e are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection.").

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The Montana Constitution clearly exceeds the federal floor, providing that "[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const. art. II, § 13. Notably, this guarantee is positive and explicit. Anthony Johnstone, *The Montana Constitution in the State Constitutional Tradition*, 352 (2022) ("The federal Constitution does not guarantee the right to vote in those terms."); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 93 (2014) (the federal Constitution couches the right to vote in general, negative language while the Montana Constitution, among a few others, includes an express, positive right to vote); Hannah Tokerud, *The Right* [17] *of Suffrage in Montana: Voting Protections Under the State Constitution*, 74 Mont. L. Rev. 417, 420 (2013) ("[T]o the 1972 Convention delegates, 'free' probably meant both without cost and without restraint.").

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

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

Id. (quoting Mont. Const. Conv., III Verbatim Tr. at 402 (Feb. 17, 1972) (Del. McKeon)); *see also* Mont. Const. Conv., III Verbatim Tr. at 445 (Feb. 17, 1972) ("[I]n the Bill of Rights, we've been working with a number of areas which we consider sacred . . . [T]he right to vote is certainly the most sacred right of them all.") (Del. Campbell). While the legislature must "provide by law the requirements for residence, registration, absentee voting, and administration of elections," it must do so "in conformity with the fundamental right to free and open elections where no power shall at any time interfere to prevent the free exercise of [18] the right." *MDP*, ¶ 19 (quoting Mont. Const. art. IV, § 3; art. II, § 13); *see also id.* ¶ 35 ("The delegates' discussion demonstrates that they understood Article IV, Section 3 as ultimately protecting the fundamental right to vote.").[3]

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

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* * * *

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

APPENDIX G — Excerpts from Appellant's Reply Brief, No. DA 22-0667, Supreme Court of the State of Montana, Filed August 14, 2023

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.

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Filed August 14, 2023

APPELLANT'S REPLY BRIEF

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

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* * *

[51] **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 [52] 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.

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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.

Appendix G

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 [53] 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).

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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.

* * * *

APPENDIX H — House Bill 176

67th Legislature **HB 176**

AN ACT REVISING LATE VOTER REGISTRATION; CLOSING LATE VOTER REGISTRATION AT NOON THE DAY BEFORE THE ELECTION; PROVIDING AN EXCEPTION SO MILITARY AND OVERSEAS ELECTORS MAY CONTINUE TO REGISTER THROUGH THE DAY OF THE ELECTION; AMENDING SECTIONS 13-2-301, 13-2-304, 13-13-301, 13-19-207, AND 13-21-104, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

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BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 13-2-301, MCA, is amended to read:

"**13-2-301. Close of regular registration—notice—changes.** (1) The election administrator shall:

(a) close regular registrations for 30 days before any election; and

(b) publish a notice specifying the day regular registrations will close and the availability of the late registration option provided for in 13-2-304 in a newspaper of general circulation in the county at least three times in the 4 weeks preceding the close of registration or broadcast a notice on radio or television as provided in 2-3-105 through 2-3-107, using the method the election administrator believes is best suited to reach the largest number of potential electors. The provisions of this

subsection (1)(b) are fulfilled upon the third publication or broadcast of the notice.

(2) Information to be included in the notice must be prescribed by the secretary of state.

(3) An application for voter registration properly executed and postmarked on or before the day regular registration is closed must be accepted as a regular registration for 3 days after regular registration is closed under subsection (1)(a).

(4) An elector who misses the deadlines provided for in this section may register to vote or change the elector's voter information and vote in the election~~, except as otherwise~~ as provided in 13-2-304."

Section 2. Section 13-2-304, MCA, is amended to read:

"**13-2-304. Late registration—late changes**. (1) Except as provided in 13-21-104 and subsection (2) of this section, the following provisions apply:

(a) An elector may register or change the elector's voter registration information after the close of regular registration as provided in 13-2-301 and vote in the election if the election administrator in the county where the elector resides receives and verifies the elector's voter registration information prior to ~~the close of the polls on election day.~~

~~(b) Late registration is closed from noon to 5 p.m. on the day~~ noon the day before the election.

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~~(c)~~(b) Except as provided in 13-2-514(2)(a) and subsection ~~(1)(d)~~ (1)(c) of this section, an elector who registers or changes the elector's voter information pursuant to this section may vote in the election if the elector obtains the ballot from the location designated by the county election administrator.

