DA 22-0667

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 184

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

Plaintiffs and Appellees,

vs.

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

Defendant and Appellant.

BRIEF OF AMICUS CURIAE LAWYERS DEMOCRACY FUND IN SUPPORT OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

*Election Day Registration (EDR) is more commonly referred to as Same Day Registration (SDR), as SDR can include allowing voters to both register to vote (or update their voter registration information) and vote on Election Day.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with proportionally spaced Times New Roman text typeface of 14 points, is double-spaced, and the word count calculated by Microsoft Word is 4,991 words, excluding Certificate of Compliance, Certificate of Service, and Table of Cases & Authorities.

DATED: May 24nd, 2023

Daniel K. Stusek

TABLE OF CASES & AUTHORITIES

Cases Page(s)

Montana Constitutional Provisions

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

Lawyers Democracy Fund ("LDF") is a nonprofit, tax-exempt entity organized under I.R.C. Section 501(c)(4). It has a long history of advancing ethics, integrity, and legal professionalism in the electoral process, including safeguarding the rights of eligible voters, maintaining the integrity of elections, and instilling public confidence in election outcomes. LDF primarily conducts, funds, and publishes research and in-depth analyses regarding the effectiveness of current and proposed election methods, particularly those lacking adequate coverage in the national media. LDF also has an extensive history of supporting voter identification requirements, publishing broadly about the value of Photo ID, and submitting briefs as amicus curiae in cases defending election laws, including *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), *N.C. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), and *Holmes v. Moore*, 868 S.E. 2d 313 (N.C. 2022), rev'd 868 S.E. 2d 592 (2023).

STANDARD OF REVIEW

The Montana Supreme Court has, on a number of occasions, ruled that the proper standard for review of a statute is whether the District Court's conclusions of law were correct. Statutes are presumed to be constitutional, and the Supreme Court will avoid an unconstitutional interpretation if possible. A party challenging the constitutionality of a statute has the burden of proving it unconstitutional beyond a reasonable doubt, and any doubt will be resolved in favor of the statute. "No statute will be held unconstitutional unless its violation of the fundamental law is clear and palpable." *Ramsbacher v. Jim Palmer Trucking*, 391 Mont. 298, 417 P.3d 313 (2018); *Brown v. Gianforte*, 404 Mont. 269, 488 P.3d 548 (2021). *See Planned Parenthood of Montana v. State, by and through Knudsen*, 409 Mont. 378, 515 P.3d 301 (2022):

The Court in *Montana Shooting Sports Association, Inc. v. State of Montana*, 355 Mont. 49, 54, 224 P.3d 1240 (2010), determined as follows:

> We review a district court's conclusions of law, including constitutional determinations, de novo. *State v. Ariegwe*, 338 Mont. 442, 167 P.3d 815 (2007). When resolution of an issue involves a question of constitutional law, this court exercises plenary review of a district court's interpretation of the law. *Shammel v. Canyon Resources Corp.*, 338 Mont. 541, 167 P.3d 886 (2007).

See also *Johnson v. Costco Wholesale*, 336 Mont. 105, 152 P.3d 727 (2007).

As recognized by even U.S. Supreme Court Justice Felix Frankfurter, "(i)t is nothing new for lawyers to identify desire with constitutionality and to look to the Court to declare unconstitutional legislation one does not like..." Bernard Schwartz and Stephan Lesher, *Inside the Warren Court, 1953-69*, New York, Doubleday, 1983, at page 139. However, personal ideology cannot justify a District Court decision, as it is a question of law, not fact, as to whether a challenged statutory provision interferes with a fundamental right, facially or as applied. *Clark Fork Coal v. Montana Dist. of Natural Resources & Conservation*, 405 Mont. 225, 481 P.3d 198 (2021).

