

IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT CAUSE NO. DA 22-0667

MONTANA DEMOCRATIC PARTY AND MITCH BOHN, WESTERN
NATIVE VOICE ET AL., MONTANA YOUTH ACTION ET AL.,

Plaintiffs and Appellees,

v.

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

Defendant and Appellant.

**AMICUS CURIAE BRIEF OF MONTANA FEDERATION OF PUBLIC
EMPLOYEES**

On Appeal from the Montana Thirteenth Judicial District,
Yellowstone County, Cause No. DV 21-0451

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United States Election Assistance Commission, “Disability and voting accessibility in the 2020 elections.” February 16, 2021, https://www.eac.gov/sites/default/files/voters/Disability_and_voting_accessibility_in_the_2020_elections_final_report_on_survey_results.pdf 15

I. INTRODUCTION

The Montana Federation of Public Employees (“MFPE”) respectfully submits this *amicus curiae* brief. MFPE is Montana’s largest labor union; it represents over 21,000 politically and geographically diverse Montanans. MFPE, ten of its individual members, the Montana American Federation of Labor-Congress of Industrial Organizations (“AFL-CIO”), and the Montana Association of Centers for Independent Living (“MTCIL”), are plaintiffs in a related case that challenges the constitutionality of 2021 Montana House Bill 176 (“HB176”), which would have ended election day registration in Montana. That case is pending in the Eighth Judicial District Court, No. CDV-21-0500, Hon. John A. Kutzman presiding. MFPE and its co-plaintiffs have a strong interest in the trial ruling in this case enjoining HB176, which is the objective of their collateral litigation in Cascade County.

The premise of election day registration is simple: Montanans who prove their identity and eligibility to vote can register—or update their existing registration—on election day and vote. In every statewide election since the inception of election day registration in 2006, thousands of Montanans have voted using election day registration. In the 2020 statewide primary and general elections, over 9,000 Montanans relied on election day registration. Of the ballots processed on election day in November 2020, 11% were from election day

registrants. And the 2020 elections were no outlier. Over 9,000 Montanans relied on election day registration during the 2018 statewide primary and general elections, and over 15,000 Montanans relied on election day registration during the 2016 statewide primary and general elections.

Montana voters who use election day registration are not lazy. They are not civically disengaged. They did not fail to plan. Rather, thousands of the Montanans who rely on election day registration are registered voters who have simply moved to a new home. Others must update their registration to fix government-created errors in their registration information, like a name or address misspelled during the manual transcription of a voter registration card—issues the voter doesn't know exist until they try to vote on election day. Others who use election day registration are Montana voters who have been inactivated from the voter rolls by the government—often without their knowledge. Others are first time Montana voters.

Election day registration is especially important for working Montanans, including union members. In many counties, election day is the only day in which county election offices are open outside of regular business hours. For Montanans who work during regular business hours, election day may be the only opportunity to update their voter registration in person.

Election day registration is also crucial to Montanans who are members of

the disability community, including MFPE members. Montanans with mobility, vision, and other disabilities face added burdens to voting and voter registration. Many Montanans in the disability community cannot register by mail and must travel to a county elections office to register to vote. By reducing the number of trips necessary to register—and by preserving the option of fixing registration issues and voting in the same day—election day registration ensures the constitutional right to suffrage for Montanans who are members of the disability community.

Election day registration has become an essential component of the constitutional right to vote in Montana. Since its inception, Montanans have come to rely on the availability of election day registration. If something about a voter's registration needs to be updated—including things the voter has no awareness of or control over—then the registration can be updated on election day. Election day registration ensures that these Montanans who are eligible voters can still exercise their constitutional right to cast a ballot.

HB176 does the opposite. It sends eligible voters home, eliminating election day registration and denying citizens the right to update their registrations and vote on election day. HB176 not only violates the right to vote, it also violates the right to equal protection. HB176 arbitrarily discriminates against Montanans based on where they move: the bill leaves in place election day registration for Montanans

who move *within* a county, but repeals it for voters who move to another Montana county, for new voters, and for occasional voters. This distinction is arbitrary, discriminatory, and unlawful. There is no state interest in treating Montanans who move inside their county differently from Montanans who move to another county, or who are new or occasional voters.

Through an investigation in connection with its Cascade County action, MFPE determined that HB176 affirmatively disenfranchised eligible Montana voters during elections in fall 2021. MFPE's data consultant testified at trial in this case on her findings. The district court below adopted her testimony as a finding of fact. This finding erases any ambiguity about the real-world effects of HB176: it disenfranchises voters, and will do so again if the district court is not affirmed.

Voting is a fundamental right—the first right in a democratic republic. Because HB176 bars otherwise-eligible Montanans from voting, it violates the Montana Constitution. The trial ruling should be affirmed.

