IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0667

MONTANA DEMOCRATIC PARTY and MITCH BOHN,

Plaintiffs and Appellees,

v.

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

Defendant and Appellant.

BRIEF OF APPELLEES MONTANA DEMOCRATIC PARTY AND MITCH BOHN

APPEARANCES:

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

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

Matthew Gordon
PERKINS COIE LLP

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

Theresa J. Lee*
Election Law Clinic
HARVARD LAW SCHOOL
6 Everett Street, Suite 5112
Cambridge, MA 02138
(617) 998-1010
thlee@law.harvard.edu

Jonathan Topaz*
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street

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

Attorneys for Plaintiffs-Appellees Montana Democratic Party and Mitch Bohn

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

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

Alex Rate
Akilah Deernose
ACLU OF MONTANA
P.O. Box 1968
Missoula, MT 59806
406-224-1447
ratea@aclumontana.org
deernosea@aclumontana.org

Jacqueline De León*
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
New York, NY 10004
(212) 519-7866
jtopaz@aclu.org

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

Dale Schowengerdt
LANDMARK LAW, PLLC
7 West 6th Ave. Suite 518
Helena, MT 59601
(406) 457-5496
dale@landmarklawpllc.com

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

Mac Morris
E. Lars Phillips
CROWLEY FLECK PLLP
1915 S. 19th Ave
Bozeman, MT 59718
(406) 556-1430
wmorris@crowleyfleck.com
lphillips@crowleyfleck.com

John Semmens
CROWLEY FLECK PLLP
900 North Last Chance Gulch, Suite 200
Helena, MT 59601
(406) 449-4165
jsemmens@crowleyfleck.com

Christian Corrigan
Solicitor General
Office of the Attorney General

Boulder, CO 80302-6296
(303) 447-8760
jdeleon@narf.org

P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
christian.corrigan@mt.gov

Attorneys for Defendant-Appellant Christi Jacobsen

**Admitted pro hac vice*
***Application for admission pro hac vice forthcoming*

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in finding House Bill 176 ("HB 176"), which eliminated Election Day Registration ("EDR"), violates the Montana Constitution's rights to vote and equal protection where the evidence overwhelmingly proved that EDR is critical to protecting access to the franchise, especially for Native and youth voters.
2. Whether the District Court erred in finding Senate Bill 169 ("SB 169"), which eliminates student IDs as a primary form of voter identification, violates the Montana Constitution's right to equal protection.
3. Whether the District Court erred in finding House Bill 530, §2 ("HB 530, §2 "or "HB 530"), which restricts ballot collection activities, violates the Montana Constitution's rights to vote, equal protection, freedom of speech, and due process, or, in the alternative, represents an unconstitutional delegation of power, where many Montanans, including Native Americans, rely on ballot collection to exercise their right to vote, and two 2020 lawsuits resulted in the permanent injunction of a similar restriction.[1]

[1] Plaintiff-Appellees Montana Democratic Party and Mitch Bohn ("MDP Plaintiffs") refer to HB 176, SB 169, and HB 530 as the "challenged provisions." MDP Plaintiffs do not address the Secretary's arguments regarding HB 506, which was challenged by Forward Montana Foundation et al. (the "Youth Plaintiffs").

4. Whether the District Court erred in finding that the Elections Clause of the U.S. Constitution does not prohibit Montana's judiciary from enjoining election laws that violate Montana's Constitution.

STATEMENT OF THE CASE

After presiding over a nine-day trial, considering scores of exhibits, and assessing the testimony and credibility of over 25 witnesses, the District Court permanently enjoined the Secretary of State from enforcing the challenged provisions. In a thorough, thoughtful, and exceedingly well-supported 199-page opinion, the District Court properly found that each provision violates core rights guaranteed by the Montana Constitution.

The Secretary asks this Court to reweigh the evidence and second-guess the District Court's conclusions. But her brief rarely even cites to—let alone grapples with—the District Court's actual findings of fact, failing entirely to establish why any are clearly erroneous.

An appeal is not an opportunity for the Secretary to retry her case, and this Court has made clear that it "will not substitute [its] judgment for that of the trier of fact on such matters." *Koeppen v. Bolich*, 2003 MT 313, ¶ 42, 318 Mont. 240, 250, 79 P.3d 1100, 1107 (internal quotation omitted). The District Court's conclusions that the challenged provisions violate the Montana Constitution are entirely consistent with this Court's precedent and backed by overwhelming record evidence.

In contrast, the Secretary provides nothing near the requisite showing to warrant reversal. The District Court's decision should be affirmed.

FACTUAL BACKGROUND

At issue is the District Court's judgment that three challenged provisions violate the Montana Constitution:

- **HB 176**, which eliminates EDR. EDR has long allowed Montanans to securely register and cast their ballots on Election Day, resulting in dramatically higher turnout and enfranchising countless, particularly young voters and Native voters.
- **SB 169**, which eliminates student IDs as a "primary" form of voter identification. Under SB 169, student IDs may now be used for voting only if presented along with another form of secondary ID, such as a utility bill or paycheck, which students are less likely to have.
- **HB 530,** which requires the Secretary to adopt a rule prohibiting the distribution, collection, or delivery of ballots in exchange for pecuniary benefit. HB 530 revives for the third time Montana's unjustifiable attempts to restrict ballot collection, which Montana voters, and Native voters in particular, have long relied upon to vote.

HB 176 and SB 169 were enacted on April 19, 2021. Mont. Code Ann. § 13-2-301 (HB 176); § 13-13-114 (SB 169). The following day, MDP Plaintiffs filed

their complaint in Yellowstone County District Court challenging both laws under the Montana Constitution. Dkt. 1. MDP Plaintiffs amended their complaint on May 14, 2021, Dkt. 3, to add a challenge to HB 530, which was enacted earlier that day, PTX018. MDP Plaintiffs' case was consolidated with related cases brought by Western Native Voice et al. and Youth Plaintiffs. Dkt. 38, 39.

The Secretary filed a motion to dismiss MDP Plaintiffs' complaint, which the District Court denied. Dkt. 10, 32. MDP Plaintiffs then moved to preliminarily enjoin the challenged provisions. Dkt. 41. The District Court granted the motion on April 6, 2022, enjoining all three laws pending resolution of the litigation. Dkt. 124. The Secretary appealed that ruling regarding HB 176 and SB 169 to this Court, and on September 21, 2022, this Court affirmed. *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 3, 410 Mont. 114, 120, 518 P.3d 58, 61. The parties engaged in extensive discovery, after which the Secretary moved for summary judgment, which the District Court denied. Dkt. 154, 201.

The parties tried the case before the Honorable Michael G. Moses from August 15 through 25, 2022. Plaintiffs presented testimony from four expert witnesses, each of whom the District Court deemed credible and whose conclusions the District Court found were entitled to "substantial weight." FFCL ¶¶ 143, 147, 151, 158. The experts included Dr. Kenneth Mayer, a preeminent political scientist and scholar in voting behavior, who concluded that the challenged provisions impose

significant burdens on voting—particularly among populations least able to carry that burden—and "will result in otherwise eligible voters not being able to vote." *Id.* ¶¶ 153, 155. Relying on extensive scientific literature as well as Montana-specific data, Dr. Mayer concluded that each challenged provision is "what the public administration literature would call pure dead weight" and "do[es] nothing but make it harder to vote." *Id*. ¶ 157.