~~(d)~~(c) With respect to an elector who registers late pursuant to this section for a school election conducted by a school clerk, the elector may vote in the election only if the elector obtains from the county election administrator a document, in a form prescribed by the secretary of state, verifying the elector's late registration. The elector shall provide the verification document to the school clerk, who shall issue the ballot to the elector and enter the verification document as part of the official register.

~~(e)~~(d) An elector who registers late and obtains a ballot pursuant to this section may return the ballot as follows:

(i) before election day, to a location designated by the county election administrator or school clerk if the election is administered by the school district; or

(ii) on election day, to the election office or to any polling place in the county where the elector is registered to vote or, if the ballot is for a school election, to any polling place in the school district where the election is being conducted.

(2) If an elector has already been issued a ballot for the election, the elector may change the elector's

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voter registration information only if the original voted ballot has not been received at the county election office, or received by the school district if the district is administering the election, and if the original ballot that was issued is marked by the issuing county as void in the statewide voter registration system, or by the school district if the district is administering the election, prior to the change."

Section 3. Section 13-13-301, MCA, is amended to read:

"**13-13-301. Challenges.** (1) An elector's right to vote may be challenged at any time by any registered elector by the challenger filling out and signing an affidavit stating the grounds of the challenge and providing any evidence supporting the challenge to the election administrator or, on election day, to an election judge.

(2) A challenge may be made on the grounds that the elector:

(a) is of unsound mind, as determined by a court;

(b) has voted before in that election;

(c) has been convicted of a felony and is serving a sentence in a penal institution;

(d) is not registered as required by law;

(e) is not 18 years of age or older;

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(f) has not been, for at least 30 days, a resident of the county in which the elector is offering to vote, except as provided in 13-2-514;

(g) is a provisionally registered elector whose status has not been changed to a legally registered voter; or

(h) does not meet another requirement provided in the constitution or by law.

(3) When a challenge has been made under this section, unless the election administrator determines without the need for further information that the challenge is insufficient:

(a) prior to the close of registration under 13-2-301, the election administrator shall question the challenger and the challenged elector and may question other persons to determine whether the challenge is sufficient or insufficient to cancel the elector's registration under 13-2-402; ~~or~~

(b) after the close of regular registration under 13-2-301 ~~or on election day~~, the election administrator or, on election day, ~~the~~ either the election administrator or an election judge shall allow the challenged elector to cast a provisional paper ballot, which must be handled as provided in 13-15-107.

(4)(a) In response to a challenge, the challenged elector may fill out and sign an affidavit to refute the challenge and swear that the elector is eligible to vote.

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(b) If the challenge was not made in the presence of the elector being challenged, the election administrator or election judge shall notify the challenged elector of who made the challenge and the grounds of the challenge and explain what information the elector may provide to respond to the challenge. The notification must be made:

(i) within 5 days of the filing of the challenge if the election is more than 5 days away; or

(ii) on or before election day if the election is less than 5 days away.

(c) The election administrator or, on election day, the election judge shall also provide to the challenged elector a copy of the challenger's affidavit and any supporting evidence provided.

(5) The secretary of state shall adopt rules to implement the provisions of this section and shall provide standardized affidavit forms for challengers and challenged electors."

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Section 4. Section 13-19-207, MCA, is amended to read:

"**13-19-207. When materials to be mailed.** (1) Except as provided in 13-13-205(2) and subsection (2) of this section, for any election conducted by mail, ballots must be mailed no sooner than the 20th day and no later than the 15th day before election day.

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(2)~~(a)~~ All ballots mailed to electors on the active list and the provisionally registered list must be mailed the same day.

~~(b)~~(3)(a) At any time before noon on the day before election day, a ballot may be mailed or, on request, provided in person at the election administrator's office to~~:~~

~~(i)~~ an elector on the inactive list after the elector reactivates the elector's registration as provided in 13-2-222; or

~~(ii) an individual who registers under the late registration option provided for in 13-2-304.~~

~~(c)~~(b) An elector on the inactive list shall vote at the election administrator's office on election day if the elector reactivates the elector's registration after noon on the day before election day.

~~(d)~~(4) An elector who registers pursuant to 13-2-304 ~~on election day or on the day before election day~~ must receive the ballot ~~and vote it~~ at the election administrator's office."

Section 5. Section 13-21-104, MCA, is amended to read:

"**13-21-104. Adoption of rules on electronic registration and voting—acceptance of funds.** (1) The secretary of state shall adopt reasonable rules under the rulemaking provisions of the Montana Administrative

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Procedure Act to implement this chapter. The rules are binding upon election administrators.