As applied by the U.S. Supreme Court, the key to what is termed the "Anderson-Burdick standard" is its flexibility in balancing competing interests. A court must weigh the character and magnitude of the asserted injury to the constitutional right that a plaintiff seeks to vindicate against the precise interests put forward by the state as justification for any perceived burden. *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). If a state imposes severe restrictions on a plaintiff's right to vote, the statute must be narrowly drawn to advance a state interest of compelling importance. *Norman v. Reed*, 502 U.S. 279 (1992). Contrarily, minimally burdensome and nondiscriminatory regulations are subject to a less-searching examination, closer to

"rational basis", and the state's important regulatory interests are generally sufficient to justify the restrictions. *Anderson v. Celebrezze, supra*, p.788.

Thus, the Plaintiffs/Appellees in this case have the ultimate burden of proving, beyond a reasonable doubt, that the 2021 amendments to M.C.A. Title 13 (S.B. 169 and H.B. 176) abridge someone's fundamental, constitutional right to vote. *See Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488 (1989); Montana Constitution, Article III, Section 1, which provides that a branch of government may not usurp the role of the other branches, to wit: "The power of the government of this state is divided into three distinct branches... No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others...".

I.

THE JUDICIARY'S ROLE IS NOT TO DETERMINE THE PRUDENCE OF A LEGISLATIVE DECISION.

Article II, Section 1 of the Montana Constitution states that "(a)ll political power is vested in and derived from the people. All government of right originates with the people (and) is founded upon their will only...". A republican form of government is a government by representatives chosen by the people (i.e., the legislature), *In re Duncan*, 139 U.S. 449, 11 S. Ct. 573 (1891), whose authority is derived from the people. The duly-elected Montana legislature, in a given session,

originates with specific representatives chosen through the electoral process. Laws enacted by such a legislature represent the will of the people at a given point in time.

With regard to the regulation of elections, the Montana Legislature is charged to "provide by law the requirements for residence, registration, absentee voting, and administration of elections". It may provide for a system of poll booth registration (i.e., EDR), but shall "insure the purity of elections and guard against abuses of the electoral process". Mont. Const. Art. IV, Section 3. As cogently presented by attorney for Appellant, and worthy of re-iteration herein:

> The Framers' intent controls the interpretation of a constitutional provision. *Brown v. Gianforte*, 404 Mont. 269, 488 P.3d 548 (2021). The Framers required the Legislature to develop a system of voter registration, required the legislature to ensure election integrity and prevent fraud, but only allowed for EDR. And, the Framers were specific as to the Legislature's authority on this point. The Framers purposefully chose not to constitutionalize EDR so the Legislature had the flexibility... to adjust for problems and was not "locked in". Mont. Const. Con. Tr., 437-438, 450.

See also Brief of Amicus Curiae "Restoring Integrity & Trust in Elections". To argue otherwise would be to ask the Court to usurp the express constitutional mandate, given by the people to their legislative representatives, to make legitimate policy choices, after debate and the weighing of testimony. Such policy choices reflect the will of the people, at a given point in time, and should not be set aside except in extreme circumstances. *See Satterlee v. Lumberman's Mutual Ins. Co.*,

353 Mont. 265, 222 P.3d 566 (2009): It is for the legislature to pass upon the wisdom of a statute; *McClanathan v. Smith*, 186 Mont. 56, 606 P.2d 507 (1980).

Appellees' arguments in this regard have previously been presented and have been soundly rejected by a number of state and federal courts, including the U.S. Supreme Court. Montana would be an outlier to adopt such tenuous arguments.

II.

AN UNDISPUTED FACT IS THAT IT IS EASY TO BOTH VOTE AND REGISTER TO VOTE IN MONTANA.