II. BACKGROUND

Voter registration of its members is central to MFPE's mission. MFPE was involved in the enactment of election day registration in Montana in 2005, helped lead the successful effort to stop its repeal in 2014, and opposed HB176 in 2021. Following the enactment of HB176, MFPE conducted an in-depth investigation of its members' historic utilization of, and reliance on, election day registration in

Montana. MFPE also conducted an investigation of the effects of HB176 on local elections in Montana in the fall of 2021. Through its investigations, and through MFPE's longstanding involvement in election day registration related issues in Montana, MFPE has developed significant expertise in the role of election day registration in Montana and the real-world effects of HB176.

A. Voting and Election Day Registration

There is no voter registration deadline in the Montana Constitution. Rather, the Montana Constitution anticipates and expressly authorizes election day registration. The delegates to the 1972 Montana Constitutional Convention determined that changing federal requirements meant it would be preferable to establish election day registration through statute, rather than fixing certain procedures for election day registration in the Constitution itself.

At the time of the 1972 Constitutional Convention, there was not widespread computer technology that would allow county clerks to verify instantly whether an election day registrant is eligible to vote. In the time since, federal law has required the use of electronic voter registration systems that allow local election officials to communicate instantly with the Montana Secretary of State's databases and confirm whether a registrant is eligible to vote. Complying with the original intent of Montana's Constitutional Convention delegates, Montana adopted a system of election day registration in 2005 with overwhelmingly bipartisan

support. This law entered into effect during the 2006 statewide elections.

Publicly available data from the Montana Secretary of State show that from 2006 until the enactment of HB176 in 2021, 70,278 Montanans utilized election day registration, with thousands of Montanans registering on election day in every statewide election over that time period. Voters from all parts of Montana rely on election day registration. In 2020, 9,790 voters registered on election day from 53 of 56 counties in the statewide primary and general elections. In 2018, 9,004 voters registered on election day from 54 of 56 counties in the statewide primary and general elections. And in 2016, 15,401 voters registered on election day from all 56 counties in the statewide primary and general elections.

Election day registration protects voters from administrative barriers to voting. Many Montanans utilizing election day registration are existing registered voters who need to update their registration to reflect a change in address, a name change, address a government error, or otherwise change a minor part of their current registration to vote. For example, thousands of Montanans who use election day registration do so because they are required to update their address after a move. Many of these voters arrive at their polling location on election day under the belief that their registration is up-to-date, only to find that they are still registered at a previous address in another county or neighborhood. Election day registration provides a clear remedy for this situation: it allows these Montanans to

update their registration and cast a ballot.

Election day registration is also a fail-safe that protects Montanans from government-induced errors in their voter registration. Errors in the processing of voter registration forms are not uncommon. Many steps in the voter registration process in Montana involve the transcription of handwritten voter registration information by government officials. This process not-infrequently results in small discrepancies between the information a voter submits and what their voter file says, through no deliberate fault of the voter or the government. A voter's address might be one letter different than the address transcribed into their voter file, for example. However, voters are unlikely to learn about errors introduced inadvertently by the government during the registration process until they show up to vote on election day. Election day registration provides a clear remedy for this situation: it is a fail-safe that allows voters to correct their information when they have done their part but suffer an administrative error along the way.

Other voters utilize election day registration because the government has inactivated them from the voter rolls, often unbeknownst to the voter. Here, too, election day registration provides a clear remedy: infrequent but eligible voters are permitted to update their registration status and vote on election day.

Election day registration also helps working people update their registrations. Election offices are open until at least 8:00 P.M. on election day but

only until 5:00 P.M. on most other business days. For this reason, election day is also typically the only time that Montanans can register to vote in person outside typical 8:00 A.M. to 5:00 P.M. working hours.

Election day registration is also crucial to Montanans who have registered as overseas or military voters by allowing, for example, service members who have returned from a deployment to update their registration and vote on election day.

In 2014, Montanans overwhelmingly rejected a ballot initiative that would have ended election day registration, by a margin of 57% to 43%. Opposition to ending election day registration was geographically widespread, with voters in 80 out of 100 legislative districts opposing the measure.

B. Individual Montanans rely on election day registration for a diversity of reasons, all of which advance their fundamental right to vote

MFPE's members are demographically and politically diverse: they are young, old, retirees, active workers, Montanans of color, men and women, Republicans, Democrats, Libertarians, Independents, and Montanans who are members of the disability community. MFPE members utilize election day registration in every statewide election. One hundred and thirty-nine MFPE members utilized election day registration in the 2020 statewide general election. Of these members, 22 updated their registration to a new county, 74 updated their registration to a new precinct, and 43 registered or updated their voter registration

for other reasons. Since 2006, more than 1,200 MFPE members have utilized election day registration.

Following the enactment of HB176, MFPE surveyed its members about their reliance on election day registration and its role in exercising their constitutional right to vote.

Samantha Harrington grew up in Great Falls and went to college in Missoula. She turned 18 while in Missoula and voted there in the 2008 election. After school, she moved back to Great Falls in 2012 to work as a Comprehensive School and Community Treatment professional. Busy with her new job helping kids with addiction and mental health challenges, Ms. Harrington did not realize that she needed to change the address on her voter registration. She went to vote in Great Falls on election day in November 2012 after finishing her workday at C.M. Russell High School. Election officials in Cascade County offered her the opportunity to update her registration to Great Falls. She remembers how busy it was that day. She updated her registration and cast her ballot. By the time Ms. Harrington reached the polls that night, she could not have made it to Missoula in time to vote if officials in Cascade County turned her away and required her to return to her previous polling place, some three hours away. Had HB176 been in effect, she would have been unable to vote.

