IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0172

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

Plaintiffs and Appellees,

v.

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

Defendant and Appellant.

APPELLANT'S OPENING BRIEF
(Expedited Consideration Requested)

APPEARANCES:

Dale Schowengerdt
John M. Semmens
CROWLEY FLECK PLLP
P.O. Box 797
Helena, MT 59624-0797
(406) 449-4165
dale@crowleyfleck.com

Leonard H. Smith
David F. Knobel
CROWLEY FLECK PLLP
P.O. Box 2529
Billings MT 59103

Ian McIntosh
William McIntosh Morris
E. Lars Phillips
CROWLEY FLECK PLLP

Matthew Gordon
Perkins Coie LLP
1201 Third Avenue
Suite 4900
Seattle, Washington 98101-3099
(206)359-9000
mgordon@perkinscoie.com

Peter M. Meloy
Meloy Law Firm
P.O. Box 1241
Helena, Montana 59624
(406)442-8670
mike@meloylawfirm.com

John Heenan
Heenan & Cook PLLC
1631 Zimmerman Trail

1915 S. 19th Ave
Bozeman MT 59719

David M.S. Dewhirst
Solicitor General
Kathleen Lynn Smithgall
Assistant Solicitor General
Office of the Attorney General
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Austin Markus James
Chief Legal Counsel
Office of the Secretary of State
P.O. Box 202801
Helena, MT 59620-2801
Telephone: (406) 444-6197

Attorneys for Defendant and Appellant Christi Jacobsen

Billings, MT 59102
(406)839-9091
john@lawmontana.com

Henry J. Brewster
Jonathan P. Hawley
ELIAS LAW GROUP LLP
10 G Street NE Suite 600
Washington, DC 20002
(202)-968-4596
hbrewster@elias.law
jhawley@elias.law

Attorneys for Plaintiffs and Appellees Montana Democratic Party and Mitch Bohn

Rylee Sommers-Flanagan
Upper Seven Law
P.O. Box 31
Helena, MT 59624
Phone: (406) 396-3373
rylee@uppersevenlaw.com

Ryan Aikin
Aikin Law Office, PLLC
P.O. Box 7277
Missoula, MT 59807
Phone: (406) 840-4080
ryan@aikinlawoffice.com

Attorneys for Plaintiffs and Appellees Montana Youth Action, et al.

Alex Rate
Akilah Lane
ACLU of Montana
P.O. Box 1968

Missoula, MT 59806
406-224-1447
ratea@aclumontana.org

Alora Thomas-Lundborg*
Jonathan Topaz*
Dale Ho*
ACLU
125 Broad Street
New York, NY 10004
(212) 519-7866

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

Jacqueline De León*
Matthew Campbell*
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302-6296
(303) 447-8760

Theresa J. Lee*
Election law Clinic
Harvard Law School
6 Everett Street, Suite 5112
Cambridge, MA 02138
(617) 998-1010
Attorneys for Plaintiffs and Appellees Western Native Voice, et al. *Admitted *pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF ISSUE

Did the District Court err in applying strict scrutiny to preliminarily enjoin election laws without finding they imposed a substantial burden on the right to vote or intentionally discriminated against any class of voters?

STATEMENT OF THE CASE

This appeal arises from the District Court's preliminary injunctions of SB 169, which made minor changes to voter ID requirements, and HB 176, which changed the late registration deadline by one day. The bills became effective when the Governor signed them into law on April 19, 2021. One day later, Montana Democratic Party ("MDP") filed suit challenging their constitutionality.

Various other organizational plaintiffs filed related cases. Western Native Voice, et al. ("WNV"), challenged the constitutionality of HB 176 on May 17, 2021. And Montana Youth Action, et al. ("MYA") challenged the constitutionality of HB 176 and SB 169 on September 9, 2021. The District Court consolidated the MDP, WNV, and MYA cases.[1]

[1] Appellees also challenged HB 530 (prohibiting paid ballot collection) and MYA challenged HB 506 (governing when ballots are mailed to underage voters). Although the District Court preliminarily enjoined those statutes, the Secretary has not appealed the decision as applied to them.

While litigation progressed, the Secretary implemented HB 176 and SB 169 as required by law; more than 337,000 Montanans successfully voted in three elections in 2021. App. 661. Plaintiffs eventually each filed motions to preliminary enjoin HB 176 and SB 169 in January 2022, 268 days—and three separate Montana elections—after MDP initiated these proceedings.

The District Court preliminarily enjoined HB 176 and SB 169 on April 6, 2022, just 28 days before Montana's May 3, 2022 elections, and 63 days before Montana's June 7, 2022 elections. The Secretary filed a notice of appeal and immediately filed a Mont. R. App. P. 22(1) motion to stay with the District Court. The District Court denied that motion on April 22, 2022. Defendant appealed that order on April 27, 2022. Mont. R. App. 22(2).

STATEMENT OF FACTS

Providing efficient and secure elections has long been a critical feature of Montana law. It is so important that the Delegates to the Constitutional Convention took the unique step of making that duty explicit in the Constitution: "The legislature shall provide by law the requirements for . . . registration . . . and administration of elections . . . and shall insure the purity of elections and guard against abuses of the electoral process." Mont. Const. art. IV, § 3. Every session the

Legislature fulfills that duty in the necessary task of regulating elections, balancing the twin goals of making voting both accessible and secure.

The laws at issue in this appeal are perfect examples of the Legislature's efforts to balance those goals.

I. SB 169's Changes to Montana's Voter Identification Laws.

Montana has required voter identification since at least 2003. 2003 Montana Laws Ch. 475 (HB 190). Montana's voter identification laws (both before and after SB 169) split acceptable forms of ID into two categories, primary and non-primary. Primary photo IDs are sufficient by themselves to establish voter identification, while non-primary IDs are acceptable when presented with another document showing name and address. Before SB 169, student IDs were primary ID. § 13-13-114 (1)(a)(i-ii), MCA; *see* App. 661-662, 790-791, 798-799. SB 169 amended the primary ID requirement by making government-issued federal or Montana ID primary, and all other ID non-primary. A voter must show an election judge:

> (i) A Montana driver's license, Montana state identification card issued pursuant to 61-12-501, military identification card, tribal photo identification card, United States passport, or Montana concealed carry permit; or
>
> (ii) (A) a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address; and

> (B) photo identification that shows the elector's name, including but not limited to a school district or postsecondary education photo identification.

§ 13-13-114 (i-ii), MCA.

Because student IDs are not government-issued IDs, they are no longer primary, but still can be used with another qualifying document showing name and address, such as the voter registration card the Secretary's office sends to each registered voter. App. 658-660, 662, 682. The Legislature enacted SB 169 to "help prevent[] illegal voting," "increase[] voter confidence in elections"; and "make[] it easier for election administrators and workers to administer and understand what constitutes proper voter ID." App. 741-742, 790-791, 797-798.

At the same time, the Legislature made complying with Montana's voter ID laws easier. First, SB 169 removed the requirement that primary ID be "current and valid," so an expired driver's license or other expired qualifying ID is now sufficient. The Secretary recommended that change after hearing from several Tribes that the "current and valid" language interfered with Native voting because it was sometimes unclear whether Tribal IDs were current. App. 664-665. That change also removed potential barriers to older and disabled voters with expired licenses. In response, the Legislature eliminated the "current and valid" requirement. App. 658-659, 664-665, 790, 797-798, 895-896.