Viewing H.B. 176 as one component of Montana's relatively progressive voting system, even accepting the district court's focus on the change wrought by this law, the removal of EDR can hardly be deemed to impose a true, let alone severe, restriction on any person's right to vote. As stated in *Ohio Democratic Party v. Husted*, 834 F.3d 620, 628-630 (6th Cir. 2016), wherein a U.S. Court of Appeals soundly rejected arguments similar to those made by Plaintiffs herein:

> S.B. 238's withdrawal of the convenience of same-day registration is hardly obstructive; it merely brings Ohio into line with (thirty-one) other states that require registration before an individual may vote... It's as if plaintiffs disregard the Constitution's clear mandate that the states (and not the courts) establish election protocols, instead reading the document to require all states to maximize voting convenience. Under this conception of the federal courts' role, little stretch of imagination is needed to fast-forward and envision a regime of judicially-mandated voting by text message or Tweet (assuming of course, that cell phones and Twitter handles are not disproportionately possessed by identifiable segments of the voting population). (underlineation added)

> The notion that S.B. 238's elimination of same day registration disparately imposes anything more than a 'minimal' burden on some African Americans ignores the abundant and convenient alternatives that remain for all Ohioans who wish to vote. The district court places inordinate weight on its finding that some African-American voters may prefer voting on Sundays, or avoiding the mail, or saving on postage, or voting after a nine-to-five work day. To the extent S.B. 238 may be viewed as impacting such preferences, its 'burden' clearly results more from a 'matter of choice rather than a state-created obstacle.' *Frank*, 768 P.3d at 749. The Equal Protection Clause simply cannot be reasonably understood as demanding recognition and accommodation of such variable personal preferences, even if the preferences are shown to be shared in higher numbers by members of certain identifiable segments of the voting public.

In light of such, the Court commented that it was no surprise that the U.S. Supreme Court in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198-99, 198 S. Ct. 1610 (2008), rejected an analogous challenge to an undeniably more burdensome law based on this sort of "burden of making a second trip to vote argument", concluding, at page 631, as follows:

> ... (T)he record does not establish that S.B. 238 – as opposed to non-state-created circumstances – actually makes voting harder for African Americans... Without sufficient evidence to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden that is fully justified, the *Crawford* Court refused to accept bare assertions that a small number of voters... may experience a special burden and instead looked to the statute's broad application to all state voters in concluding that the law imposed 'only a limited burden on voters' rights'. *Crawford*, 553 U.S. at 200, 202-03, 128 S.Ct. 1610,

and ruling at page 640, as follows:

> Accordingly, we conclude that S.B. 238, affording abundant and convenient opportunities for all Ohioans to exercise their right to vote, is well within the constitutionally granted prerogative and authority of the Ohio Legislature to

> regulate state election processes. It does not run afoul of the Equal Protection Clause or the Voting Rights Act (of 1965, as amended, 52 U.S.C. 10301) as those laws have been interpreted and applied to voting regulations in the most instructive decisions of the (U.S.) Supreme Court. (underlineation and parenthetical matter added)

The well-analyzed *Husted* opinion is very persuasive authority. Just as H.B. 176 no longer allows Montanans to register on election day, so Ohio's S.B. 238 precluded persons from registering and voting on the same day. And, the Court noted that, as to the fundamental right to vote, this was an inconvenience rather than a true burden. The most instructive voting burden analyses of the U.S. Supreme Court will impact some voters. Appellees' arguments are inconsistent with the most instructive voting regulation decisions of the U.S. Supreme Court and have been consistently rejected by other Courts. *See*, e.g., *Barilla v. Ervin*, 886 F.2d 1514 (9th Cir. 1989).

A statute that is perceived to represent the will of a majority of the people may not in fact do so some decades later. EDR impliedly reflected the will of the people in Ohio, acting through their legislature, in 2005; however, it didn't work and was legislatively repealed in 2014. Likewise, EDR may have reflected the will of the people of Montana when enacted in 2005; however, considering the composition of the Montana legislature in 2021, such was not the case. It is irrelevant that H.B. 176 or S.B. 169 will impact a small minority of some voters who would prefer to register

or vote in a way more personally convenient to them; that is a matter of choice, not a state-created obstacle.

III.