The District Court also heard testimony from three expert political scientists on the impacts of HB 176 and HB 530 on Native Americans living on reservations in Montana. Dr. Alex Street, Dr. Daniel McCool, and Dr. Ryan Weichelt performed statistical, qualitative, and geomapping analyses to conclude that Native voters are particularly reliant on EDR and ballot collection, such that HB 176 and HB 530 are highly likely to have a differentially greater negative impact on their ability to register and vote. *Id.* ¶¶ 140-51. Like Dr. Mayer, these experts concluded these laws do not further—and in some cases actually *hinder*—the purported state interests. *Id.* ¶ 142, 152.

The Secretary did not dispute much of the trial evidence, including the vast majority of Plaintiffs' expert testimony. And the Secretary's lone expert, Sean Trende, was unqualified for that role. As the District Court found, Mr. Trende had not even completed graduate school when he testified. *Id*. ¶ 159. Nor had he published any peer-reviewed articles concerning EDR, voter ID, ballot collection,

voting by Native Americans, or any topics relevant to the issues in this case. *Id.* ¶ 159. At trial, Mr. Trende failed to provide any specific analysis of the issues, and his opinions relied on incomplete data, inapposite sources, and questionable factual support. In light of these shortcomings, the District Court found his "opinions are entitled to little, if any, weight." *Id.* ¶ 160.[2]

The District Court also heard extensive testimony from voters injured by the challenged provisions, *see, e.g.*, FFCL ¶¶ 162, 164; representatives from tribes testifying about the unique burdens these laws impose on Native voters, *id.* ¶¶ 163, 166, 168; Montana officials who administered elections both before and after enactment of the challenged provisions, *id.* ¶¶ 169, 174, 180, 186, 192; two Republican legislators who testified about the legislature's motivation in passing them, *id.* ¶¶ 175, 188; and an MDP representative who testified about the challenged provisions' direct impacts on MDP's members and operations, *id.* ¶ 172.

After carefully considering the evidence and arguments before it, the District Court found all three challenged provisions violate the Montana Constitution and permanently enjoined them. On September 30, 2022, the District Court detailed the bases for its decision in a thorough 199-page opinion.

[2] Even so, Mr. Trende testified that he *agreed* with, or had no basis to dispute, many of Plaintiffs' experts' conclusions, including Dr. Mayer's conclusions that younger voters are more reliant on EDR and less likely to have a form of "primary" ID under SB 169. *Id.* ¶ 158. And he agreed that laws that increase burdens on voting lead to less people voting. *Id.* ¶ 160.

The Secretary's appeal is now before this Court.

STANDARD OF REVIEW

A district court has "broad discretion" to grant injunctive relief "based on applicable findings of fact and conclusions of law." *Est. of Mandich v. French*, 2022 MT 88, ¶ 16, 408 Mont. 296, 302, 509 P.3d 6, 11 (citing *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4). This Court reviews a grant of injunctive relief for "a manifest abuse of discretion." *Id.* (citing *Shammel v. Canyon Res. Corp*., 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912). "Findings of fact are entitled to 'great deference' and reviewed only for clear error." *Mont. Democratic Party*, ¶ 11. This Court may reverse a trial court's factual finding only where it is unsupported by substantial evidence or based on a misapprehension of the effect of the evidence, or where a review of the record evokes the "definite and firm conviction that a mistake has been" made. *Id.*

A district court's conclusions of law are reviewed de novo. *Est. of Mandich*, ¶ 16. While statutes are generally presumed to be constitutional, legislation that infringes upon fundamental rights is reviewed under strict scrutiny, shifting the burden to the State to demonstrate it is narrowly tailored to advance a compelling interest. *Weems*, ¶ 34.

SUMMARY OF ARGUMENT

This case pits the Secretary and three suppressive laws—HB 176, SB 169, and HB 530—against Montana voters, the Montana Constitution, and the District Court's comprehensive findings on the burdens these laws impose. In 2020 and many election cycles before, new voters could register on Election Day, student voters could prove their identity with student ID, and rural or otherwise homebound voters could ensure their ballot would be delivered with the assistance of a friend or organizer. One by one, the new laws ripped each of these rights away. Or at least they would have, but for the mountain of evidence and clear legal doctrine that warranted the permanent injunction entered by the District Court. Because the District Court's findings were not clear error and its conclusions faithfully applied Montana law, the injunction should be affirmed.

As the District Court found, HB 176's revocation of EDR severely burdens the right to vote, especially for Native and young voters, in violation of the Constitution's rights to vote and equal protection. The District Court also correctly found that SB 169's arbitrary demotion of student ID to a "secondary" form of identification violated those same core constitutional guarantees, and that Plaintiffs have standing to vindicate their rights. Finally, the District Court correctly found that HB 530's prohibition against ballot collection was beyond its authority, and that Plaintiffs' challenge to that abuse is ripe.

ARGUMENT

I. The District Court's judgment finding HB 176 unconstitutional should be affirmed.

By eliminating EDR, HB 176 yanked away a method of one-stop Election Day registration and voting that Montanans relied upon for 15 years. As the District Court found, this unjustified—and unjustifiable—backsliding violated the Montana Constitution's guarantees of the right to vote and equal protection. *See* Mont. Const. art. II, §§ 13, 4.

The Secretary does not dispute that EDR increases voter turnout among eligible Montanans, in particular, young and Native voters. Instead, she argues a range of issues—whether HB 176 severely restricts the right to vote, the appropriate level of scrutiny, whether HB 176 survives strict scrutiny, and whether the District Court's equal protection analysis is flawed—that she did not raise in her Statement of the Issues, and therefore are not properly before the Court. *See State v. Maynard*, 2010 MT 115, ¶ 2, 356 Mont. 333, 334, 233 P.3d 331, 333 n.1 (declining to address issue stated in party's briefing not listed in statement of issues and not "further develop[ed])" in brief); *Irion v. Peterson*, 247 Mont. 459, 461, 807 P.2d 714, 715 (1991) (reviewing only issues raised in parties' statement of issues). But even if this Court were to reach these issues, it should affirm.

A. The District Court correctly concluded that HB 176 unconstitutionally burdens the right to vote.

Laws like HB 176 that interfere with a fundamental right must satisfy strict scrutiny. *Mont. Democratic Party*, ¶ 18. The Secretary instead requests rational basis review based on her disagreement with the magnitude of the burdens that HB 176 imposes on voters. *See* Appellant's Opening Br. ("Sec'y Br.") at 14-18. But Montana law does not reserve strict scrutiny for only the most egregious violations; where fundamental rights are burdened, strict scrutiny applies.

Alternatively, the Secretary argues that the Court should break from its long-standing precedent and impose the *Anderson-Burdick* balancing test employed by federal courts to evaluate infringements on the federal right to vote. *Id.* at 17. Wrong again: state constitutional claims are adjudicated under state law. Besides, the District Court's finding that HB 176 severely burdens the right to vote, which is subject to clear error review, *Mont. Democratic Party*, ¶ 34, requires strict scrutiny even under *Anderson-Burdick*. Thus, even under the Secretary's preferred test, HB 176 is subject to strict scrutiny. Because the state interests invoked to defend HB 176 do not justify its burdens—again, as the District Court properly found—the law cannot survive strict scrutiny or even more forgiving standards of review.

1. Under Montana law, HB 176 must satisfy strict scrutiny.

The Court should reject the Secretary's suggestion that it abandon its well-established approach of applying strict scrutiny to laws that interfere with

fundamental rights. As this Court reaffirmed just last year when it upheld the District Court's order preliminarily injunction, strict scrutiny here is the "status quo." *Mont. Democratic Party*, ¶ 20; *see also* FFCL ¶ 553 (recognizing this Court "has long applied strict scrutiny to right-to-vote challenges, including in those cases decided after federal courts adopted *Anderson-Burdick*") (citing cases); *cf. State v. Sullivan*, 2023 MT 53N, ¶ 11, 526 P.3d 1094 (articulating this Court's "strong preference" for stare decisis).