Second, the Legislature adopted a failsafe for voters unable to comply with the voter ID requirements by allowing them to submit a "Declaration of Impediment for an Elector" affidavit, which is available at elections offices. App. 659, 663; *see also* § 13-15-107(3), MCA; ARM 44.3.2110. Using the "Declaration of Impediment" form, which did not exist prior to enactment of SB 169, voters who lack required photo ID still can submit a provisional ballot by attesting they have one of several qualifying impediments, including: (1) "lack of transportation"; (2) "lack of birth certificate or other documents needed to obtain identification"; (3) "work schedule"; (4) "lost or stolen identification"; (5) "disability or illness"; (6) "family responsibilities"; or (7) "photo identification has been applied for but not received." § 13-15-107(4), MCA; App. 659, 663, 688 (sample form). And even if an elector cannot utilize the reasonable impediment process, the elector may use the Polling Place Identification Form process set forth by administrative rule. *See* ARM 44.3.2102(7); ARM 44.3.2103(1)(f).

II. HB 176's Change to Montana's Late Registration Deadline.

HB 176 modified § 13–2–304, MCA, by moving the registration deadline from Election Day to noon the day before. App. 904. Election Day Registration ("EDR") was implemented in 2005. But in 1972—when Montana's Constitution was adopted—voter registration ended 40 days prior to Election Day (30 days for federal

elections). Rev. Code Mont. §§ 23-3016, 23-3724 (1971). Like Montana, most states do not offer EDR.[2] App. 734, 757, 760.

The Legislature enacted HB 176, in part, to "give election administrators plenty of time to finalize registration rolls and run organized and efficient elections on election day." App. 796. It also sought to reduce long lines at the polls, which are common on general election days, and to give election administrators sufficient time to tabulate and report election results. App. 789-790, 796-797.

Montana election administrators, especially those in rural counties with limited staff, requested and supported HB 176 because EDR placed an excessive burden on them. App. 771-786; 789, 796-797. Doug Ellis—former Broadwater County Election Administrator who worked in its election office for nearly 20 years—summarized the problems EDR created:

> Elections are by far the most trying position that I have. And a lot of it is because same day registration. It's extremely hard to put information of all the voters, in the system, get their ballots counted and keep the

[2] Montana's late registration period remains longer than most states. Twenty-six states have deadlines between 20-30 days, while 18 states offer EDR. Five States, including Montana, have late registration deadlines between one and 15 days. Montana, along with North Carolina, maintain same-day registration during the early voting period. *Voter Registration Deadlines*, Nat'l Conf. St. Legislatures, https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx.

> numbers correct while still registering people to vote the same day you are having an election. It's extremely hard.

App. 831. Other Montana election administrators, such as Janel Tucek and Monica Eisenzimer, also testified about the distinct difficulties EDR poses on running an efficient election with limited, mostly volunteer, staff. App. 772-786.

Election experts have concluded HB 176 facilitates effective election administration because it "provides election administrators and workers adequate time to process voter registration applications." App. 731. That is critical to effective election administration, because election day is exceedingly busy and rural counties in particular face challenges registering voters on busy election days. App. 732-733, 772-786. Eliminating EDR reduces election day work volume and, in doing so, reduces confusion and mistakes by election workers, providing substantial benefits, especially in rural counties. App. 721, 732-734.

At the same time, social scientists have found no causal link between EDR and increased voter turnout. App. 735-737, 757-760. HB 176 is unlikely to have a statistically significant impact on voter participation in Montana elections, especially because Montana election law allows voters to register and vote on the same day anytime during the 30-day period before Election Day. *Id.*; § 13-2-304(d)(i), MCA (late registrants may return their ballot "before election day").

Moreover, registering to vote in Montana is easy, which voters can do in multiple ways, including: (1) completing a registration form when applying for, or renewing, a driver's license; (2) visiting a county election office; or (2) mailing a registration form to a county election office.[3] *See also* ARM 44.3.2003, 44.3.2005. And all voters can check the status of their voter registration anytime by reviewing their "My Voter Page" on the Secretary's website.[4]

Montana law also provides multiple safeguards for voters on Election Day, allowing voters to correct errors in their registration, update precinct address, and reactivate registration. App. 654-656. Voters also may vote a provisional ballot if errors cannot be rectified before the polls close. *Id.* The Secretary of State's office has trained election administrators on this failsafe process. *Id.*

III. Defendant Has Successfully Implemented HB 176 and SB 169.

In April 2021, the Secretary of State's office began investing considerable time and public resources implementing the Legislature's new election laws, especially SB 169 and HB 176. App. 666-675. Implementing these laws required a great deal of coordination, voter education, and administrative effort. As the Secretary described in her Rule 22(2) Motion to Stay, those efforts included:

---

[3] Secretary of State, *How to Register to Vote,* https://sosmt.gov/elections/vote/#1641574992907-9dee3295-aa37.

[4] Montana Secretary of State, *My Voter Page*, https://app.mt.gov/voterinfo/.

- Airing public service announcements approximately 14,240 times on broadcast television and 18,102 times on radio educating the public about the laws' requirements;
- Sending a mailing to every registered voter in the state noting the new registration deadline;
- Issuing Election Judge Handbooks, Polling Place Quick Guides, and other training materials to all election officials in the state;
- Overhauling administrative rules governing elections to reflect the new laws; and
- Extensive training on the new laws for a record number of new election administrators and election staff.

See App. 666-676, 825-828, 891-893. If the District Court's preliminary injunction remains in effect, election staff will need to be retrained. For example, they must be trained to accept standalone student ID, and that they *may not* accept expired tribal ID or driver's licenses, or offer an affidavit of impediments for voters who lack ID.

The Secretary's efforts to implement HB 176 and SB 169 were overwhelmingly successful. Over 337,000 Montanans successfully voted in various elections held in Montana in 2021, each of which was governed by HB 176 and SB 169. App. 661. Notably, Plaintiffs have not identified any voters who were unable to vote in Montana's 2021 elections solely because of HB 176 or SB 169.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy and should be granted with caution[.]" *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794. This Court typically reviews the grant or denial of a preliminary

injunction for manifest abuse of discretion. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386. But that deferential standard is inapplicable when a district court's order is based on conclusions of law; in such circumstances "no discretion is involved and [this Court reviews] the district court's conclusions of law to determine whether the interpretation of the law is correct." *City of Whitefish v. Bd. of Cty. Comm'rs of Flathead Cty.*, 2008 MT 436, ¶ 7, 347 Mont. 490, 199 P.3d 201. Interpretations of the Montana Constitution and/or Montana statutes "undoubtedly" are questions of law. *Comm'r of Pol. Pracs. v. Wittich*, 2017 MT 210, ¶ 71, 388 Mont. 347, 400 P.3d 735.

SUMMARY OF ARGUMENT

The District Court erred by subjecting modest election law changes to strict scrutiny simply because they "implicate" the right to vote and may affect voters in different ways. That standard is inconsistent with Montana law. Courts across the county have rejected it because it would obliterate the State's authority to regulate elections. The District Court's contrary conclusion is unprecedented, and if affirmed, would put Montana in a class of its own. Appellees have cited no case concluding that strict scrutiny applies to laws that merely "implicate" the right to vote, without evaluating the burden imposed.