THE DISTRICT COURT ERRED IN CONCLUDING AN INCONVENIENCE IN EXERCISING THE RIGHT TO VOTE TRIGGERS STRICT SCRUTINY.

Strict scrutiny of a statute is required only when the classification impermissibly interferes with the exercise of a fundamental right or discriminates against a suspect class. *Gulbrandson v. Carey*, 272 Mont. 494, 901 P.2d 573 (1995).

Examples of fundamental rights, as set-out in the Montana Constitution, include privacy, freedom of speech, freedom of religion, the right to vote and the right to interstate travel. In *Oberg v. City of Billings*, 207 Mont. 277, 674 P.2d 494 (1983), the trial court erroneously assumed that, because the Article II, Section 10 fundamental right of privacy was alleged to have been violated, a strict scrutiny analysis was required, as a matter of law. The Supreme Court disagreed, stating that "we have held that a mere allegation that a fundamental right is burdened is insufficient to trigger a strict scrutiny analysis of equal protection", *Godfrey v. Montana State Fish & Game Commission*, 631 P.2d 1265, 1267 (1981); rather, one must prove, and not merely allege, that a fundamental right was substantially abridged. This Court's jurisprudence is consistent with the U.S. Supreme Court's *Anderson-Burdick* test.

The District Court's conclusion that H.B. 176, ipso facto based on the otherwise equal inconvenience it introduces to the election system, discriminates against Native Americans thus violating Montana's right of equal protection, is legally incorrect. As stated by this Court in *Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002 (1981), "disproportionate impact of a facially neutral law will not make the law unconstitutional, unless a discriminatory intent or purpose is found." The *Fitzpatrick* Court found the Montana law to be "facially neutral", as is H.B. 176, and there was no proof in the record that, beyond a reasonable doubt, the law had a discriminatory intent or was subject to discriminatory application. See analysis of this issue in *Ohio Democratic Party v. Husted, supra.*

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. *Oberson v. U.S. Dept. of Agriculture*, 339 Mont. 519, 171 P.3d 715 (2007). If the classes established are similarly situated, a legislative act is not unconstitutional so long as the law operates equally upon those within the class (of electors). *Farrier v. Teachers' Retirement Bd.*, 328 Mont. 375, 120 P.3d 390 (2005). *See Rohlfs v. Klemenhagen, LLC*, 354 Mont. 133, 139, 227 P.3d 42 (2009), wherein the standard of review applied to an alleged violation of a fundamental right under Article II, Section 4 of the Montana Constitution was whether the statute is rationally related to a legitimate government purpose.

A law that underscores a substantial government purpose may inconvenience certain persons within the class, as long as it does not discriminate against them. In *Godfrey v. Mont. State Fish & Game Com'n*, 631 P.2d 1265 (1981), this Court stated that "(a) state may affect a person's right to travel without violating it. If an individual moves from State A to State B and State B refuses him the right to vote in that State's elections (because he/she doesn't satisfy residency requirements), State B has arguably 'chilled' that individual's freedom of movement but cannot be found to have abridged his rights under the equal protection clause." (parenthetical matter added)

Strict scrutiny of a statute is required only when the classification impermissibly interferes with the exercise of a fundamental right, rather than merely "chills" or inconveniences it. *Arneson v. State, by Dept. of Admin.*, 262 Mont. 269, 864 P.2d 1245 (1993), *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996). H.B. 176 might be requiring one to do what is expected of all citizens, but the law does not impermissibly interfere with any citizens right to vote or single out students or Native Americans for any unique burden. Indeed, Art. II., Sec. 4 of the Montana Constitution cannot be "reasonably understood as demanding recognition and accommodation of such variable personal preferences, even if the preferences are shown to be shared in higher numbers by members of certain identifiable segments of the voting public." *Husted, supra*, p. 630.

IV.