The District Court correctly recognized that the right to vote is fundamental. FFCL, ¶¶ 549-50 (citing Mont. Const. art. II, § 13; *State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 113 P.3d 281; *Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, 325 P.3d 1204). When a law burdens the fundamental right to vote, the government must satisfy strict scrutiny by demonstrating it is "narrowly tailored to serve a compelling government interest." *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 16, 366 Mont. 224, 286 P.3d 1161.

Federal courts' application *Anderson-Burdick* does not compel a different result. "In interpreting the Montana Constitution," this Court "has repeatedly refused to 'march lock-step'" with the U.S. Supreme Court, "even where the state constitutional provision at issue is nearly identical to its federal counterpart." *State v. Guillaume*, 1999 MT 29, ¶ 15, 293 Mont. 224, 975 P.2d 312 (quoting *Ranta v. State*, 1998 MT 95, ¶ 25, 288 Mont. 391, 958 P.2d 670). This willingness to "walk

alone," *State v. Long*, 216 Mont. 65, 69, 700 P.2d 153, 156 (1985), vindicates this Court's recognition that "states may interpret provisions of their own constitutions to afford greater protection" than the U.S. Constitution, *Guillaume*, ¶ 15.

Maintaining robust protections under state law is especially vital in the context of the right to vote, which "is perhaps the most foundational of our Article II rights and stands, undeniably, as the pillar of our participatory democracy." *Mont. Democratic Party*, ¶ 19. Several other state supreme courts have recognized as much and apply strict scrutiny to right-to-vote claims. *See, e.g.*, *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (2000) (applying strict scrutiny to right-to-vote claim and declining to apply *Anderson-Burdick* because "*Burdick* did not deal with the Idaho Constitution and instead was decided under the United States Constitution"); *Weinschenk v. State*, 203 S.W.3d 201, 216 (Mo. 2006) (en banc) (finding *Anderson-Burdick* test "not persuasive" where "the issue is constitutionality under Missouri's Constitution, not under the [U.S.] Constitution"); *see also Madison v. State*, 161 Wash. 2d 85, 98-99, 163 P.3d 757, 766-67 (2007); *Tully v. Edgar*, 171 Ill. 2d 297, 304-05, 664 N.E.2d 43, 47 (1996). Applying *Anderson-Burdick* to challenges brought under Montana's constitution would also overlook this test's grounding in federalism concerns that are not implicated by state law claims. *E.g.*, *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018) (explaining *Anderson-Burdick* is product of a "confluence of

interests" between state election regulations and federal courts' protection of federal rights). Montana's legal framework should apply, as it always has.[3]

2. Even under *Anderson-Burdick*, HB 176 must satisfy strict scrutiny.

Even if this Court were to apply *Anderson-Burdick*, strict scrutiny would still apply. Under *Anderson-Burdick*, a law that imposes a severe burden on the right to vote must be justified by a compelling interest. *See Short, v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018). And the District Court found that HB 176's burden on the right to vote is, in fact, severe.

This finding is supported by overwhelming record evidence. Since EDR was introduced in 2005, more than 70,000 Montanans have taken advantage of the opportunity it affords to exercise their right to vote. FFCL ¶¶ 177, 314. EDR has significantly boosted turnout in Montana, particularly among voters who have traditionally been impeded in accessing the franchise. *Id.* ¶¶ 316-21. As the District Court found—and as extensive oppositional testimony before the Legislature detailed—EDR has benefited many disadvantaged groups that continue to rely on it, including young, elderly, disabled, and indigenous voters. FFCL ¶¶ 343-50, 583-84.

[3] The Secretary suggests that the application of strict scrutiny would discourage reasonable election regulations, even those designed to help voters during emergencies, *see* Sec'y Br. 20, but, as the District Court explained, strict scrutiny applies only where a fundamental right is *burdened*. FFCL ¶ 547; *see also id.* ¶ 566 (HB 176); *id.* ¶ 594 (HB 530).

EDR is so popular among Montana voters that just seven years ago they resoundingly rejected a similar effort to eliminate EDR by referendum. *Id.* ¶ 345. Even the Secretary admits that EDR improved Montana's election processes. *Id.* On this record, the District Court was more than justified in concluding that repeal of EDR would severely burden the right to vote.

The Secretary's failure to show that those conclusions were clearly erroneous dooms her appeal. Rather than argue that these findings are unsupported by substantial evidence or based on a misapprehension of the effect of the evidence, *see Mont. Democratic Party*, ¶ 11, the Secretary selectively focuses on isolated bits of trial evidence and asks this Court to ignore the remaining mass in order to supplant the District Court's factual determinations, *see* Sec'y Br. 15-17 (arguing evidence demonstrates that HB 176 creates only a "minimal burden" on the right to vote). But this Court does not "reweigh conflicting evidence or substitute its judgment for the district court's regarding the strength of the evidence." *Matter of P.T.D.*, 2018 MT 206, ¶ 17, 392 Mont. 376, 380, 424 P.3d 619, 622; *see also Hoven v. Waddell*, 2022 MT 124N, ¶ 14, 512 P.3d 267 (explaining it is trier of fact's role "to make credibility determinations and weigh the evidence"). The District Court's factual findings are

supported by substantial evidence and entitled to "great deference." *Mont. Democratic Party*, ¶ 11 (quoting *In re A.M.M.*, ¶ 10).[4]

3. The District Court's conclusions that the state's purported interests in HB 176 do not justify the burdens it imposes on the right to vote were not clearly erroneous.

The Secretary's suggestion that HB 176 is narrowly tailored to advance the state's interests in reducing administrative burdens, long lines, and Election Day delays, Sec'y Br. 22-28, is wrong as a matter of law and fact. After careful consideration of the record, including the testimony of Montana election officials who appeared at trial, the District Court found that HB 176 does not advance many of these interests at all, and certainly is not narrowly tailored to any of them. These factual findings were not clear error. *See Driscoll v. Stapleton*, 2020 MT 247, ¶ 23, 401 Mont. 405, 417, 473 P.3d 386, 393.

First, the District Court's conclusion that EDR does not create administrative burdens was based on substantial evidence. FFCL ¶ 497 (citing Tr. 909:8-12

[4] Unable to identify any clear error in the District Court's findings, the Secretary and amicus curiae Lawyers Democracy Fund ("LDF") point to factual findings in different cases involving different registration deadlines in different jurisdictions, challenged under different legal regimes. *See* Sec'y Br. 21 and LDF Br. (citing *Marston v. Lewis*, 410 U.S. 679, 681, 93 S. Ct. 1211, 1213, 35 L. Ed. 2d 627 (1973) (Arizona)); LDF Br. (citing *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 123 (D. Conn. 2005) (Connecticut), and *Ohio Democratic Party v. Husted*, 834 F.3d 620, 628–630 (6th Cir. 2016) (Ohio); *Barilla v. Ervin*, 886 F.2d 1514, 1525 (9th Cir. 1989) (Oregon). For obvious reasons, the factual findings in these cases are of no moment here.