If the District Court had applied the correct standard, it should have concluded that the statutes are not subject to strict scrutiny and easily pass constitutional review. Requiring government-issued ID imposes a minimal burden and advances the State's important interests in preventing fraud, ensuring compliance with voting qualifications, and promoting public confidence that elections are secure, i.e., the same interests that have justified Montana's voting ID laws for nearly two decades. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 193, 197 (2008). Government-issued ID is "needed to board a plane, enter federal buildings, and cash a check." *Id.* at 194. Requiring the same to vote does not "represent a significant increase over the usual burdens of voting." *Id.* at 198. And even if Appellees' factually unsupported premise that the law burdens young voters more distinctly were correct (it is not), that is insufficient to enjoin it. Absent intentional discrimination (which Appellees did not show and the District Court did not find), disparate impact alone does not support enjoining facially neutral laws. Indeed, in many ways SB 169 made Montana's voter ID laws easier to comply with; the District Court's injunction, if anything, increased the burden on voters.

The District Court also erred in enjoining HB 176's change of the late voter registration deadline from Election Day to noon the day before. Once again, the U.S. Supreme Court addressed this precise question: "a person does not have a federal

constitutional right to walk up to a voting place on election day and demand a ballot." *Marston v. Lewis*, 410 U.S. 679, 680 (1973). Upholding Montana's late registration deadline is even more straightforward because the Montana Constitution, Article IV, § 3 grants the Legislature discretion regarding EDR. The Framers crafted the language intentionally to provide flexibility to enact EDR if they chose, and modify it if EDR caused problems. And that is precisely what happened. Election administrators, especially those in smaller counties, complained EDR made Election Day unnecessarily chaotic, delayed vote tallies, and made voting more difficult by exacerbating long lines at the polls. The Legislature made the reasonable choice of eliminating that problem, while still maintaining a long late-registration period—significantly longer than the 40-day deadline in place when the Constitution was ratified.

Because any burdens imposed are slight, the State's compelling regulatory interests fully justify SB 169 and HB 176.

With trial scheduled to begin August 15, 2022, and the general election quickly approaching, the Secretary respectfully requests the Court expedite its consideration to provide needed clarity to the District Court and parties on the constitutional standards governing this case.

ARGUMENT

I. The District Court's injunction analysis does not reflect Montana law.

The Order contains minimal legal analysis. Boiled down, its premise is any statute that "implicates" voting rights must pass strict scrutiny. Order, p. 35. This Court must directly evaluate the correctness of that novel legal conclusion, which underpins the Order. But this Court also should reverse the Order for being inconsistent with Montana preliminary injunction law.

A. The Order never evaluated success on the merits.

To obtain a preliminary injunction, "an applicant must establish that he has a legitimate cause of action, **and that he is likely to succeed on the merits[**.]"[5] *Cole v. St. James Healthcare*, 2008 MT 453, ¶ 15, 348 Mont. 68, 199 P.3d 810 (emphasis added). That is true if the applicant seeks relief under § 27-19-201(1) or (2), MCA, as Plaintiffs did. *Id.*; *M.H. v. Montana High Sch. Ass'n*, 280 Mont. 123, 135, 929 P.2d 239, 247 (1996); Order, p. 56.

The District Court never analyzed whether Plaintiffs will succeed on the merits. And it fell far short of concluding Plaintiffs had "a probable right" to vote free from regulation. *Cf. M.H.*, 280 Mont. at 136, *with* Order, p. 56 (injunction

[5] As the District Court conceded, "laws promulgated by the legislature enjoy the presumption of constitutionality." Order, p. 56.

prevented a "potential constitutional violation"). If the District Court implicitly engaged in this analysis, it turned on whether its original premise was legally correct, i.e., whether election laws must always pass strict scrutiny. Order, p. 35; *Driscoll*, ¶ 18 (courts must determine appropriate "level of scrutiny"). As established below, that premise conflicts with federal law, Montana law, and the plain language of the Montana Constitution.

B. The District Court's irreparable harm analysis is erroneous.

"[A]ll requests for preliminary injunctive relief require some demonstration of threatened harm or injury." *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 16, 395 Mont. 160, 437 P.3d 142. An applicant "must show a prima facie case that he will suffer irreparable injury before the case can be fully litigated." *Maurier*, ¶ 11.

The District Court erred by not requiring Plaintiffs to prove Montanans would be "irreparably harmed" by voting in elections governed by HB 176 and SB 169, as occurred in 2021 without issue. Instead, it analyzed whether those bills "implicated" the right to vote. Order, pp. 34-35. Determining they did, the District Court concluded: (1) Plaintiffs could be harmed by the bills; because (2) the bills were unconstitutional under its original premise. Order, pp. 35-38, 53-54.

The District Court's circular reasoning finds no support under Montana law. This Court should reverse it for not requiring Plaintiffs to substantiate their factual

allegations. App. 103, 113 (alleging bills at issue will "burden thousands of Montana voters"). If valid, Plaintiffs' claims should have been confirmed by Montana's 2021 elections. They were not.

That Plaintiffs allowed 268 days to pass—and multiple Montana elections—between filing complaints and seeking injunctions, also confirms Plaintiffs cannot establish irreparable harm. The District Court sanctioned Plaintiffs' inexplicable delay without meaningful legal analysis. Order, pp. 55–56. That too was error.

Preliminary injunctions are "granted at the commencement of an action before there can be a determination of the rights of the parties to preserve the subject in controversy in its existing condition pending a determination." *Boyer v. Karagacin*, 178 Mont. 26, 34, 582 P.2d 1173, 1178 (1978). The U.S. Supreme Court has denied preliminary injunctions in similar circumstances. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("party requesting a preliminary injunction must generally show reasonable diligence," a principle that "is as true in election law cases as elsewhere"). Courts have concluded delays of as few as "thirty-six days" after learning of "irreparable harm" compelled denial. *See Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90–91 (D.D.C. 2014) (surveying supporting cases). Plaintiffs' unreasonable delay refutes their claims of "irreparable harm." *Tough Traveler, Ltd. v. Outbound Prod.*, 60 F.3d 964, 968 (2d Cir. 1995).

C. The District Court erred by issuing a mandatory injunction.

Compounding its initial error absolving Plaintiffs' delay, the District Court further erred by imposing a mandatory injunction on election officials just before Montana's 2022 elections. Mandatory injunctions "require a positive action[.]" *Split Fam. Support Grp. v. Moran*, 232 F. Supp. 2d 1133, 1135–36 (D. Mont. 2002).

The District Court erroneously concluded Plaintiffs were not seeking mandatory injunctions. Order, pp. 21-22. It reasoned the Order did not direct Defendant to take affirmative acts. Order, p. 22. The District Court later reached the opposite conclusion. Dkt. 142, p. 10 ("the Court recognizes the necessity of . . . the work that will be required to comply with" the Order). Because the Order requires election officials to "take a positive action," it is a mandatory injunction. *Moran*, 232 F. Supp. 2d at 1135-36. The District Court erred by not demanding the "stronger showing" required by Montana law. *Paradise Rainbows v. Fish & Game Comm'n*, 148 Mont. 412, 420, 421 P.2d 717, 721–22 (1966).