ELECTION DAY REGISTRATION THREATENS ELECTION SECURITY

In 2021, Montana joined a growing majority of twenty-nine other states that do not permit election day registration. *National Conference of State Legislatures*, 2023, Jan. 31, "Same Day Voter Registration"; *New York Times*, 2022, Nov. 8, "Here Are the States that Allow Same-Day Voter Registration".

Montana did so based on reliance of many decades of constitutional jurisprudence upholding voter registration requirements before election day. *See Dunn v. Blumstein*, 405 U.S., 330 (1972), in which Justice Thurgood Marshall stated that a thirty-day pre-election registration period was reasonable and necessary. In fact, no court has overturned reasonable registration deadlines and judicially imposed election day registration. Ho, Dale, *Election Day Registration and the Limits of Litigation*, Volume 129, Yale Law Journal, Nov. 18, 2019.

Same-day registration and voting does not permit an election administrator a reasonable time in which to verify, as required by law, that an individual is in fact a resident, and thus a qualified elector under Montana law. A non-resident student, unfamiliar with candidates and generally unaffected by local issues, has only one residence, typically his home state to which he/she "returns in seasons of repose". He/she should request an easily obtainable absentee ballot from his/her home state,

and not be allowed to overturn Montana's reasonable system of election regulation and security.

The U.S. Supreme Court has expressly held that "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, 93 S.Ct. 1211, 35 L.Ed.2d 627 (1973); neither does such a right exist in Montana. Subsequent cases that have challenged registration deadlines, as unjustified or unduly burdensome based on new facts or circumstances, have been unsuccessful. *Acorn v. Bysiewicz* 413 F. Supp. 2d 119 (Conn., 2005).

One of the prerequisites to voting in a Montana election is that you offer sufficient proof of residency in this state, and that the election official is able to verify such. M.C.A. Section 13-2-304(1)(a). In this regard, M.C.A. Section 13-1-112(1) and (5) provide that: "(t)he residence of a individual is where the individual's habitation is fixed and to which, whenever the individual is absent, the individual has the intention of returning"; "(a)n individual may not gain residence in a county if the individual (such as a student) comes in for temporary purposes without the intention of making that county the individual's home." (parenthetical matter added.) *See* also M.C.A. Section 1-1-215, Residence-rules for determining.

In order to vote, one has the burden of establishing that he/she is in fact a Montana resident. M.C.A. Section 13-1-111(c); *See Sommers v. Gould*, 53 Mont.

538, 544, 165 P.599, 601 (1917), where this Court held that "(a) change of residence can only be made by the act of removal and the intent to remain in another place." A person's legal residence does not depend on a continuous presence in his/her home state, and is not dissolved by a temporary absence, such as for schooling in another state. 25 AmJur 2d, "Domicile", Section 55. Emancipated minors and persons 18 years of age or over may register in the county in which they live if they intend to make that community their residence. Mere presence for schooling at a college or university is not sufficient to establish residency in a community, but must be coupled with an actual intent to make that community one's residence. A person who is attending an institution of learning will retain his original out-of-state residence for voting purposes unless he/she intends to change his/her residence to Montana. 34 A.G. Op. 13 (1971).

In order to vote in Montana, a person must be registered to vote and must meet all the requirements of M.C.A. Section 13-1-111(l); and, he/she has the burden of establishing such to the satisfaction of an election administrator. "[A]s a practical matter, there must be substantial regulation of elections... if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974). To achieve this objective, Montana has enacted comprehensive election laws, and "election laws will invariably impose some burden (inconvenience) upon individual voters." *Burdick, supra*, at 434.

Registration is one of these inconveniences; but a mere inconvenience, without evidence beyond a reasonable doubt of a discriminatory intent or application, does not equate to the violation of a constitutional right.

A state cannot legislate both minimal (e.g., 30 days) durational residency requirements and same-day voter registration and expect to "insure the purity of elections". Montana Constitution, Article IV, Section 3. The 2021 legislative amendment (S.B. 176) imposed a minimal, reasonable registration deadline in order to allow election administrators to perform their statutory duty to verify the qualifications of would-be voters. (For every ineligible person who is allowed to vote, the vote of a qualified, resident elector might be cancelled.)