(Seaman); Tr. 1768:24-1769:1 (Tucek); Tr. 1571:7-13 (Custer); Tr. 1713:17-1714:9 (Ellis); Tr. 2098:2-23 (Rutherford); Tr. 1840:13–1841:8 (Hertz); Eisenzimer Dep. 50:5-7). In fact, the District Court found that HB 176 may *increase* administrative burdens because it would require elections administrators to learn new rules and manage significant voter confusion resulting from the sea change to the voting process. FFCL ¶ 513 (citing Tr. 1766:24-1767:14, 1768:12-21, 1779:7-10 (Tucek); Tr. 1565:10-15 (Custer); Tr. 973:2-19 (Seaman); Tr. 1459:7-13 (Franks-Ongoy); Tr. 2088:8-2089:3 (Rutherford)).

Moreover, any additional work that EDR creates for election administrators results from more Montanans being able to vote. *See* FFCL ¶ 498. Eliminating EDR would reduce the burden on election officials only if it resulted in fewer Montanans voting. FFCL ¶¶ 498, 507, 508 (citing PTX091 at 11:4-6 (election administrator testifying that "any time someone registers and vote[s], it's more work for us. That's the job.")). Montana does not have any legitimate, let alone compelling, interest in reducing administrative tasks by disenfranchising voters. It is no wonder, then, that courts have repeatedly found that mere administrative burdens cannot alone justify burdening the fundamental right to vote. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2018).

The District Court also found that there are ways to reduce any alleged burdens on administrators without eliminating EDR, such as hiring more poll workers, offering more training, and modernizing election equipment. FFCL ¶ 510. This compels the finding that HB 176 is not narrowly tailored to alleviating administrative burdens. *See Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996) (explaining that law burdening fundamental right fails strict scrutiny where it is not "the least onerous path that can be taken to achieve the state objective").[5]

Second, the District Court properly found, based on substantial evidence, that HB 176 does not advance any interest in reducing voting lines. The evidence established as a matter of fact that long lines to vote are not a problem in Montana, and certainly are not caused by EDR: registered voters who do not need to make use of EDR typically vote with no wait. FFCL ¶ 516; *see also id.* ¶¶ 523 (wait times at Montana polls have *decreased* as EDR has become more popular); 524 ("All data indicate that EDR is not associated with long wait times in Montana"). Moreover, as

[5] In asking this Court to reverse, the Secretary relies on evidence that the District Court found not credible. Sec'y Br. 24 (citing testimony from Mr. Ellis and Ms. Tucek, among others); FFCL ¶¶ 185–186, 360. FFCL ¶¶ 185 (devaluing "[t]he credibility of Mr. Ellis's testimony regarding administrative burdens"); 186 (finding Ms. Tucek's testimony regarding administrative burdens "entitled to limited weight"). These credibility determinations were firmly within the purview of the trial court. *Matter of P.T.D.*, ¶ 17.

the District Court found, EDR does not and cannot increase lines at most polling locations because EDR generally occurs at centrally designated locations, not at polling places. *See* FFCL ¶ 515. Where EDR does occur at polling locations, EDR voters queue separately from already-registered voters. *See id*. The Secretary's argument that HB 176 advances a compelling state interest by reducing EDR wait times assumes that it is better to deny Montanans the right to vote than to allow them to wait in line to register and vote on Election Day. It is not. *See* FFCL ¶ 525 (finding that, if "[t]he purpose of reducing wait times is to prevent people from dropping out of line and thus being unable to vote," HB 176 is "completely self-defeating . . . since the people actually waiting in any lines at issue need to make use of EDR in order to be able to vote").

Third, the District Court properly found, based on substantial evidence, that HB 176 does not reduce delays or errors in voting tabulation. FFCL ¶¶ 512 ("The Secretary cannot point to a single instance where an election administrator was unable to report election results in a timely fashion due to EDR."), 501 (finding "no evidence of any errors resulting from" EDR).

Finally, although the Secretary argued at trial that HB 176 advances the state's interest in preventing voter fraud, she has abandoned this argument on appeal. For good reason. *See* FFCL ¶¶ 571 ("EDR has not been implicated in a single instance of voter fraud in Montana since its inception."), 142 (crediting expert testimony that

HB 176 has "no discernable [public] benefit" in terms of election integrity and voter fraud), 157 (crediting testimony that there is no connection between HB 176 and increasing voter confidence or preventing fraud). Indeed, the evidence established that voter registration is *more secure* during EDR than during regular registration. FFCL ¶ 327. The District Court found this election official testimony to be highly credible and gave it substantial weight.[6]

In inviting this Court to reweigh the evidence and consider different factual records in different cases, Sec'y Br. 22-28, the Secretary offers no basis for reversal. *See Hoven*, ¶ 14.[7]

[6] LDF appears to argue that EDR *could* lead to fraud *if* election administrators do not have adequate time to verify voter qualifications. This is contrary to the record, which repeatedly affirms that election administrators use all the same verification safeguards for EDR —and that, in fact, EDR is *more* secure, because voters have to physically present to an election official. FFCL ¶¶ 299, 324, 506.

[7] This Court has already rejected the Secretary's argument that the Legislature's discretionary authority to enact EDR allows it to eliminate EDR—even when doing so imposes a severe burden on the right to vote. Sec'y Br. 19020; *Mont. Democratic Party*, ¶ 36 (holding Legislature's discretionary power to provide for EDR "cannot logically be read to nullify the fundamental right to vote"). This same reasoning forecloses LDF's argument that there is no "right" to EDR: HB 176 is unconstitutional not because the Constitution guarantees a right to EDR, but because the evidence established that EDR is crucial for many Montanans to be able to exercise their right to vote and eliminating it would severely burden that right.

B. The District Court properly applied this Court's equal protection jurisprudence.

Because the District Court's conclusion that HB 176 violates the Montana Constitution's right to vote should be affirmed, this Court need not reach the question of whether the District Court also properly found that HB 176 violates the Montana Constitution's equal protection clause. But should the Court reach the question, here, too, the Secretary provides no basis for reversal.

As an initial matter, while some of this Court's precedents have referred to a discriminatory purpose in evaluating an alleged equal protection violation, *see, e.g*., *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421, more recent decisions have recognized that a facially neutral law's disparate impact on similarly situated groups can violate equal protection. *See, e.g., Snetsinger v. Montana University System*, 2004 MT 390, ¶ 27, 325 Mont. 148, 157, 104 P.3d 445, 452; *Henry v. State Comp. Ins. Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456 .[8]

Here, the District Court found that "HB 176 severely burdens the right to vote of Montana voters, particularly Native American voters, students, the elderly, and

[8] The Secretary's citation to *Washington v. Davis*, Sec'y Br. 33, is misplaced because that case interprets the federal Equal Protection Clause. 426 U.S. 229, 248 (1976)). Montana's Equal Protection Clause "provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution." *Snetsinger*, ¶ 15.

voters with disabilities." FFCL ¶ 566. The Secretary does not dispute—or even acknowledge—these findings.

In any event, the District Court affirmatively found that the Legislature enacted HB 176 to reduce voting by young people and Native Americans. FFCL ¶ 585. Indeed, the Legislature was not even able to articulate the justification for the bill, offering instead, as the District Court found, only "fuzzy rationale," despite being well-informed of its discriminatory impact on young and Native voters. FFCL ¶ 343. These factual findings were not clear error.