D. The District Court erred by not considering the public interest.

Courts must "balance the equities and minimize potential damage when considering an application for a preliminary injunction." *Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342. Courts should only grant injunctive relief "upon conditions that will protect all—including the

public—whose interests the injunction may affect." 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2947 (3d ed. 2021). The public's interest in its election statutes, and efficient election administration, is significant. *Larson v. State*, 2019 MT 28, ¶ 40, 394 Mont. 167, 434 P.3d 241.

Here, the Secretary has already implemented the law, educated voters, and trained staff, who are now busily preparing for the upcoming elections. The District Court never evaluated how preliminarily enjoining SB 169 and HB 176 would prejudice the public interest, given that extensive preparation and voter education. It also erases the facets of SB 169 that make voting easier (e.g., use of expired IDs and Polling Place Identification Form). That was error. *Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1154 (D. Mont. 2004). And any reasonable balancing of the equities should tilt sharply in the State's favor.

II. The District Court erred in applying strict scrutiny to election laws that merely "implicate" constitutional rights.

The District Court held any law that "implicates the fundamental right to vote [must] be subject to strict scrutiny," regardless of the burden it imposes. Order, p. 40. Courts universally have rejected that standard because it obliterates a state's authority to regulate elections. The U.S. Supreme Court put it best:

> 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. . . **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**.

Burdick v. Takushi, 504 U.S. 428, 433 (1992) (internal citations omitted) (emphasis added).

The right to vote unquestionably is fundamental under both the Montana and federal constitutions. But that cannot mean there is a right to vote in any manner, free from regulation. *Id.* The State's authority to regulate elections is necessary to ensure fair and honest elections, which, in turn, safeguards the right to vote. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995).

Rather than adopt a rigid test that dissuades States from exercising this power, federal courts adopted a "more flexible standard" ("*Anderson-Burdick* standard"). *See Burdick*, 504 U.S. at 433–35 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Strict scrutiny is reserved for laws that severely burden the right to vote, while lesser burdens trigger less exacting scrutiny; "the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* at 434. Thus, the "general rule" is "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious" and, thus, satisfy constitutional

scrutiny. *Crawford*, 553 U.S. at 189–91 (plurality). "Common sense" compels this conclusion—government plays a necessary role in structuring and administering elections. *Burdick*, 504 U.S. at 433; *see also* U.S. Const. art. 1, § 4, cl.1; Mont. Const. art. IV, § 3. In other words, the *Anderson-Burdick* framework—which has been widely adopted—expressly rejects Appellees' and the District Court's all-or-nothing approach. *See Crawford*, 553 U.S. at 190.

The challenged laws here fall squarely within the scope of election regulations that courts have repeatedly upheld under the *Anderson-Burdick* framework, i.e. reasonable regulations that were constitutionally permissible because they did not impose severe burdens on voters. *See, e.g.*, *Crawford*, 553 U.S. at 198 (photo-identification requirement); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (registration deadline requirement); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016) (reduction of early voting period).

That is entirely consistent with how this Court approaches balancing fundamental rights with the State's important regulatory authority. "The extent to which the Court's scrutiny is heightened depends both on the nature of the interest **and the degree to which it is infringed**." *Wadworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173 (1996) (emphasis added). In fact, the Montana Constitution provides an even greater justification for adopting a flexible standard than federal

law. It grants broad power to the Montana Legislature—even broader than the U.S. Constitution gives to States. Mont. Const. art. IV, § 3; Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, p. 450 (granting Legislature "very broad" authority to "pass whatever statutes it deems necessary" to keep Montana elections "free of fraud").

Balancing competing constitutional interests is not unique to voting rights; this Court has adopted similar approaches in the context of other fundamental rights. *See, e.g.*, *Montana Cannabis Indus. Ass'n v. State,* 2012 MT 201, ¶¶ 17–24, 366 Mont. 224, 286 P.3d 1161 (surveying opinions concluding even "fundamental rights" may be "circumscribed by the State's police power to protect the public[]"); *Willems v. State*, 2014 MT 82, ¶ 33 n. 3, 374 Mont. 343, 325 P.3d 1204 (Article II, § 13 "right of suffrage" outweighed by Article V, § 14, which requires legislative districts); *Nelson v. City of Billings*, 2018 MT 36, ¶¶ 19-29, 390 Mont. 290, 412 P.3d 1058 ("authority to set procedural rules to perpetuate and maintain the legal system of this state" under Article VII, § 2 outweighed the fundamental "right to know"); *Mont Cannabis Indus. Ass'n*, ¶ 20 ("[A]lthough individuals have a fundamental right to pursue employment, they do not have a fundamental right to pursue a particular employment or employment free of state regulation."); *see also Driscoll*, ¶ 45 (there is no "credible support for the legal proposition that the fundamental right to vote

necessarily includes the most convenient or most preferable way to vote") (Sandefur and Rice, JJ., concurring in part and dissenting in part). In short, even fundamental rights are not absolute and must be balanced against other constitutional interests.

The District Court, without any analysis, rejected this balancing framework, instead holding any law that merely "implicates" the right to vote must satisfy strict scrutiny. Order, p. 35. And Appellees cited no authority—indeed, not a single case—where any State applies this ill-advised standard. That fundamental error in the District Court's analysis was the basis of its flawed preliminary injunction.

III. SB 169 easily passes constitutional review.

SB 169's modest changes to Montana's ID requirements impose a minimal burden that advances the State's important (indeed, compelling) interests in promoting voter confidence, preventing fraud, verifying residence, and modernizing the State's voting requirements. The U.S. Supreme Court upheld similar interests in *Crawford*, rejecting the same arguments Appellees make here. 553 U.S. at 187, 198. The District Court did not even acknowledge *Crawford*.

Notably, Appellees do not challenge the concept of voter ID in total. Order, p. 42 ("as testified to by experts on both sides, requiring voter identification itself increases voter confidence"). They only challenge the Legislature's decision to make government-issued federal and Montana ID primary, and student or other ID

nonprimary. That cannot possibly constitute a substantial burden on the right to vote, or really any burden at all. Student ID still may be used to vote, even under SB 169. The Legislature simply recognized it is less reliable than government-issued ID—the same decision made by airlines, banks, federal courthouses, hotel front desks, and even the colleges students attend, which require government ID to register and get a student ID.[6]

A. Requiring government-issued ID as primary ID imposes minimal, and constitutionally permissible, burdens on voters.

In evaluating SB 169, this Court is not writing on a blank slate. In *Crawford*, the Supreme Court recognized "the inconvenience of making a trip to the [MVD], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198. That conclusion is surely correct. Indeed, most voters already possess qualifying, readily available ID for in-person voting.

In Montana, establishing voter ID is even easier than the Indiana law in *Crawford*. SB 169 provides voters multiple ways to prove their identity, which Appellees consistently ignore. *Supra*, Statement of Facts, section I. As discussed

[6] University of Montana, *Get Your Griz Card*, https://www.umt.edu/griz-card/get-your-griz-card/default.php; Montana State University, *Get Your Cat Card*, https://www.montana.edu/catcard/students.html.

above, SB 169 created a simple failsafe for the few voters without qualifying ID through a form declaration of impediment available at election offices. *Id.*

Appellees' claim that the law burdens students is simply implausible. Assuming a student does not have a government-issued ID (itself implausible, especially since they needed one to register), he or she can use a student ID in conjunction with the voter registration card the Secretary mailed to them (or a utility bill, bank statement or any other government document with name and address). Not surprisingly, Appellees cannot identify a single college student (or anyone else) who would be precluded from voting by SB 169.