Persons with so little interest in, or knowledge of, matters pertaining to their right to vote are reasonably disenfranchised, not by state statute, but by their own personal tergiversation and passivity in accomplishing their registration. (See Defendant's FOFCOL #86: "Experts find that it is difficult to determine a person's true reason for not voting; an experiment in North Dakota found that people blamed their decision not to vote on restrictive registration requirements despite the fact that North Dakota does not have a voter registration law. Trial Tr. 1961: 14-1962:25.")

As succinctly stated by a majority of the U.S. Supreme Court in *Rosario v. Rockefeller*, 410 U.S. 752 (1973):

> The petitioners do not say why they did not enroll prior to the cutoff date; however, it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by the law but by their own failure to take timely steps to effect their enrollment.

Inasmuch as "honest, fair and orderly elections" should indeed be a state goal, "registration requirements... (such as H.B. 169) are classic examples of permissible regulation." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 196 N. 17, 119 S.Ct. 636 (1999), parenthetical matter added; *See* also *Diaz v. Cobb*, 541 F. Supp. 2d 1319 (2018).

Under M.C.A. Section 61-5-103(1), a person who has de facto resided in Montana for more than sixty consecutive days, and who de jure intends to be considered a resident, must be licensed under the laws of Montana before operating a motor vehicle. Thus, continuing possession of an out-of-state driver's license after sixty days of consecutive residency indicates that one does not in fact intend to become a resident and, thus, is not a qualified elector under Montana law. And, a student identification card, standing alone, does not reflect an intention to make Montana one's residence. S.B. 169 reasonably addressed this issue by amending the documentation a voter must provide to be verified as a qualified elector. S.B. 169 was a bipartisan effort to make the law one that was fair and workable. Under SB 169, a voter must present:

A Montana drivers' 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 current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address; **and**

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

M.C.A. Section 13-13-114(1)(a)(i) & (ii). To assist voters who may not have access to primary forms of ID, the Secretary distributes a voter confirmation card to every registered voter that can be presented along with any photo identification showing the elector's name-including a student ID-in order to vote at the polls.

The issue of legal residence is a complex issue that requires time and consideration. And, claiming residence on voting day for the purpose of qualifying for in-state tuition, or to avoid the "hassle" of voting absentee in one's true state of residence, do not evidence an intent to establish residency for electoral purposes. Thus, Montana had more than justifiable reasons to require registration before election day.

V.

THE STATE HAS A COMPELLING INTEREST IN AVOIDING ADMINSTRATIVE CHAOS AND INSURING THE PURITY OF ELECTIONS

In 2017, Sandwich, Massachusetts town clerk Taylor White wrote an opinion piece describing, as follows, how same-day registration creates administrative chaos:

> What advocates for same-day registration fail to understand is that deadlines are in place for an important administrative reason. They ensure election officials can conduct fair, accurate and orderly elections. Among a variety of other technical and legal factors, a major part of this is establishing the names on the voter list that have been deemed eligible to participate in any given election... A set timeframe between the voter registration deadline and Election Day allows the 'dust to settle' and a period for election officials to address any lingering questions or issues. On the contrary, allowing residents to show up at the polls on Election Day without first going through the registration processes will undoubtedly create administrative chaos.

The Sixth Circuit Court in *Ohio Democratic Party v. Husted, supra*, at p. 632, stated, in this regard, as follows:

> Because S.B. 238 is minimally burdensome and nondiscriminatory, we apply a deferential standard of review akin to rational basis and Ohio need only advance important regulatory interests. Ohio contends S.B. serves four legitimate interests: '(1) preventing voter fraud; (2) reducing costs; (3) reducing administrative burdens; and (4) increasing voter confidence and preventing voter confusion... At least with respect to a minimally burdensome regulation triggering rational-basis review, we accept a justification's sufficiency as a legislative fact and defer to the findings of Ohio's legislature so long as its findings are reasonable. *See Frank*, 768 F.3d at 750; *See* also *Munro v. Socialist Workers Party*, 479 U.S. 189, 195.