The Secretary's belated hearsay objection to the District Court's finding of discriminatory intent, Sec'y Br. 30, is procedurally improper and factually incorrect. Because the Secretary did not object to the presentation of this evidence at trial, *see* Sec'y App. 187, she failed "to preserve the issue for purposes of appeal." *Cosner v. Napier*, 249 Mont. 153, 154, 813 P.2d 989, 990 (1991). Besides, a *plethora* of evidence buttresses the District Court's finding of discriminatory intent under the framework set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977), including transcripts of witness testimony as to how repealing EDR would harm specific types of voters, FFCL ¶ 350, and evidence that youth voting has steadily increased in recent years, FFCL

¶ 366, and that Republican legislators were motivated in part by concerns that college students tend to be liberal, FFCL ¶¶ 341-42.[9]

The District Court's finding that HB 176 was passed with discriminatory intent against Native voters is likewise well-supported, including, for example, by evidence of Montana's long history of disenfranchising Native voters. *See* FFCL ¶¶ 344-49, 585; *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016) (citing *Arlington Heights*, 429 U.S. at 267).

II. The District Court's judgment finding SB 169 unconstitutional should be affirmed.

SB 169 unconstitutionally demoted student ID from a primary form of voter ID to a secondary form that may be used only in conjunction with a current utility bill, bank statement, paycheck, government check, or other government document

[9] The District Court correctly rejected the Secretary's argument that "young voters" is not an adequately defined class. FFCL ¶ 662. Neither of the cases the Secretary cites speaks to what makes a classification sufficient. Sec'y Br. 33–35 (citing *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 21, 325 Mont. 1, 7–8, 103 P.3d 1019, 1023 and *Matter of S.L.M.*, 287 Mont. 23, 29–34, 951 P.2d 1365, 1369–1372 (Mont. 1997)). This Court has clarified that "two groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 29, 374 Mont. 453, 460–61, 325 P.3d 1211, 1219. *Id.* Here, the District Court did not clearly err in crediting the testimony of Dr. Mayer, who—relying on academic literature and Montana-specific data—testified about the disproportionate burdens HB 176 imposes on young voters. FFCL ¶¶ 153, 156. Using that evidence, the class is definable "in a way which will effectively test the statute without truncating the analysis." *Goble*, ¶ 34.

showing the voter's name and current address. For nearly 20 years, young Montana voters were able to use student ID to vote without incident. This sudden and arbitrary change directly harms young Montanans, who are far less likely to have any of the remaining forms of primary ID or the secondary documents they now must produce with a student ID to vote. MDP Plaintiffs successfully challenged SB 169 on the grounds that it violated the rights to vote and equal protection guaranteed by the Montana Constitution. *See* Mont. Const. art. II, §§ 13, 4. In seeking reversal, the Secretary argues first that MDP lacks standing, and second that SB 169 satisfies rational basis review. Both arguments fail.

A. MDP has standing to challenge SB 169.

MDP has both associational and organizational standing to challenge SB 169. This Court may affirm on either ground. *See Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 42, 360 Mont. 207, 226, 255 P.3d 80, 95.

First, the District Court properly found that MDP has associational standing to challenge SB 169 on behalf of its members. FFCL ¶ 541 (adopting ¶¶ 572-614 of Pls.' PFFCL); Pls.' PFFCL ¶ 592. This is because (a) at least one of its members would have standing to sue in her own right, (b) MDP seeks to protect interests germane to its purpose, and (c) neither the claim asserted nor the relief requested require the individual participation of MDP's members. *See* FFCL ¶ 541; Pls.' PFFCL ¶ 593.

The Secretary challenges only the first element, arguing that MDP did not identify a specific individual disenfranchised by SB 169. Sec'y Br. 36-37. But the District Court found that at least one of MDP's members would be affected by SB 169 and thus would have standing to sue. *See* FFCL ¶ 541; Pls.' PFFCL ¶¶ 594 (MDP) (citing Tr. 1200:5-15 (Hopkins) (testifying SB 169 would negatively impact MDP's members because MDP has many members on college campus, and college students are disproportionately impacted by SB 169)). The Secretary cites no authority requiring MDP to identify an affected individual by name, nor can she, as this is not the standard in Montana. *See Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cnty*., 2019 MT 147, ¶ 22, 396 Mont. 194, 208, 445 P.3d 1195, 1203 (finding associational standing absent identification of specific member).[10]

Separately and independently, MDP also has standing based on SB 169's direct harm to its own interests. *See* FFCL ¶ 541; Pls.' PFFCL ¶ 581. Under this Court's precedent, organizations have direct standing when they are threatened with economic harm "caused by, or likely to be caused by" the challenged action. *Larson v. State By & Through Stapleton*, 2019 MT 28, ¶¶ 46-47, 394 Mont. 167, 201, 434

[10] Federal courts employ the same standard, recognizing associational standing of political parties with vast membership under the theory that challenged legislation is extremely likely to affect at least one of its members, whether specifically identified or not. *See, e.g., Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1337 (N.D. Ga. 2018); *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004).

P.3d 241, 263). The District Court found MDP met this standard after crediting testimony that, unless enjoined, SB 169 will frustrate MDP's mission and cause it to divert time and resources from other priorities, thus inflicting "distinct injuries." FFCL ¶ 15; *see also id.* ¶ 541; Pls.' PFFCL ¶¶ 582, 583. The Secretary does not dispute these factual findings. Instead, she quibbles that MDP used the word "might" when testifying about which other priorities its resources would be diverted from, Sec'y Br. 38-39, based on a misreading of *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020)), which is not law in Montana. In *Shelby*, the Sixth Circuit found that the plaintiff organization's claim that the *litigation* required it to divert resources from its mission was insufficient to confer standing. *See id.* MDP makes no such claim here, and neither Montana nor the Sixth Circuit require organizations to prove standing by making a detailed showing that they already diverted resources before bringing suit, which could functionally eliminate plaintiffs' right to seek prospective relief. *See Mont. Immigrant Just. All. v. Bullock*, 2016 MT 104, 383 Mont. 318, 325 n.1, 371 P.3d 430, 437 (recognizing standing where challenged law "threatens to divert [the organization's] resources and frustrate [its] mission"). The District Court's factual finding that alleviating SB 169's burdens on MDP's members would require it to divert resources from its mission, FFCL ¶ 15, is supported by substantial evidence, is not clear error, and is more than sufficient to establish standing.

B. The District Court properly found that SB 169 violates Montanans' right to equal protection.

The District Court correctly concluded that SB 169 is not rationally related to any of the alleged interests in reducing voter fraud, improving voter confidence, or ensuring election integrity. FFCL ¶¶ 665-67, 671. Because Plaintiffs met their initial burden to show that SB 169 disproportionate burdens young voters, "the burden then shifted to the State to justify the distinction." *Mont. Cannabis Indus. Ass'n*, ¶ 43. Rational basis review required the Secretary to demonstrate "that the objective of the statute was legitimate and bears a rational relationship to the classification used by the Legislature." *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 19, 302 Mont. 518, 523, 15 P.3d 877, 882. After a nine-day trial, she failed to do so.