(2) The rules must provide that:

(a) there are uniform statewide standards concerning electronic registration and voting;

(b) regular absentee ballots for a primary, general, or special election are available in a format that allows the ballot to be electronically transmitted to a covered voter as soon as the ballots are available pursuant to 13-13-205;

(c) a covered voter may~~, subject to 13-2-304,~~ register and vote up to the time that the polls close on election day;

(d) a covered voter is allowed to cast a provisional ballot if there is a question about the elector's registration information or eligibility to vote;

(e) a covered voter with a digital signature is allowed the option of using the digital signature as provided in 13-21-107; and

(f) a ballot cast by a covered voter and transmitted electronically will remain secret, as required by Article IV, section 1, of the Montana constitution. This subsection (2)(f) does not prohibit the adoption of rules establishing administrative procedures on how electronically transmitted votes must be transcribed to an official ballot. However, the rules must be designed to protect the accuracy, integrity, and secrecy of the process.

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(3) The secretary of state may apply for and receive a grant of funds from any agency or office of the United States government or from any other public or private source and may use the money for the purpose of implementing this chapter."

Section 6. Effective date. [This act] is effective on passage and approval.

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– END –

I hereby certify that the within bill, HB 176, originated in the House.

/s/____________________
Chief Clerk of the House

/s/____________________
Speaker of the House

Signed this ____________ day of ______, 2021.

/s/____________________
President of the Senate

Signed this ____________ day of ______, 2021.

HOUSE BILL NO. 176

INTRODUCED BY S. GREEF, D. ANKNEY, M. BLASDEL, B. BROWN, M. CUFFE, J. ELLSWORTH, S. FITZPATRICK, C. FRIEDEL, T.

Appendix H

GAUTHIER, B. GILLESPIE, C. GLIMM, G. HERTZ, S. HINEBAUCH, B. HOVEN, D. HOWARD, D. KARY, B. KEENAN, T. MANZELLA, T. MCGILLVRAY, B. MOLNAR, K. REGIER, W. SALES, D. SALOMON, J. SMALL, R. TEMPEL, G. VANCE, J. WELBORN, F. ANDERSON, B. BEARD, M. BERTOGLIO, M. BINKLEY, J. DOOLING, P. FIELDER, R. FITZGERALD, J. FULLER, S. GALLOWAY, F. GARNER, C. HINKLE, K. HOLMLUND, M. HOPKINS, W. MCKAMEY, B. MITCHELL, J. PATELIS, J. READ, J. SCHILLINGER, D. SKEES, K. WALSH, K. WHITMAN, C. SMITH

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AN ACT REVISING LATE VOTER REGISTRATION; CLOSING LATE VOTER REGISTRATION ON THE FRIDAY AT NOON THE DAY BEFORE THE ELECTION; PROVIDING AN EXCEPTION SO MILITARY AND OVERSEAS ELECTORS MAY CONTINUE TO REGISTER THROUGH THE DAY OF THE ELECTION; AND AMENDING SECTIONS 13-2-301, 13-2-304, 13-13-301, 13-19-207, AND 13-21-104, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

APPENDIX I — Senate Bill 169

67th Legislature **SB 169**

AN ACT GENERALLY REVISING VOTER IDENTIFICATION LAWS; REVISING CERTAIN IDENTIFICATION REQUIREMENTS FOR VOTER REGISTRATION, VOTING, AND PROVISIONAL VOTING; AMENDING SECTIONS 13-2-110, 13-13-114, 13-13-602, AND 13-15-107, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 13-2-110, MCA, is amended to read:

"**13-2-110. Application for voter registration—sufficiency and verification of information—identifiers assigned for voting purposes.** (1) An individual may apply for voter registration in person or by mail, postage paid, by completing and signing the standard application form for voter registration provided for in 13-1-210 and providing the application to the election administrator in the county in which the elector resides.

(2) Each application for voter registration must be accepted and processed as provided in rules adopted under 13-2-109.

(3) Except as provided in subsection (4):

~~(a)~~, an applicant for voter registration shall provide the applicant's:

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(a) Montana driver's license number~~; or~~

(b) Montana state identification card number issued pursuant to 61-12-501; or

(c)~~(b) if the applicant does not have a Montana driver's license, the applicant shall provide the last four digits of the applicant's social security number~~ the last four digits of the applicant's social security number.