And when they tried, the attempt backfired. Appellees submitted a declaration from MSU student Hailey Sinoff who vaguely claimed she needed her student ID to vote. App. 887-890. But in her deposition, Sinoff admitted she never knew the previous law permitted voting with student ID until counsel told her that while preparing for her deposition. "I've never thought of like my student ID card as an acceptable form of identification for anything other than getting into the gym…I've never seen anyone use their student ID card as like an acceptable form of identification for something serious." App. 868-869, at 52:15-53:10. She also testified

she had qualifying ID to vote under SB 169 when she turned eighteen, including a passport. App. 864, at 36:15-22.[7]

Rather than identify actual voters with concrete harm, Appellees—and the District Court—relied exclusively on abstract expert testimony that young voters might be less likely to have a second form of identification beyond their student ID. Order, pp. 4-5, 35. But that academic testimony cannot withstand even cursory scrutiny because it uses college students as a proxy for "young voters." Take for example the District Court's citation of Dr. Kenneth Mayer's testimony that "[c]ollege-age students, in general, are less likely than the general population to possess a driver's license or ID. . . In Montana, 71.5% of the population 18-24 has a Montana driver's license, well behind the total license possession rate of 94.7% among the 18 or older population in Montana." Order, p. 4. MYA's expert Yael Bromberg made the same error, claiming "youth vote" means college students. Order, pp. 5-6.

[7] Appellees challenge SB 169 and HB 176 based on alleged harm to voters. *See, e.g.,* App. 126, 129-130. Yet all Appellees challenging HB 169 and SB 176 are organizations, not voters, and thus lack standing. *See Driscoll*, ¶ 45, n.7 (Sandefur, J., concurring and dissenting). While this Court found it unnecessary to address this issue in *Driscoll*, it highlights the implausibility of Appellees' claims. If the statutes truly harmed voters, they would be able to find at least one member to identify.

Appellees and the District Court extrapolate that to mean fewer college students have a driver's license (they say nothing about other government-issued ID), and thus likely need student ID to vote. *Id.* But only 32.3% of 18-24 year-olds in Montana are enrolled in college.[8] And, as noted, to register and get a student ID, college students need "a federal or state government issued identification (ex. Driver's license), a passport, military ID or other government-issued photo ID."[9] That further explains why Appellees have been unable to identify a single student voter precluded from voting under SB 169. If anything, SB 169 put young voters on equal footing by ending student ID's favored status. That aside, the testimony does nothing to support Appellees' claim that SB 169 will preclude students from voting.

The District Court also accepted Appellees' claim that not allowing out-of-state driver's license as primary ID was discriminatory and burdensome against out-of-state college students. Order, pp. 5, 35, 53. That raises the obvious question why students from out-of-state would be voting in Montana if they are not residents, which raises another interest served by the law—verifying residency. App. 739-740.

---

[8] NCHEMS Information Center, *Percent of 18 to 24 Year Olds Enrolled in College*, http://www.higheredinfo.org/dbrowser/index.php?submeasure=331&year=2017&level=nation&mode=data&state=.

[9] *Get Your Griz Card*, https://www.umt.edu/griz-card/get-your-griz-card/default.php.

To register to vote, a person must be a resident, which means a fixed habitation and intent to remain in Montana. § 13-1-112(1), MCA. Once someone becomes a resident, drivers have sixty days to get a Montana driver's license. § 61-5-103, MCA. Given that, it makes no sense to suggest SB 169 burdens voters with out-of-state driver's licenses from using that license as a primary ID. If they are Montana residents with out-of-state driver's licenses, they already are required to obtain a Montana driver's license. Beyond that, those voters may still use out-of-state licenses as a secondary ID, when paired with another document with their address showing they actually live in Montana.

But even if Appellees were correct SB 169 impacted student voters more distinctly (it does not), it would not be constitutionally significant. Even where "a somewhat heavier burden may be placed on a limited number of persons," including the elderly and homeless, the law should not be subjected to heightened scrutiny. *Crawford*, 553 U.S. at 199-203. In evaluating a voting system's burdens (especially in a facial challenge, as here), courts look at "[the statute's] broad application to all [] voters." *Id.* at 202-03. And the Court noted any increased harm to certain individuals was mitigated by the opportunity to cast a provisional ballot without ID and/or vote absentee, just like in Montana. *Id.* at 199, 202. That SB 169 may affect different

voters in different ways is both unavoidable and justified by the "State's broad interests in protecting election integrity." *Id.* at 200.

The District Court did not—and could not—find SB 169 imposes a substantial burden on voters. Just like the voter ID law in *Crawford*, SB 169 "surely does not qualify as a substantial burden on the right to vote." *Id.* at 198.

B. The District Court ignored the State's legitimate and compelling interests.

Because the burden imposed by SB 169 is slight, at best, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434. Here, the interests are not only important, but compelling, as this Court has already recognized: the State has "a compelling interest in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes." *Larson*, ¶ 40.

Requiring government-issued ID as primary ID is "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process" by "deterring and detecting voter fraud" and "safeguarding voter confidence." *Crawford*, 553 U.S. at 191, 197; *see also* App. 720-768 (Defendant's expert reports). Indeed, even Appellees' experts largely concede voter ID increases voter confidence. Order, p. 36.

And in fact, substantial evidence confirms voter ID increases voter confidence in elections and does not impact voter turnout. App. 399-497, 738, 757, 760-762. For example, the bipartisan Carter-Baker Commission recommended states adopt strict photo-ID laws to prevent fraud and increase voter confidence nearly two decades ago. App. 267, 276-279 (finding robust voter identification laws are "bedrocks of a modern election system" and "essential to guarantee the free exercise of the vote by all U.S. citizens"). The Carter-Baker Report recommended requiring REAL ID cards for voting. App. 277-279. In *Crawford*, the Court drew a direct line to voter ID, noting that safeguarding public confidence "encourages citizen participation in the democratic process" but "the 'electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Crawford*, 553 U.S. at 197 (citation omitted).

Consistent with those conclusions, the Legislature was well-within its authority to require that primary ID be government-issued. Student IDs do not have the same level (or perception) of security and reliability as a government-issued ID, which is of course why not even Montana universities will not accept them for registration. App. 790-791, 797-799. A Wisconsin federal court recently explained why student IDs are not in the same category:

> Unlike other IDs used for voting, student IDs aren't otherwise regulated by federal, state, or tribal law, so any school's ID may be different from another's.
>
> * * *
>
> The content of nearly all of the other voter IDs is regulated by another state or federal statute, making them more recognizable and uniform, and potentially making them harder to fake. That's not the case for student IDs. [Plaintiff] doesn't identify any uniform standards that Wisconsin colleges and universities have adopted, which other courts have found to be a reason to treat student IDs differently.

Common Cause v. Thomsen, 2021 WL 5833971, at *6 (W.D. Wis. Dec. 9, 2021) (citing *Nashville Student Organizing Committee v. Hargett*, 155 F.Supp.3d 749, 756 (M.D. Tenn. 2015) (reasonable to believe student IDs are more likely to be falsified)).