Contrary to the Secretary's mischaracterization, Sec'y Br. 40, SB 169 does not codify the Legislature's preference for governmental IDs relative to non-governmental-IDs. Instead, the law distinguishes between different *kinds* of governmental IDs. SB 169 ended Montana's nearly two-decade long practice of allowing voters to use out-of-state driver's licenses or Montana college IDs as primary identification at the polls. FFCL ¶¶ 362, 367, 385-87. Out-of-state driver's licenses are government-issued IDs. *See* FFCL ¶ 194. And the Secretary's own 30(b)(6) witness, who *drafted* SB 169, admitted that he did not even know whether Montana University System IDs constitute government IDs. *Id.* Thus, the Secretary's arguments about the reasonableness of distinguishing between

governmental and non-governmental IDs, *see* Sec'y Br. 43-45, are total non sequiturs—they do not correspond to the actual distinction SB 169 makes. Because SB 169's new hierarchy for different types of governmental IDs is "patently arbitrary and bears no rational relationship to a legitimate governmental interest," it "offends equal protection of the laws." *Timm v. Montana Dep't of Pub. Health & Hum. Servs*., 2008 MT 126, ¶ 34, 343 Mont. 11, 23, 184 P.3d 994, 1003.[11]

Contrary to the Secretary's alternative argument, *see* Sec'y Br. 47, 43-49, the District Court did consider the State's proffered interests in reducing voter fraud, improving voter confidence, and ensuring election integrity. It simply found no rational relationship between any of them and SB 169. *See* FFCL ¶ ¶ 667, 484.

First, the District Court found "no evidence" of "any connection between voter fraud and [SB 169]." FFCL ¶ 472 (finding that "all evidence presented in this case" indicates that SB 169 is *not* connected to voter fraud). It found that the rate of voter fraud in the U.S. is "infinitesimally small," FFCL ¶ 477, and that there is no evidence of any voter fraud in Montana associated with student IDs, FFCL ¶¶ 470, 472, 480-81. Indeed, both the Secretary's Election Director and her own expert

[11] Contrary to the Secretary's unsupported allegation, Sec'y Br. 44–45, there is "no evidence that student IDs or out-of-state driver's licenses are less secure or more susceptible to forgery than the primary forms of ID under SB 169." FFCL ¶ 485. Nor is there any evidence that anyone has ever forged a student ID or an out-of-sate driver's license to vote in Montana. *Id.*

testified that that there is no connection between voter fraud and student IDs in Montana. *Id*. FFCL ¶¶ 470, 483 (citing Trende testimony that he does not think "photo ID laws actually do anything to decrease fraud, to the extent it exists," and that he has "no evidence that SB 169 will decrease voter fraud")).[12]

Rather than dispute these factual findings, the Secretary relies on a U.S. Supreme Court decision to argue that the state always has an interest in preventing potential future fraud. Sec'y Br. 49 (quoting *Crawford v. Marion Cnty. Election Bd*., 553 U.S. 181, 194-96 (2008) (upholding voter ID requirements under *Anderson-Burdick* standard). Even if that were true, the Secretary would still need to demonstrate some connection between that interest and SB 169 to survive rational basis review. *See Crawford*, 553 U.S. at 196-97 (upholding photo identification law in part based on Indiana's "unusually inflated list of registered voters" that included "thousands of persons who had either moved, died, or were not eligible to vote because they had been convicted of felonies"). She failed to do so.

[12] While there is some evidence that legislators who backed the bill *believed* that it could potentially reduce voter fraud, the District Court found that "legislators who supported the bill can cite no evidence beyond their own feelings." *Id*.; *see also id*. ¶ 191 (finding testimony of legislator in support of SB 169 "neither competent nor credible," and noting that the legislator "admit[ted] that his support for the challenged laws is based on 'just [his] feelings'" (quoting Tr. 1899:9–15 (Hertz)). These feelings are insufficient to create a "legitimate state interest" justifying SB 169's burdens on Montanans' right to vote.

Second, the District Court properly found that SB 169 is not rationally related to ensuring voters are properly qualified. If a voter is already registered, then election workers examine ID presented at the polls only to verify the voter's identity, not to confirm their qualifications. FFCL ¶ 194 (discrediting testimony that one purpose of showing ID at the polls is to verify eligibility). And several types of "primary" IDs under SB 169, such as an expired driver's license or a photo-less concealed-carry permit, do not speak to a voter's current residency or qualifications. FFCL ¶¶ 194, 385, 401, 666; *accord Mont. Democratic Party*, ¶ 30.

Third, the record supports the District Court's finding that SB 169 is not rationally related to any interest in improving voter confidence. *See* FFCL ¶¶ 157, 484, 666. Even if some hypothetical photo identification law could improve voter confidence, SB 169 does not require photo identification; instead, it demotes some kinds of photo IDs to "secondary" status while promoting other photo-less IDs to "primary status." FFCL ¶¶ 666, 385.

Nor is SB 169 rationally related to reducing administrative burdens. The District Court found that SB 169 does not improve the election process, FFCL ¶ 667, and it credited an election administrator's testimony that SB 169, in fact, significantly *complicates* the process of determining adequate voter identification, *id.*; *see also id.* ¶ 364. Rather than discrediting these findings, the Secretary asks this Court to credit different evidence. *See* Sec'y Br. 43, 46. Because deference is owed

to the District Court's findings regarding the relationship between challenged legislation and state interests, *Jaksha v. Butte Silver Bow Cnty.*, 2009 MT 263, ¶ 23, 352 Mont. 46, 51, 214 P.3d 1248, 1253, this Court should decline that request.

III. The District Court's judgment finding HB 530 unconstitutional should be affirmed.

The only two issues related to HB 530 that the Secretary identifies in her statement of the issues—whether the challenge is ripe, and whether the Legislature has authority to enact HB 530, Sec'y Br. 1—are easily answered. Plaintiffs' challenge is ripe because HB 530 has already inflicted harm, and the Legislature does not have authority to violate Montanans' rights to vote, equal protection, due process, and free speech. *See infra* III.A, C, E, F. Because the Secretary does not challenge the District Court's conclusions that HB 530 severely burdens the right to vote, fails strict scrutiny, and violates Montanans' constitutional rights, these issues are not properly before this Court. *See Maynard*, ¶ 2; *Irion*, 247 Mont. at 461. Even if this Court were to reach these issues, the Secretary provides no valid basis to disturb the District Court's well-supported findings and well-reasoned conclusions.

A. The District Court correctly concluded that Appellee's challenge to HB 530 is ripe.

The District Court correctly concluded that HB 530 is ripe for review. FFCL ¶ 587. The "basic purpose of the ripeness requirement is to prevent the courts . . . from entangling themselves in abstract disagreements." *Reichert v. State ex rel.*

McCulloch, 2012 MT 111, ¶ 54, 365 Mont. 92, 116, 278 P.3d 455, 472. Here, the disagreement is not abstract because HB 530 has already injured MDP by causing it to immediately (a) cease ballot collection, and (b) expend resources educating voters, staff, and volunteers about the change in the law. FFCL ¶¶ 590-91. Both of these harms are concrete.

Courts routinely find self-censorship of the kind that MDP endured by halting its ballot collection efforts to supply the concrete injury required for ripeness. *See, e.g.*, *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (citing *Va. v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (holding self-censorship is "a harm that can be realized even without an actual prosecution")). And MDP's fear of potential enforcement is reasonable. *See id*. HB 530's text mandates a rule that does not allow anyone to "provide," "offer to provide," or "accept" a "pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots." FFCL ¶ 454. Even though the Secretary has not yet drafted this administrative rule, the statute requires that it be written "in substantially the same form" as HB 530. *Id*. Based on this statutory language, the District Court reasonably found that "Plaintiffs and this Court have every reason to believe that the administrative rule will prohibit paid staff from engaging in ballot assistance activities and impose a civil penalty for violation of that rule." FFCL ¶ 592.