The Yellowstone County District Court erred in demanding exacting evidence to justify the state's interests and requiring the state to prove that the new laws would address such interests.

As to voter fraud, the *Husted* Court, at page 633, reasoned that, under

Crawford's teaching, working to achieve the goal of elimination of voter fraud is a sufficiently weighty interest to justify the minimal burden experienced by certain voters. *Crawford*, 553 U.S. at 191, 128 S.Ct. 1610. Additional reasons for eliminating same-day registration were the safeguarding of public confidence and eliminating even "appearances of fraud" as, in order to inspire public confidence, the electoral system needs to be able, in all events, to confirm the qualifications of voters.

As to administrative burdens, the Court found that boards of elections are extremely busy with finalizing ballots, running ballots through voting machines for logic and accuracy testing, processing the registration wave that arrives on election day near the close of registration, and recruiting and training poll workers. *See* Defendant's FOFCOL, Election Day Preparation and Procedure, pp. 9-14. Thus, the Court must balance registration and voting options with the burdens on boards of elections, stating as follows:

> Again, the district court demanded too much. We agree rather with the (U.S.) Supreme Court that legislatures 'should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.' *Munro*, 479 U.S. at 195, 107 S.Ct. 533. Requiring that a '[s]tate's political system sustain some level of damage before the legislature could take corrective action' is neither practical, nor constitutionally compelled. *Husted*, p. 634.

See also Marston v. Lewis, *supra* and *Burns v. Forston*, 410 U.S. 686, 93 S.Ct. 1209 (1973), in which the U.S. Supreme Court upheld Arizona and Georgia's 50-

day registration cutoffs, concluding that such cutoffs were necessary to give the state sufficient time to verify lists of potential electors. Neither of these states has adopted EDR.

In *Holmes v. Moore*, 868 S.E. 2d 592 (N.C. 2023), the North Carolina Supreme Court recently rejected the arguments proffered herein by Appellees. The Court: (1) upheld the reasonable exercise of legislative function which required certain types of photo identification cards in order for one to be verified as a qualified elector under state law; (2) held that Plaintiffs could not prove beyond a reasonable doubt that the law was enacted with discriminatory intent or actually produced a "meaningful disparate impact along social lines".

Similarly, in *Barilla v. Ervin, supra*, the Court addressed the plaintiff's claim that Oregon's 20-day registration cutoff unconstitutionally burdened his right to vote. The Court, basing its decision on *Rosario v. Rockefeller*, *supra*, found that "(t)he entire plaintiff class consisted of people who could have registered in time (to vote), but who, for one reason or another, failed to do so... Thus, to the extent that the plaintiffs' plight can be characterized as disenfranchisement at all, it was not caused by [the statute], but by their own failure to take timely steps to effect their enrollment."

VI.

CONCLUSION

As recognized by a majority of the Court in *Ohio Democratic Party v. Husted, supra*:

> Yet, our task (especially with respect to minimally burdensome laws) is neither to craft the 'best' approach, nor to impose our own idea of democracy upon the Ohio state legislature. *Libertarian Party*, 462 F.3d 579, 587; see also *Crawford, supra*, 181, 196.

The Plaintiffs/Appellees in this case cannot meet their burden of proving that M.C.A. Section 13-2-304(a) has burdened a fundamental right, and is therefore unconstitutional beyond a reasonable doubt. Contrary arguments proffered by Plaintiffs/Appellees are extra-legal, and are premised upon mistaken beliefs and political predilections. This Court should reverse the decision of the District Court which was, at best, a breathtaking example of judicial activism and, at worst, patently wrong.

Dated this 24nd day of May, 2023.

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CERTIFICATE OF SERVICE

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