Moreover, SB 169's constitutionality does not turn on whether student ID's have fraudulently been used to vote in Montana. Just like any law (e.g., political disclosure laws), the State may take proactive and preventative measures to respond to potential electoral problems. *See Crawford*, 553 U.S. at 194. In *Crawford*, the Supreme Court had no problem approving Indiana's law without a record "of any such fraud actually occurring." *Id.*; *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (states are "permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively"). Moreover, requiring a state to prove harm before enacting a reasonable, non-discriminatory regulation—like SB 169—contradicts Montana's constitutional framework requiring the Legislature to

regulate elections to "insure the purity of elections and guard against abuses of the electoral process." Mont. Const. art. IV, § 3.

And anyway, Montana has well-documented instances of voter fraud; the Legislature also knew of fraud in other states, most notably North Carolina. App. 498-528, 552-580, 791-792, 799-800; *Brnovich*, 141 S. Ct. at 2348, n.20. Indeed, two individuals recently were cited for illegally voting in an election in Dodson, Montana, where the outcome was decided by two votes. App. 552-559.

Documented instances of fraud aside, the public's lack of confidence in elections is an urgent problem in the United States, including Montana. App. 144, 183-184, 206, 213, 235, 241, 244, 256, 260, 303, 320, 720-768 (Defendant's expert reports), 789-791, 796-799. As the Carter-Baker Report noted, "the perception of possible fraud contributes to low confidence in the [electoral] system," which is why it recommended States adopt REAL ID for voting. App. 276-279; *see also Crawford*, 553 U.S. at 197.

Appellees surely disagree with the Legislature's policy decision. But "[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford*, 553 U.S. at 191–97; *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 20, 354 Mont. 133, 227 P.3d 42 ("This Court's role is not to determine the prudence of a legislative decision."). And after *Crawford*,

courts have recognized states have significant interests, and substantial constitutional latitude, in requiring government-issued voter ID. *Hargett*, 155 F.Supp.3d at 756. Montana's interests likewise are indisputable.

C. The District Court's equal protection analysis was fundamentally flawed because it was based solely on possible disparate impact on students.

The District Court concluded that Appellees established a prima facie equal protection violation, even though it is undisputed SB 169 is facially neutral. Order, p. 43. The District Court based its decision solely on its view that SB 169 may impose disparate impacts on "young voters," and thus "unconstitutionally burden[s] Plaintiffs' right to equal protection of the laws by treating similarly situated groups unequally." Order, p. 45. That is wrong for the reasons discussed above; SB 169 does not disparately impact "young voters."

But the District Court's equal protection analysis is deeply flawed for another reason. This Court has definitively rejected a disparate impact theory in the absence of established discriminatory intent towards the effected class. *Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002, 1010 (1981). That view is consistent with a long line of federal precedent. *See Washington v. Davis*, 426 U.S. 229, 248 (1976) "[W]eighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back

decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional." *Crawford*, 553 U.S. at 207 (J., Scalia, concurring); *see also Brnovich*, 141 S. Ct. at 2343, 2346–47.

All election laws affect voters in different ways, which is why courts have recognized such claims fail at the outset:

> To make this assertion, however, the plaintiffs have to make an unjustified leap from **the disparate inconveniences** that voters face when voting to **the denial or abridgement of the right to vote**. Every decision that a State makes in regulating its elections will, inevitably, result in somewhat more inconvenience for some voters than for others. For example, every polling place will, by necessity, be located closer to some voters than to others.

Lee v. Virginia State Bd. of Elections, 843 F.3d 592, 600–01 (4th Cir. 2016) (emphasis original).

According to the District Court, however, simply alleging disparate inconvenience by some groups, based on abstract political modeling, is enough to preliminarily enjoin a presumptively constitutional law, without further analysis. There is no evidence, and the District Court cited none, indicating the Legislature intended to discriminate against any class by enacting SB 169.

IV. Moving the late voter registration deadline back one day is explicitly permitted by the Montana Constitution and minimally burdensome.

The Legislature's decision to move the voter registration deadline back one day does not substantially burden voting rights. Courts, including the U.S. Supreme Court, have uniformly rejected Appellees' argument it does. Establishing a registration deadline is a quintessential legislative function that protects voting rights by advancing a state's compelling interests in providing orderly, efficient, and accurate elections by permitting election officials to focus on the extraordinary task of running an election.

The question is even easier to resolve state law because the Montana Constitution grants the Legislature explicit discretion over EDR. The Delegates unambiguously intended to allow the Legislature to enact EDR if it chose and repeal EDR if problems later surfaced. The District Court erred by disregarding the Constitution's plain language.

A. The Framers viewed EDR as a policy issue over which the Legislature should have maximum flexibility to modify—not a constitutional issue.

Appellees' claim HB 176 is unconstitutional, and the District Court's unflinching acceptance of that argument, ignores the plain language of in Article IV, § 3, which grants the Legislature discretion to enact—or repeal—EDR:

> 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.

(Emphasis added). In construing this provision, the Court relies upon the same rules used in construing statutes, several of which are dispositive here. *Nelson*, ¶ 14.

First, "[t]he intent of the framers of a constitutional provision is controlling. The intent should be determined from the plain meaning of the words used." *Great Falls Trib. Co. v. Great Falls Pub. Sch.*, 255 Mont. 125, 128–29, 841 P.2d 502, 504 (Mont. 1992). The plain language of Article IV, § 3 leaves no room for debate: the Framers purposefully placed no limits on the Legislature's discretion to enact, or repeal, EDR. The Framers **required** the Legislature to develop a system of registration, absentee voting, and residency. And they **required** the Legislature to develop systems to ensure election integrity and prevent fraud. But they **allowed** the Legislature to provide for EDR. Plaintiffs' argument that the Constitution requires EDR is directly at odds with the Framers' unambiguous intent, as reflected by the plain language of Article IV, § 3.

Second, constitutional provisions must be read in "coordination with the other sections" so they form a consistent whole. *Howell v. State*, 263 Mont. 275, 286–87, 868 P.2d 568, 575 (Mont. 1994). To accomplish that, "the specific prevails over the general." *Ditton v. Dep't of Just. Motor Vehicle Div.*, 2014 MT 54, ¶ 22, 374 Mont.

122, 319 P.3d 1268. Thus, Article IV, § 3's specific grant of Legislative discretion to enact EDR controls over Article II, § 13's general right to suffrage. Read in "coordination," these provisions clarify the right to suffrage cannot encompass the claimed right to EDR. *Howell*, 263 Mont. at 286–87.

Third, interpreting Montana's Constitution as requiring EDR makes even less sense in historical context. The Court must construe the Constitution "in light of the historical and surrounding circumstances under which the Framers drafted the Constitution." *Nelson*, ¶ 14. Here, it is indisputable that EDR did not exist in Montana until 2005.

In 1973, voters were not allowed to register on Election Day. Rev. Code Mont. §§ 23-3016, 23-3724 (1971) (Registration closed 30 days before federal elections, 40 days for other elections). Delegates to Montana's 1972 Constitutional Convention considered—and expressly rejected—proposals that would have required the Montana Legislature to provide EDR. While many Delegates supported EDR, they viewed it as a policy preference, not a constitutional command.