MDP's cessation of its ballot collection activities in response to HB 530 is also sufficient injury to make its challenge ripe. Over several election cycles, MDP has prioritized ballot collection as a core GOTV activity by paying employees and reimbursing volunteers for expenses. FFCL ¶ 419. Since HB 530's enactment, MDP has refrained from this activity. *Id.* ¶ 645. In addition, HB 530 has harmed MDP by causing it to divert resources from other priorities to educate voters about changes in the law and mitigate its impact on voter turnout. *Id.* ¶ 15. The Secretary's argument that "Appellees may never be harmed by HB 530," Sec'y Br. 52, simply fails to acknowledge—let alone dispute— the many ways in which the District Court found that HB 530 has *already* harmed MDP.

MDP Plaintiffs' vagueness challenge is similarly ripe because, as the Secretary concedes, until she issues a rule, "it is impossible to know whether HB 530 will affect Appellees." Sec'y Br. 53. The undisputed *uncertainty* about what HB 530 prohibits has caused Appellees to cease all ballot collection activities, thus harming its own operations and severely burdening the right to vote. FFCL ¶¶ 594, 455. As the Secretary acknowledges, due process concerns arise "when a statute does not allow one 'to know what is prohibited.'" Sec'y Br. 55 (quoting *State v. Dugan*, 2013 MT 38, ¶ 66, 369 Mont. 39, 303 P.3d 755). HB 530 supplies a textbook illustration of this doctrine.

The Secretary's alternative argument that MDP Plaintiffs somehow "failed to exhaust administrative remedies," Sec'y Br. 57, exhibits the confusion of a caller with the wrong number. The exhaustion requirement, derived from the Montana Administrative Procedures Act ("MAPA"), governs when a party seeks judicial review of a written final decision of an administrative agency. *See N. Star Dev., LLC v. Mont. PSC*, 2022 MT 103, ¶ 23, 408 Mont. 298, 510 P.3d 1232. But MDP Plaintiffs challenge the constitutionality of a statute, not an agency decision, so MAPA is entirely inapposite.

B. The District Court correctly concluded, in the alternative, that HB 530 is an unconstitutional delegation of power.

The District Court correctly concluded, in the alternative, that "if the Secretary is correct that HB 530[] is not ripe for review because the substance of the final rule is 'speculation,' then it would constitute an unlawful delegation of legislative power." FFCL ¶ 648. To be a proper delegation, the law must leave "nothing with respect to a determination of what is the law." FFCL ¶ 649 (quoting *White v. State*, 233 Mont. 81, 88, 759 P.2d 971, 975 (1988)). HB 530 fails that test.

The Secretary's own witness forecloses her argument that HB 530 expressly articulates the delegation. When asked to "identify any policy, standard, or rule to guide the regulations implementing HB 530," the Secretary's Chief Counsel "failed" to do so. FFCL ¶ 651. The District Court correctly reasoned that, without an objective standard for the Secretary to follow, "the Secretary must decide the scope"

of HB 530's prohibition "without the required policy, standard, or rule to use for guidance." FFCL ¶ 653. Such a delegation violates Article V, Section 1 of the Montana Constitution, and HB 530 is therefore void. *Id.*

C. The District Court did not clearly err in finding that HB 530 unconstitutionally burdens the right to vote.

The District Court's finding that HB 530 severely and disproportionately burdens the right to vote is well supported by the evidence. HB 530 is the latest in a series of recent legislative attempts to ban or restrict ballot collection in Montana. FFCL ¶ 422. These efforts consistently target the voting rights of certain segments of the population—including Native voters, *id.* ¶ 596—in a manner that flouts the Montana Constitution.

The District Court's finding with respect to Native voters followed the roadmap established in prior litigation, in which this Court affirmed the finding that a law similarly restricting ballot collection activity (the "Ballot Interference Prevention Act" or "BIPA") "burden[ed] the right to vote" for voters living in rural tribal communities "by eliminating important voting options that make it easier and more convenient for voters to vote," thereby "increasing the costs of voting." FFCL ¶ 429 (citing *Driscoll v. Stapleton*, No. DV 20 408, 2020 WL 5441604 (Mont. Dist. Ct. May 22, 2020); *Driscoll v. Stapleton*, No. DV 20 408, slip op. (Mont. Dist. Ct. Sept. 25, 2020)).

Substantial evidence supports the District Court's finding that BIPA was a "less onerous" restriction than HB 530 because BIPA targeted only ballot collection, not other forms of ballot assistance eliminated by HB 530. FFCL ¶ 600. The District Court further found that the "factual record regarding the burdens on voters in this case is essentially identical to the one" that this Court "and two district courts had before them when they invalidated BIPA." *Id.* Among other things, many Native Montanans rely on ballot collection assistance to vote because a "panoply of socioeconomic factors—the result of centuries of discrimination against Native Americans—make it more difficult for Native Americans living on reservations to register and vote." *Id.* ¶¶ 597, 99.

Remarkably, the Secretary fails to grapple with the findings of the District Court or the similar conclusions of multiple other Montana courts, and instead cites to a case with a different factual record, applying a different standard, finding that an *Arizona* law prohibiting ballot collection did not severely burden *Arizona* voters. Sec'y Br. 62, 67 (citing *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021)). That case provides no basis to disturb the District Court's application of Montana law to this factual record.

D. The District Court did not clearly err in finding that HB 530 is not related to any legitimate state interest.

The District Court found that HB 530 is "a solution in search of a problem" that "furthers no legitimate, let alone compelling, state interest." FFCL ¶ 604. Those findings are well supported by the evidence.

The District Court did not clearly err in finding that HB 530 is not justified by any interest in preventing voter coercion or voter fraud. The Secretary provided no evidence of voter coercion, related to ballot collection or otherwise, *id.* ¶¶ 603, 609, 430, and the District Court found that there is no evidence of significant or widespread voter fraud in Montana, let alone any fraud that HB 530 would remedy. *Id*. ¶ 465. These findings were based on testimony from both Plaintiffs' and the Secretary's experts, as well as two election administrators called by the Secretary. *Id.*; *see also id*. ¶¶ 486-88. Indeed, the record established that there has *never* been a formal complaint in Montana lodged against any individual or organization engaging in paid ballot collection based on fraud or coercion. *Id*. ¶ 420.

Moreover, the District Court did not err by demanding that the Secretary provide some evidence of fraud. *Contra* Sec'y Br. 66. This is the same standard this Court held the Secretary to in *Driscoll*, where the Secretary claimed that BIPA advanced important state interests in ensuring voter confidence and guarding against abuses in the electoral process, but "did not present evidence in the preliminary

injunction proceedings of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana." ¶ 22.

Lastly, even if there were any evidence of fraud or coercion related to ballot collection, HB 530 is not sufficiently tailored, under any level of scrutiny, to advance those interests. Montana already criminalizes ballot fraud and coercion, FFCL ¶¶ 473-75; § 13-35-201, 103, 201(1), 201(3), 218, 207, and voting more than once in an election, § 13-35-210(1), MCA; § 45-7-208, MCA. The District Court properly found that these existing laws are sufficient to protect against the Secretary's concerns. FFCL ¶ 476.

In sum, there is simply no evidence that HB 530 would reduce fraud. Instead, the District Court credited testimony from Dr. McCool that rates of voter fraud are actually *higher* in states that ban ballot assistance. FFCL ¶ 421. The Secretary does not dispute the credibility of this testimony.

E. The District Court correctly concluded that HB 530 violates equal protection.

The District Court correctly concluded that HB 530 imposes different burdens on Native and non-Native voters, and this classification, which affects the fundamental right to vote, does not survive strict scrutiny. *See* FFCL ¶¶ 582, 586, 611.