(4) (a) If an applicant ~~does not have a Montana driver's license or social security number~~ is unable to provide information in accordance with subsection (3), the applicant shall provide as an alternative form of identification:

(i) a military identification card, a tribal photo identification card, a United States passport, Or a Montana concealed carry permit; or

~~(i)~~(ii) (A) ~~a current and valid~~ any other form of photo identification~~, including but not limited to a school district or postsecondary education photo identification or a tribal photo identification~~, including but not limited to a school district or postsecondary education photo identification with the individual's name; ~~or~~ and

~~(ii)~~(B) a current utility bill, bank statement, paycheck, government check, or other government document that shows the individual's name and current address.

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(b) The alternative form of identification must be:

(i) an original version presented to the election administrator if the applicant is applying in person; or

(ii) a readable copy of any of the required documents, which must be enclosed with the application, if the applicant is applying by mail.

(5) (a) If information provided on an application for voter registration is sufficient to be accepted and processed and is verified pursuant to rules adopted under 13-2-109, the election administrator shall register the elector as a legally registered elector.

(b) If information provided on an application for voter registration was sufficient to be accepted but the applicant failed to provide the information required in subsection (3) or (4) or if the information provided was incorrect or insufficient to verify the individual's identity or eligibility to vote, the election administrator shall register the applicant as a provisionally registered elector.

(6) Each applicant for voter registration must be notified of the elector's registration status pursuant to rules adopted under 13-2-109.

(7) The secretary of state shall assign to each elector whose application was accepted a unique identification number for voting purposes and shall establish a statewide uniform method to allow the secretary of state and local

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election officials to distinguish legally registered electors from provisionally registered electors.

(8) The provisions of this section may not be interpreted to conflict with voter registration accomplished under 13-2-221, 13-21-221, and 61-5-107 and as provided for in federal law."

Section 2. Section 13-13-114, MCA, is amended to read:

"**13-13-114. Voter identification and marking precinct register book before elector votes—provisional voting.** (1) (a) ~~Before~~ Except as provided in subsection (2), before an elector is permitted to receive a ballot or vote, the elector shall present to an election judge ~~a~~ one of the following forms of ~~current photo~~ identification showing the elector's name~~. If the elector does not present photo identification, including but not limited to~~:

(i) a ~~valid~~ Montana driver's license, Montana state identification card issued pursuant to 61-12-501, military identification card, tribal photo identification card~~,~~, United States passport, or Montana concealed carry permit; or

(ii) (A) ~~a school district or postsecondary education photo identification, or a tribal photo identification, the elector shall present~~ a current utility bill, bank statement, paycheck, ~~notice of confirmation of voter registration issued pursuant to 13-2-207,~~ government check, or other government document that shows the elector's name and current address; and

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(B) photo identification that shows the elector's name, including but not limited to a school district or postsecondary education photo identification.

~~(b)~~(b) An elector who provides the information listed in subsection ~~(1)(a)~~ (1)(a) may sign the precinct register and must be provided with a regular ballot to vote.

~~(c)~~(c) If the information provided in subsection ~~(1)(a)~~ (1)(a) differs from information in the precinct register but an election judge determines that the information provided is sufficient to verify the voter's identity and eligibility to vote pursuant to 13-2-512, the elector may sign the precinct register, complete a new registration form to correct the elector's voter registration information, and vote.

~~(d)~~(d) An election judge shall write "registration form" beside the name of any elector submitting a form.

(2) If the elector is unable to present the information required by subsection (1) or if the information presented under subsection (1) is insufficient to verify the elector's identity and eligibility to vote or if the elector's name does not appear in the precinct register or appears in the register as provisionally registered and this provisional registration status cannot be resolved at the polling place, the elector may sign the precinct register and cast a provisional ballot as provided in 13-13-601.

(3) If the elector fails or refuses to sign the elector's name or if the elector is disabled and a fingerprint, an

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identifying mark, or a signature by a person authorized to sign for the elector pursuant to 13-1-116 is not provided, the elector may cast a provisional ballot as provided in 13-13-601."

Section 3. Section 13-13-602, MCA, is amended to read:

"**13-13-602. Fail-safe and provisional voting by mail.** (1) To ensure the election administrator has information sufficient to determine the elector's eligibility to vote, an elector voting by mail may enclose in the outer signature envelope, together with the voted ballot in the secrecy envelope~~, a copy of a current and valid photo identification with the elector's name or~~:

(a) a Montana driver's license number, Montana state identification card number issued pursuant to 61-12-501, or the last four digits of the applicant's social security number;

(b) a readable copy of a military identification card, a tribal photo identification card, a United States passport, a photo identification card issued by a Montana college or university, or a Montana concealed carry permit; or

(c) (i) any other form of readable photo identification with the individual's name; and

(ii) a copy of a current utility bill, bank statement, paycheck, notice of confirmation of voter registration issued pursuant to 13-2-207, government check, or other

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government document that shows the elector's name and current address ~~or other information necessary to determine the elector's eligibility to vote~~.