During the 1972 Constitutional Convention, the General Government and Constitutional Amendment Committee drafted a report on "Suffrage and Elections." Montana Constitutional Proposals, February 12, 1972, pp. 333-47. The Committee's Majority proposed giving the Montana Legislature broad authorization

to regulate elections. *Id.* pp. 336-38 (proposal "allows the legislature to determine the voting residency and registration requirements"). Conversely, the Committee's Minority proposed to "constitutionalize" voter registration by requiring EDR. *Id.* p. 342 (proposing "poll booth registration" based on North Dakota law and guaranteeing voters the right to "register at the time and place of voting").

Like the Committee, the 100 Delegates were initially conflicted on whether EDR should be required by Montana's Constitution. *See* Montana Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, Vol. III, pp. 400-13, 429-452. Initially, a slim majority (52 in favor, 46 opposed) voted to adopt the Committee's Minority proposal that the "Legislature **shall** provide for a system of poll booth registration[.]" *Id.* pp. 401, 412-13 (emphasis added). After breaking for lunch, that slim majority abruptly collapsed. *Id.* p. 429 (motion to "reconsider our action to accept Section 3"). Delegate Joyce explained why he and others changed their minds, noting that, while he favored EDR as a policy matter, he concluded that "we have to permit flexibility if we're going to have a constitution" and that giving the Legislature discretion "is the only . . . thing that we should do" because it gives "flexibility there to adjust for problems." *Id.* p. 437-38; *see also id.* p. 444 (Delegate Van Buskirk, a former election judge, supports majority proposal because "the Constitution should be as flexible as we are able to have it").

Ultimately, the Delegates compromised, as summarized by Delegate Aronow:

> Mr. Chairman, I take it to be the sense of a great many people at this Convention that **we do want to liberalize the registration process, but on the other hand, we don't want to lock in a system into the Constitution** and this will give to the Legislature the consensus of this Convention and it will also make it not mandatory for the Legislature. **In other words, if the Legislature provides for a system of poll booth registration, they're not locked in,** because the word "shall" has been removed to the permissive word "may," but the Legislature is mandated, also, that they shall insure the purity of elections[.]

Id. p. 450 (emphasis added); *see also id.* p. 402 (Delegate Brown noting provision "leaves it all to the Legislature. We're not trying to constitutionalize it.").

The District Court reduced the Secretary's argument about the plain language and debates surrounding Article IV, § 3 to an argument about the power of judicial review (Order, p. 37), which the Secretary never made, and in fact disavowed:

> Plaintiffs also act like we are saying that [Article IV, § 3] deprives this Court of judicial review. That is not what we are saying. Of course, the Court has [the] power of judicial review. But their claims are claims under the Montana Constitution. And your review is of the Montana Constitution.

Transcript of Preliminary Injunction Hearing (March 10, 2022), pp. 68-69.

Montana courts plainly can review HB 176, but the text and Framers' intent controls their analysis. *Nelson*, ¶ 14. The District Court ignored both Article IV, § 3 and the Framers' unambiguous intent, replacing it with sliver-thin legal analysis that subjected HB 176 to strict scrutiny based on speculative claims that the bill may

impact certain voters more than others. Order, pp. 36-38, 44-46. As discussed above, that is not sufficient to ground a constitutional claim. All election laws may affect voters in different ways, which is why courts have recognized that such claims should not be subjected to strict scrutiny absent intentional discrimination or a severe burden. *Supra*, Section III.C. Just as with SB 169, there is no evidence the Legislature intended to discriminate against any voters by enacting HB 176. And changing the late registration deadline by one day imposes a minimal burden, if any.

The Legislature is well within its discretion to require voters to register by noon the day before an election—a less restrictive requirement than existed when the Constitution was drafted and ratified.

B. Courts, including the U.S. Supreme Court, have uniformly rejected challenges to registration requirements far more restrictive than Montana's.

Appellees' claim to a constitutional right to EDR lacks support not only in Montana; courts have repeatedly rejected challenges to registration deadlines. The U.S. Supreme Court was blunt: "a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot." *Marston*, 410 U.S. at 680. Registration deadlines impose minimal and routine burdens on voting that advance crucial state interests in "the orderly, accurate, and efficient administration of state and local elections, free from fraud." *Burns v. Fortson*, 410 U.S. 686, 686-87

(1973). Indeed, Appellees cannot cite a single case, from any jurisdiction, concluding EDR is constitutionally compelled.

Courts have uniformly concluded strict scrutiny does not apply to registration deadlines, because these deadlines are "classic examples of [permissible] regulation." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 196 n.17 (1999). And these cases come from jurisdictions without an Article IV, § 3 counterpart, and with registration deadlines more restrictive than Montana's.

For example, in *Marston* the Supreme Court approved a 50-day registration deadline. The Court recognized "States have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible fraud." *Marston*, 410 U.S. at 680.

The Court recognized the same in *Burns*, approving Georgia law requiring a voter to register 50 days pre-election. 410 U.S. at 686-87; *see also Dunn v. Blumstein*, 405 U.S. 330, 347-48 (1972) (approving Tennessee's 30-day registration deadline "to give officials an opportunity to prepare for the election."); *Rosario*, 410 U.S. at 760 (rather than strict scrutiny, relevant inquiry is whether challenged law imposes an "arbitrary time limit unconnected to any important state goal.").

Lower courts have followed suit. *See e.g., Beare v. Briscoe*, 498 F.2d 244, 247 (5th Circ. 1974) (recognizing "the state's right to impose some reasonable cutoff point for registration."); *Barilla v. Ervin*, 886 F.2d 1514, (9th Cir. 1989) (upholding Oregon's 20-day deadline even though shorter period was administratively feasible); *Key v. Board of Voter Registration of Charleston County*, 622 F.2d 88, 90 (4th Cir. 1980) (upholding 30 day registration deadline as "perfectly valid and constitutional" even though it prohibited correcting registration after the deadline).

The district court in *Diaz v. Cobb*, 541 F.Supp.2d 1319, 1333 (S.D. Fla. 2008) summarized the unanimous view of other courts upholding voter registration deadlines. It upheld a 29-day registration deadline that, unlike HB 176, did not allow corrections to a voter's registration. Nevertheless, the deadline imposed a minimal burden that advanced the state's "compelling" interest in maintaining "order in the election process," by allowing "election officials to direct their exclusive and tireless attention to election management and preparation." *Id.* at 1335, 1340; *see also ACORN v. Bysiewicz*, 413 F.Supp.2d 119, 122-24 (D.Conn. 2005) (summarizing cases and upholding seven-day registration deadline, which directly supported important interest in "avoiding confusion and chaos on election day itself.").