The District Court found that HB 530 "levies disproportionate burdens on Native American voters compared to other voters." FFCL ¶ 612. This finding is

supported by overwhelming evidence, including empirical data, testimony from multiple tribal representatives, and expert analyses. *See id*. ¶¶ 65 (crediting testimony that HB 530 "basically shut[s] the door on [tribal members'] opportunity to vote"), 66 (finding HB 530 disproportionately affects Native voters due to inequities in mail delivery service, access to postal services, distance to county seats, poverty rates, vehicle access, internet access, and stable housing).

The District Court correctly concluded that such differential treatment triggers strict scrutiny, FFCL ¶ 613 (citing *Snetsinger*, ¶ 17), which HB 530 cannot satisfy. *See supra* III.D; FFCL ¶ 604.

Again, the Secretary is wrong that a finding of discriminatory purpose is required to trigger strict scrutiny. Sec'y Br. 68. Even so, the District Court found that "there is significant evidence of discriminatory purpose" motivating HB 530's enactment. *Id.* ¶ 614. That finding is well-supported by evidence that the legislature was "plainly on notice of the discriminatory impact of HB 530 []and other ballot assistance bans"; that HB 530's immediate predecessor, HB 406, was stymied after concerns about its constitutionality; and that the legislature repackaged failed HB 406 as HB 530 and advanced it at the last moment without any hearings or opportunity for similar public testimony. *Id*. ¶¶ 614-16.[13]

[13] Contrary to the Secretary's suggestion, the District Court did not conclude that "laws passed through an amendment procedure are presumptively invalid." Sec'y

The Secretary's claim that there is "zero record evidence" that *litigation* put the legislature on notice of HB 530's discriminatory impact, Sec'y Br. 69, mischaracterizes the Court's finding that the legislature was on notice "*following*" litigation, FFCL ¶ 614. In 2020, two Montana courts found that BIPA unconstitutionally burdened Native voters' right to vote. FFCL ¶¶ 429-30 (citing *Driscoll*, 2020 WL 5441604; *Driscoll*, No. DV 20 408, slip op.; *Driscoll*, ¶ 21 (affirming permanent injunction)); FFCL & Order, *W. Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020) (permanently enjoining BIPA). Following this litigation, witnesses and legislators testified in opposition to further ballot collection restrictions, emphasizing the burden such restrictions would place on Native Montanans. *Id*. ¶¶ 433, 440, 443, 444. In response, the Secretary cites to Senator Hertz's testimony that he was not aware of HB 530's discriminatory effects. Sec'y Br. 69. But the District Court specifically found Senator Hertz's trial testimony "neither competent nor credible." FFCL ¶ 191. The Secretary provides no basis to disturb this credibility determination.

The Secretary contends that the facts upon which the District Court relies may support some inference other than discriminatory intent, Sec'y Br. 70, but it is the role of the District Court "to make inferences based on the evidence provided." *State*

Br. 71. This mischaracterizes the District Court's finding that the legislature's rushed passage of HB 530 constitutes an irregular procedure that is itself indicative of discriminatory intent. FFCL ¶ 616 (citing *Arlington*, 429 U.S. 252 at 267).

v. Brancamp, 2002 MT 62N, 310 Mont. 537, 52 P.3d 401 (affirming conclusion of District Court because it was based on reasonable inferences from facts). Based on facts indicating that the legislature (1) was aware of HB 530's discriminatory impact on Native voters, (2) heard testimony to that effect in opposition to a restriction similar to HB 530, then (3) rushed HB 530 through an irregular legislative process without the same opportunity for public testimony, the District Court's inference of discriminatory intent is reasonable. *Accord Alexander v. Bozeman Motors, Inc*., 2010 MT 135, ¶ 30, 356 Mont. 439, 451, 234 P.3d 880, 889 (explaining that "intentional conduct may be inferred from factual allegations" indicating that actor knew of potential harm and failed to act to prevent it). Even "if events are capable of different interpretations, it is the job of the trier of fact to determine which interpretation is the most reasonable." *Brancamp*, ¶ 21. The District Court did not clearly err in finding that HB 176 was motivated by a discriminatory purpose.

F. The District Court did not err in concluding that HB 530 violates MDP's freedom of speech.

The District Court correctly concluded that HB 530 violates MDP's fundamental right to freedom of speech. FFCL ¶¶ 617-18. Multiple Montana courts have recognized that this right includes communication and coordination for ballot collection purposes. *Id.* ¶ 622; *Driscoll*, ¶ 9. While the Secretary cites federal courts that have affirmed different findings, Sec'y Br. 72, the only facts relevant to the District Court's analysis are those proved at trial in this case. *See Democracy N.C.*

v. N.C. State Bd. of Elections, 590 F. Supp. 3d 850, 863 (M.D.N.C. 2022) (whether ballot collection activity implicates First Amendment protections depends on factual findings) (citing *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018)).

Here, the District Court did not clearly err in finding MDP's ballot collection activities an "integral part of its message" and "at the heart of freedom of expression protections." FFCL ¶¶ 625- 26 (quoting *Dorn v. Bd. of Trs. of Billings Sch. Dist. No. 2*, 203 Mont. 136, 145, 661 P.2d 426, 431 (1983) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))). Therefore, the District Court correctly concluded that HB 530 unconstitutionally burdens MDP's rights. FFCL ¶ 631.

IV. The District Court correctly rejected the Secretary's Election Clause argument.

The Secretary's suggestion that the District Court's injunction violates the U.S. Constitution's Elections Clause is foreclosed by *Moore v. Harper*, No. 21-1271, 2023 WL 4187750, at *10 (U.S. June 27, 2023).

CONCLUSION

The Court should affirm the District Court's Order permanently enjoining the challenged provisions.

Respectfully submitted this 30th day of June, 2023.

/s/ Jonathan P. Hawley

Abha Khanna**
Jonathan P. Hawley
ELIAS LAW GROUP LLP

1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
(206) 656-0179
akhanna@elias.law
jhawley@elias.law

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

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

Attorneys for Plaintiffs-Appellees Montana Democratic Party and Mitch Bohn

**Admitted pro hac vice*
***Application for admission pro hac vice forthcoming*

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9993 words, excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 30th day of June, 2023.

/s/ Jonathan P. Hawley

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

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

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

Attorneys for Plaintiffs-Appellees Montana Democratic Party and Mitch Bohn

**Admitted pro hac vice*
***Application for admission pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I certify that the foregoing Brief of Plaintiffs-Appellees Montana Democratic Party and Mitch Bohn was served by eService on counsel for Defendant-Appellant.

DATED this 30th day of June, 2023.

/s/ Jonathan P. Hawley

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

Attorney for Plaintiffs-Appellees Montana Democratic Party and Mitch Bohn

CERTIFICATE OF SERVICE

I, Jonathan Patrick Hawley, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-30-2023:

John M. 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

Christian Brian Corrigan (Govt Attorney)
215 North Sanders
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

Dale Schowengerdt (Attorney)
7 West 6th Ave.
Suite 200
Helena MT 59601
Representing: Christi Jacobsen
Service Method: eService

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

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

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

Rylee Sommers-Flanagan (Attorney)
40 W. Lawrence Street
Helena MT 59601
Representing: Montana Youth Action
Service Method: eService

Ryan Ward Aikin (Attorney)
PO Box 7277
Missoula MT 59807
Representing: Montana Youth Action
Service Method: eService

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

Henry James Brewster (Attorney)
46 S Street NW

Washington DC 20001
Representing: Montana Democratic Party, Mitch Bohn
Service Method: eService

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

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

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

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

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

Electronically Signed By: Jonathan Patrick Hawley
Dated: 06-30-2023