(2) The elector's ballot must be handled as a provisional ballot under 13-15-107 if:

(a) a provisionally registered elector voting by mail does not enclose with the ballot the information described in subsection (1);

(b) the information provided under subsection (1) is invalid or insufficient to verify the elector's eligibility; or

(c) the elector's name does not appear on the precinct register."

Section 4. Section 13-15-107, MCA, is amended to read:

"**13-15-107. Handling and counting provisional and challenged ballots.** (1) To verify eligibility to vote, a provisionally registered individual who casts a provisional ballot has until 5 p.m. on the day after the election to provide valid identification or eligibility information either in person, by facsimile, by electronic means, or by mail postmarked no later than the day after the election.

(2) ~~(a)~~ If a legally registered individual casts a provisional ballot because the individual failed to provide sufficient identification as required pursuant to 13-13-114(1)(a)~~,~~:

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(a) the elector has until 5 p.m. on the day after the election to provide identification information pursuant to the requirements of 13-13-114 or as provided in subsection (3) of this section; and

(b) the election administrator shall compare the signature of the individual or the individual's agent designated pursuant to 13-1-116 on the affirmation required under 13-13-601 to the signature on the individual's voter registration form or the agent's designation form.

~~(b)~~ If the signatures match, the election administrator shall handle the ballot as provided in subsection ~~(5)~~ (7).

~~(c)~~ If the signatures do not match and the individual or the individual's agent fails to provide valid identification information by the deadline, the ballot must be rejected and handled as provided in 13-15-108.

(3) If a legally registered individual casts a provisional ballot but is unable provide the identification information pursuant to the requirements of 13-13-114, the elector may verify the elector's identity by:

(a) presenting a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address; and

(b) executing a declaration pursuant to subsection (4) that states that the elector has a reasonable impediment to meeting the identification requirements.

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(4) The secretary of state shall prescribe the form of the declaration described in subsection (3). The form must include:

(a) a notice that the elector is subject to prosecution for false swearing under 45-7-202 for a false statement or false information on the declaration;

(b) a statement that the elector swears or affirms that the information contained in the declaration is true, that the person described in the declaration is the same person who is signing the declaration, and that the elector faces a reasonable impediment to procuring the identification required by 13-13-114;

(c) a place for an elector to indicate one of the following impediments:

(i) lack of transportation;

(ii) lack of birth certificate or other documents needed to obtain identification;

(iii) work schedule;

(iv) lost or stolen identification;

(v) disability or illness;

(vi) family responsibilities; or

(vii) photo identification has been applied for but not received;

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(d) a place for the elector to sign and date the declaration;

(e) a place for the election administrator or an election judge to sign and date the declaration;

(f) a place to note the polling place at which the elector cast a provisional ballot; and

(g) a place for the election administrator or election judge to note which form of identification required by subsection (3)(a) the elector presented.

~~(3)~~(5) A provisional ballot must be counted if the election administrator verifies the individual's identity or eligibility pursuant to rules adopted under 13-13-603. However, if the election administrator cannot verify the individual's identity or eligibility under the rules, the individual's provisional ballot must be rejected and handled as provided in 13-15-108. If the ballot is provisional because of a challenge and the challenge was made on the grounds that the individual is of unsound mind or serving a felony sentence in a penal institution, the individual's provisional ballot must be counted unless the challenger provides documentation by 5 p.m. on the day after the election that a court has established that the individual is of unsound mind or that the individual has been convicted and sentenced and is still serving a felony sentence in a penal institution.

~~(4)~~(6) The election administrator shall provide an individual who cast a provisional ballot but whose ballot

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was or was not counted with the reasons why the ballot was or was not counted.

~~(5)~~(7) A provisional ballot must be removed from its provisional envelope, grouped with other ballots in a manner that allows for the secrecy of the ballot to the greatest extent possible, and counted as any other provisional ballot if the individual's voter information is:

(a) verified before 5 p.m. on the day after the election; or

(b) postmarked by 5 p.m. on the day after election day and received and verified by 3 p.m. on the sixth day after the election.

~~(6)~~(8) Provisional ballots that are not resolved by the end of election day may not be counted until after 3 p.m. on the sixth day after the election."