Plaintiffs challenging registration requirements under state constitutions have been equally unsuccessful. For example, the Massachusetts Supreme Judicial Court

upheld a 20-day voter registration cutoff, concluding it did not impose a substantial burden and passed rational basis review. *Chelsea Collaborative, Inc. v. Secretary of Commonwealth*, 480 Mass. 27, 100 N.E.3d 326 (Mass. 2018). Like Montana, voting is a fundamental right under the Massachusetts Constitution. But "[t]he requirement that voters register before exercising their fundamental right to vote is supported by the legislative objective of conducting orderly and legitimate elections." *Id.*, 480 Mass. at 40. A New Jersey appellate court concluded the same, noting no "precedent where a court has applied a strict scrutiny test to determine the constitutionality of an advance registration requirement." *Rutgers University Student Assembly v. Middlesex County Bd. of Elections*, 446 N.J. Super. 221, 233, 141 A.3d 335, 342 (N.J. App. 2016); *id.* at 234, 240 (concluding 21-day registration deadline "imposes no more than a minimal burden" supported by "the State's important interests in preventing voter fraud, ensuring public confidence in the integrity of the electoral process, and enabling voters to cast their ballots in an orderly fashion.")

Registration deadlines, like voter ID requirements, are routine burdens requiring voters take reasonable action to vote. If a voter's resulting "plight can be characterized as disenfranchisement at all, it was not caused by [the registration requirement], but by their own failure to take timely steps to effect their

enrollment." *Rosario*, 410 U.S. at 758; *see also Barilla*, 886 F.2d at 1524 (voters who failed to comply with the registration deadline "were all disenfranchised by their willful or negligent failure to register on time."); *Chelsea Collaborative, Inc.*, 480 Mass. at 38 (voters were disenfranchised by their own inaction, which easily could have been avoided had they "merely looked into what is required to register and done so."); *ACORN*, 413 F.Supp.2d at 123 (a registration deadline "merely imposes a legitimate time limitation on [voters'] enrollment, which unregistered voters choose to disregard.") (quotation omitted).

There are, of course, outer limits in which a registration period could substantially burden a voter's fundamental right. For example, the U.S. Supreme Court concluded the 50-day registration deadline it approved was approaching the "outer constitutional limits in this area." *Burns*, 410 U.S. at 687. But there is no reasonable argument Montana's one-day registration deadline, which is 39 days shorter than when its constitution was ratified, comes remotely close.

These courts recognize an important point the District Court missed entirely. States must enact substantial election regulation to have fair, efficient, and secure elections. *Thornton*, 514 U.S. at 834 ("experience shows [election laws] are necessary in order to enforce the fundamental right involved."). If strict scrutiny applies to all laws "implicating" voting rights it would eviscerate Montana's election laws,

including those Appellees ostensibly support. And it would put Montana in a class of exactly one; Appellees can identify no other court—from any jurisdiction—that has adopted the standard the District Court adopted.

C. HB 176 advances the State's compelling interests in conducting orderly and accurate elections.

HB 176 is rationally related to each of the State's core interests in ensuring an orderly, accurate, and efficient election that increases public confidence in elections. The interests were summarized in the factual background above. Ending EDR furthers the State's interest in ensuring the integrity, reliability, and efficiency of election processes by allowing local election staff to focus their Election Day resources on the herculean task of running an election. *Supra*, Statement of Facts, section II; App. 772-786, 831. This alleviates the potential for error due to the increased burden on election staff caused by having to process new voter registrations at the same time they are processing and counting votes. Election officials from Flathead, Broadwater, and Fergus County all agree EDR posed a serious burden on their staff. App. 772-786, 831. Legislators supported ending EDR after hearing testimony about the complications and delays EDR had caused. App. 789-790, 796-797.

Running an election is a monumental task, especially in Montana's rural counties. App. 772-786, 831. Processing new registrations on Election Day takes

longer than processing votes, which causes significant disruptions to the process and results in lengthy lines. App. 774-775, 785. Processing new registrations also increases stress on election staff, and often delays election administrators from reporting election results. *Id.*

And, in fact, WNV's own documents indicate long lines at polling places in remote locations have impacted Native Americans' ability to vote. App. 651. EDR caused long lines at polls and prevented Tribal voters from registering and voting because they could not afford to wait. *Id.* WNV's evidence reflects what the State knows to be true: allowing EDR can actually undermine voting rights. The purpose of HB 176 was to alleviate these burdens.

Eliminating EDR allows election administrators to focus their limited resources on efficiently running elections, assisting voters, and making sure votes are counted accurately and timely reported. App. 772-786, 721, 731-733. It also permits election administrators to assist individuals who are ill, in the hospital, or have other circumstances preventing them from voting in person, which is impossible when EDR is offered. App. 786, 789-90.

The Framers designed Article IV, § 3 to allow the Montana Legislature to experiment with EDR. Roughly 30 years after the Constitution was ratified, it did so. But that experiment ultimately resulted in excessive administrative burdens on

election staff, especially in rural locations. At the same time, the Legislature has also greatly liberalized registration by mail, and increasingly made it easier to vote in various ways. App. 720-768 (Defendant's expert reports).

In short, the Legislature fixed problems posed by EDR, while retaining a long late registration period to encourage voter participation. App. 796-97; 789. That is precisely the type of policy decision Article IV, § 3 explicitly entrusted to the Legislature. The District Court's contrary conclusion, which was the basis for its preliminary injunction, was significant legal error and this Court should reverse.

CONCLUSION

For these reasons, the Secretary requests that the Court reverse the District Court's preliminary injunction order.

Respectfully submitted May 16, 2022.

CROWLEY FLECK, PLLP

s/ *Dale Schowengerdt*

CERTIFICATE OF COMPLIANCE

I certify that this Brief is printed with a proportionately spaced Equity typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 9941 words including footnotes. Rule 11(4).

/s/Dale Schowengerdt

Orders

Document Title	Tab
April 6, 2022 Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Preliminary Injunctions	1
April 22, 2022 Order Re: Defendant's Motion to Suspend Preliminary Injunction Pending Appeal	2

CERTIFICATE OF SERVICE

I, Dale Schowengerdt, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-16-2022:

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

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

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

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

Rylee Sommers-Flanagan (Attorney)
40 W. Lawrence Street
Helena MT 59601
Representing: Forward Montana Foundation, Montana Public Interest Research Group, Montana Youth Action
Service Method: eService

Ryan Ward Aikin (Attorney)
1018 Hawthorne St.
Missoula MT 59802

Representing: Forward Montana Foundation
Service Method: eService

Clayton H. Gregersen (Attorney)
P.O. Box 2529
Billings MT 59101
Representing: Christi Jacobsen
Service Method: eService

David Francis Knobel (Attorney)
490 N. 31st St., Ste 500
Billings MT 59101
Representing: Christi Jacobsen
Service Method: eService

John Mark Semmens (Attorney)
900 N. Last Chance Gulch
Suite 200
Helena MT 59601
Representing: Christi Jacobsen
Service Method: eService

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

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

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

Austin Markus James (Attorney)
1301 E 6th Ave
Helena MT 59601
Representing: Christi Jacobsen
Service Method: eService

Ian McIntosh (Attorney)
1915 S. 19th Ave

P.O. Box 10969
Bozeman MT 59719
Representing: Christi Jacobsen
Service Method: eService

David M.S. Dewhirst (Govt Attorney)
215 N Sanders
Helena MT 59601
Representing: Christi Jacobsen
Service Method: eService

Kathleen Lynn Smithgall (Govt Attorney)
215 N. Sanders St.
Helena MT 59601
Representing: Christi Jacobsen
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: Western Native Voice
Service Method: eService

Electronically signed by Regina Grimsley on behalf of Dale Schowengerdt
Dated: 05-16-2022