Section 5. Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

Section 6. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

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Section 7. Effective date. [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill, SB 169, originated in the Senate.

/s/______________________
Secretary of the Senate

/s/______________________
President of the Senate

Signed this ______________ day of _______, 2021.

/s/______________________
Speaker of the House

Signed this ______________ day of _______, 2021.

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SENATE BILL NO. 169

INTRODUCED BY M. CUFFE, E. BUTTREY, D. SKEES, D. SALOMON, J. READ, S. FITZPATRICK, R. OSMUNDSON, D. KARY, T. MCGILLVRAY, D. HOWARD, K. REGIER, C. SMITH, G. VANCE, J. WELBORN, B. HOVEN, M. BLASDEL, D. ANKNEY, L. JONES, B. KEENAN, B. MOLNAR, C. GLIMM, G. HERTZ, M. LANG, D. LENZ, W. GALT, S. BERGLEE, B. BROWN,

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F. GARNER, J. HINKLE, K. HOLMLUND,
T. MANZELLA, W. MCKAMEY, M. NOLAND,
B. TSCHIDA, S. HINEBAUCH, S. GUNDERSON,
M. REGIER, D. LOGE, R. FITZGERALD,
F. ANDERSON, L. SHELDON-GALLOWAY,
J. TREBAS, D. BARTEL, C. KNUDSEN, B. USHER,
S. VINTON, W. SALES, T. WELCH, J. SMALL,
T. GAUTHIER, M. HOPKINS, R. TEMPEL,
F. FLEMING, J. ELLSWORTH, N. DURAM,
J. FULLER, R. KNUDSEN, J. DOOLING,
K. BOGNER, J. KASSMIER, B. MERCER,
T. MOORE, D. BEDEY, S. GREEF, B. LER,
B. PHALEN, F. NAVE, J. CARLSON,
L. BREWSTER, K. ZOLNIKOV, B. MITCHELL,
A. REGIER, L. REKSTEN, P. FIELDER, S. KERNS,
S. GALLOWAY, S. GIST, E. HILL, J. SCHILLINGER,
K. SEEKINS-CROWE, M. STROMSWOLD,
M. MALONE, J. GILLETTE, C. HINKLE,
K. WALSH, M. BERTOGLIO, G. FRAZER,
M. BINKLEY, R. MARSHALL, K. WHITMAN

BY REQUEST OF THE SECRETARY OF STATE

AN ACT GENERALLY REVISING VOTER IDENTIFICATION LAWS; REVISING CERTAIN IDENTIFICATION REQUIREMENTS FOR VOTER REGISTRATION, VOTING, AND PROVISIONAL VOTING; AND AMENDING SECTIONS 13-2-110, 13-13-114, AND 13-13-602, AND 13-15-107, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

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APPENDIX J — House Bill 506

67th Legislature **HB 506**

AN ACT GENERALLY REVISING ELECTION LAWS; ESTABLISHING PRIORITIES FOR DEVELOPMENT OF CONGRESSIONAL DISTRICTS; REVISING PROCEDURES FOR PROSPECTIVE ELECTORS TO REGISTER AND VOTE; CLARIFYING REQUIREMENTS FOR A BOARD OF COUNTY CANVASSERS; ELIMINATING THE EXPERIMENTAL USE OF VOTE SYSTEMS; AMENDING SECTIONS 5-1-115, 13-2-205, AND 13-15-401, MCA; REPEALING SECTION 13-17-105, MCA; AND PROVIDING EFFECTIVE DATES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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Section 1. Section 5-1-115, MCA, is amended to read:

"**5-1-115. Redistricting criteria.** (1) Subject to federal law, legislative and congressional districts must be established on the basis of population.

(2) In the development of legislative districts, a plan is subject to the Voting Rights Act and must comply with the following criteria, in order of importance:

(a) The districts must be as equal as practicable, meaning to the greatest extent possible, within a plus or minus 1% relative deviation from the ideal population of a district as calculated from information provided by the federal decennial census. The relative deviation

may be exceeded only when necessary to keep political subdivisions intact or to comply with the Voting Rights Act.

(b) District boundaries must coincide with the boundaries of political subdivisions of the state to the greatest extent possible. The number of counties and cities divided among more than one district must be as small as possible. When there is a choice between dividing local political subdivisions, the more populous subdivisions must be divided before the less populous, unless the boundary is drawn along a county line that passes through a city.

(c) The districts must be contiguous, meaning that the district must be in one piece. Areas that meet only at points of adjoining corners or areas separated by geographical boundaries or artificial barriers that prevent transportation within a district may not be considered contiguous.

(d) The districts must be compact, meaning that the compactness of a district is greatest when the length of the district and the width of a district are equal. A district may not have an average length greater than three times the average width unless necessary to comply with the Voting Rights Act.

(3) A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress. The following data or information may not be considered in the development of a plan:

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(a) addresses of incumbent legislators or members of congress;

(b) political affiliations of registered voters;

(c) partisan political voter lists; or

(d) previous election results, unless required as a remedy by a court.

(4) In the development of congressional districts and under the authority granted to the legislature by Article I, section 4, of the United States constitution, a congressional districting plan is subject to the Voting Rights Act and must comply with the following criteria, in order of importance:

(a) The districts must be as equal as practicable.

(b) District boundaries must coincide with the boundaries of political subdivisions of the state to the greatest extent possible. The number of counties and cities divided among more than one district must be as small as possible. When there is a choice between dividing local political subdivisions, the more populous subdivisions must be divided before the less populous, unless the boundary is drawn along a county line that passes through a city.

(c) The districts must be contiguous, meaning that a district must be in one piece. Areas that meet only at points of adjoining corners or areas separated by geographical boundaries or artificial barriers that prevent

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transportation within a district may not be considered contiguous.

(d) The districts must be compact, meaning that the compactness of a district is greatest when the length of the district and the width of a district are equal. A district may not have an average length greater than three times the average width unless necessary to comply with the Voting Rights Act."

Section 2. Section 13-2-205, MCA, is amended to read:

"**13-2-205. Procedure when prospective elector not qualified at time of registration.** (1) ~~An~~ Subject to subsection (2), an individual who is not eligible to register because of residence or age requirements but who will be eligible on or before election day may apply for voter registration pursuant to 13-2-110 and be registered subject to verification procedures established pursuant to 13-2-109.

(2) Until the individual meets residence and age requirements, a ballot may not be issued to the individual and the individual may not cast a ballot."

Section 3. Section 13-15-401, MCA, is amended to read:

"**13-15-401. Governing body as board of county canvassers.** (1) The governing body of a county or consolidated local government is ex officio a board of county canvassers and shall meet as the board of county

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canvassers at the usual meeting place of the governing body ~~within 14 days after each election,~~ at a time determined by the board~~, to~~ and within 14 days after each election to complete the canvass ~~the~~ of returns.

(2) If one or more of the members of the governing body cannot attend the meeting, the member's place must be filled by one or more county officers chosen by the remaining members of the governing body so that the board of county canvassers' membership equals the membership of the governing body.

(3) The governing body of any political subdivision in the county that participated in the election may join with the governing body of the county or consolidated local government in canvassing the votes cast at the election.

(4) The election administrator is secretary of the board of county canvassers and shall keep minutes of the meeting of the board and file them in the official records of the administrator's office."

Section 4. Repealer. The following section of the Montana Code Annotated is repealed: 13-17-105. Experimental use of voting systems.

Section 5. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

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Section 6. Effective dates. (1) Except as provided in subsection (2), [this act] is effective October 1, 2021.

(2) [Sections 1 and 5] and this section are effective on passage and approval.

– END –

I hereby certify that the within bill, HB 506, originated in the House.

/s/____________________
Chief Clerk of the House

/s/____________________
Speaker of the House

Signed this ____________ day of ______, 2021.

/s/____________________
President of the Senate

Signed this ____________ day of ______, 2021.

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HOUSE BILL NO. 506

INTRODUCED BY P. FIELDER
BY REQUEST OF THE SECRETARY OF STATE

AN ACT GENERALLY REVISING ELECTION LAWS; ESTABLISHING PRIORITIES FOR DEVELOPMENT OF CONGRESSIONAL

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DISTRICTS; REVISING PROCEDURES FOR PROSPECTIVE ELECTORS TO REGISTER AND VOTE; CLARIFYING REQUIREMENTS FOR A BOARD OF COUNTY CANVASSERS; ELIMINATING THE EXPERIMENTAL USE OF VOTE SYSTEMS; AMENDING SECTIONS 5-1-115, 13-2-205, AND 13-15-401, MCA; REPEALING SECTION 13-17-105, MCA; AND PROVIDING EFFECTIVE DATES.

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APPENDIX K — House Bill 530

67th Legislature **HB 530**

AN ACT REQUIRING THE SECRETARY OF STATE TO ADOPT RULES DEFINING AND GOVERNING ELECTION SECURITY; REQUIRING ELECTION SECURITY ASSESSMENTS BY THE SECRETARY OF STATE AND COUNTY ELECTION ADMINISTRATIONS; ESTABLISHING THAT SECURITY ASSESSMENTS ARE CONFIDENTIAL INFORMATION; ESTABLISHING REPORTING REQUIREMENTS; DIRECTING THE SECRETARY OF STATE TO ADOPT A RULE PROHIBITING CERTAIN PERSONS FROM RECEIVING PECUNIARY BENEFITS WITH RESPECT TO CERTAIN BALLOT ACTIVITIES; PROVIDING PENALTIES; PROVIDING RULEMAKING AUTHORITY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Statewide elections infrastructure—rulemaking. (1)(a) On or before July 1, 2022, the secretary of state shall adopt rules defining and governing election security.

(b) The secretary of state and county election administrators shall annually assess their compliance with election security rules established in accordance with subsection (1)(a). County election administrators shall provide the results of the assessments to the secretary of state in January of each year to ensure that all aspects

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of elections in the state are secure. Security assessments are considered confidential information as defined in 2-6-1002(1).

(2) Beginning January 1, 2023, and each year after, the secretary of state shall provide an annual summary report on statewide election security. The report must be provided to the state administration and veterans' affairs interim committee in accordance with 5-11-210.

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Section 2. Direction to secretary of state—penalty. (1) On or before July 1, 2022, the secretary of state shall adopt an administrative rule in substantially the following form:

(a) For the purposes of enhancing election security, a person may not provide or offer to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots.

(b) "Person" does not include a government entity, a state agency as defined in 1-2-116, a local government as defined in 2-6-1002, an election administrator, an election judge, a person authorized by an election administrator to prepare or distribute ballots, or a public or private mail service or its employees acting in the course and scope of the mail service's duties to carry and deliver mail.

(2) A person violating the rule adopted by the secretary of state pursuant to subsection (1) is subject to a civil penalty. The civil penalty is a fine of $100 for

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

Section 3. Codification instruction. (1) [Section 1] is intended to be codified as an integral part of Title 13, chapter 1, part 2, and the provisions of Title 13, chapter 1, part 2, apply to [section 1].

(2) [Section 2] is intended to be codified as an integral part of Title 13, and the provisions of Title 13 apply to [section 2].

Section 4. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 5. Effective date. [This act] is effective on passage and approval.

– END –

I hereby certify that the within bill, HB 530, originated in the House.

/s/______________________
Chief Clerk of the House

/s/______________________
Speaker of the House

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Appendix K

Signed this _____________ day of _______, 2021.

/s/____________________
President of the Senate

Signed this _____________ day of _______, 2021.

HOUSE BILL NO. 530

INTRODUCED BY W. MCKAMEY, D. ANKNEY, S. FITZPATRICK, B. GILLESPIE, C. GLIMM, G. HERTZ, D. HOWARD, C. SMITH, G. VANCE, J. WELBORN, B. BEARD, S. BERGLEE, M. BERTOGLIO, L. BREWSTER, E. BUTTREY, N. DURAM, G. FRAZER, J. FULLER, W. GALT, F. GARNER, S. GIST, S. GREEF, C. HINKLE, J. HINKLE, L. JONES, J. KASSMIER, C. KNUDSEN, D. LOGE, B. MERCER, L. REKSTEN, V. RICCI, J. SCHILLINGER, D. SKEES, M. STROMSWOLD, B. USHER, S. VINTON, K. WALSH, T. WELCH, K. ZOLNIKOV

BY REQUEST OF THE SECRETARY OF STATE

AN ACT REQUIRING THE SECRETARY OF STATE TO ADOPT RULES DEFINING AND GOVERNING ELECTION SECURITY; REQUIRING ELECTION SECURITY ASSESSMENTS BY THE SECRETARY OF STATE AND COUNTY ELECTION ADMINISTRATIONS; ESTABLISHING THAT SECURITY ASSESSMENTS ARE CONFIDENTIAL INFORMATION; ESTABLISHING REPORTING

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Appendix K

REQUIREMENTS; DIRECTING THE SECRETARY OF STATE TO ADOPT A RULE PROHIBITING CERTAIN PERSONS FROM RECEIVING PECUNIARY BENEFITS WITH RESPECT TO CERTAIN BALLOT ACTIVITIES; PROVIDING PENALTIES; PROVIDING RULEMAKING AUTHORITY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

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