Adam Clinch grew up in Helena, went to college in Missoula, then got a job

as a high school math teacher back in his hometown. He was registered to vote in Missoula when he graduated college in 2014. Mr. Clinch's new job as a Helena teacher had him exceptionally busy preparing for classes, helping students after hours, and so forth. On election day in November 2014, Mr. Clinch arrived at his polling place in Helena before school at around 7:00 a.m. Because he was working that day, he could not have driven to Missoula to vote if election officials turned him away. Mr. Clinch updated his registration and cast his ballot. Had HB176 been in effect, he would not have been able to vote.

Paul Dougherty began working as a substitute teacher in Kalispell and was eventually hired into a full-time teaching position. He fell in love with Montana after working seasonally in Glacier National Park. When he made Montana his home, he believed it was important to vote in his community. Though Mr. Dougherty had a Montana driver's license, lived in Montana, and worked in Montana, his voter registration before the 2014 election remained in Ohio. Mr. Dougherty utilized election day registration to register in Montana and vote the same day. He did so for the 2014 general election, registering at a polling place because the county elections office was under construction. He would not have been able to return to Ohio by close of business on election day if election officials in Kalispell turned him away. Had HB176 been in effect, Mr. Dougherty would not have been able to vote.

Cullen Hinkle is the high school band teacher in Havre. Mr. Hinkle's days are long. Most days, he begins work at 6:30 A.M. and works until around 7:00 P.M., far outside the working business hours of the county election office. 2020 was a tough year for all educators, and it made no exception for Mr. Hinkle: he oversaw over 200 students, many of whom were going into and out of mandatory quarantines. With his responsibilities at the school growing, Mr. Hinkle's schedule simply did not allow time for a trip to the local election office during business hours. Voting is exceptionally important to him, so on general election day in November 2020 he left school early so that he could go and vote. Because Mr. Hinkle recently moved to Havre from Louisiana, he registered as a new Montana voter on election day and cast his ballot. He could not have made it back to Louisiana if election officials turned him away on election day. Had HB176 been in effect and were election day registration not available to him, he would have been turned away from the polls despite meeting all the eligibility criteria to vote in Montana.

Ashley Johnson grew up in Great Falls and went to school at Montana State University in Bozeman. She turned 18 while in college and was registered to vote in Bozeman. She was tremendously busy at the time: going to college full time and working a job. She happened to be home in Great Falls on primary election day in 2008. Her father reminded her to vote. She did not know at the time that

she needed to update her registration from Bozeman to Great Falls. When she went to the polls, she updated her registration and cast a ballot. If HB176 had been in effect, Ms. Johnson would not have been able to vote.

Greg Werber is a technician with the Montana Department of Agriculture in Great Falls. He was registered to receive an absentee ballot in the 2020 general election but never received one. So he went to vote in person on election day at the fairgrounds in Great Falls. When it was his turn to be served, Mr. Werber learned that the county had marked him as an inactive voter. Relying on election day registration, Mr. Werber updated his registration and voted. Had HB176 been in effect, he would not have been able to vote.

Wyatt Murdoch is a social studies teacher in Three Forks. At the time of the 2020 general election, he taught in Wolf Point but had recently moved from Bozeman, some six hours and twenty-five minutes from Wolf Point. Mr. Murdoch arrived at the county elections office in Wolf Point on election day in November 2020 after finishing school. His teaching contract required him to be present until 4:30 P.M. He updated his registration to Wolf Point and voted. Without election day registration, Mr. Murdoch would only have been permitted to vote in Bozeman—no longer his residence, and over six hours away. Because he arrived at the county elections office in Wolf Point after school, Mr. Murdoch physically could not have made it to Bozeman by the time polls closed at 8:00 P.M. Had

HB176 been in effect, Mr. Murdoch would not have been able to vote.

Theresa Froehlich Dutoit had moved from Helena to Butte at the time of the 2020 general election. But her job remained in Helena, where she commuted each day from Butte. Her responsibilities and schedule left no time during business hours to update her registration. On election day itself, she was unable to make it to the polling place in Butte until after work. She arrived at the county elections office in Butte on election day in November 2020, updated her registration, and voted. It was about 7:00 P.M. when she got to the polls in Butte. She could not have made it to Helena—her old polling location in a city where she no longer lived—if officials in Butte turned her away. If HB176 had been in effect, Ms. Froelich Dutoit would not have been able to vote.

Jasmine Taylor works for the Montana Department of Public Health Human Services in Health Policy and Quality Assurance. While in college, she moved multiple times. Finding time to register and vote was hectic. During the 2010 general election, she updated her registration and voted on election day.

Karen Cook is a classroom teacher in Butte. When she first became a teacher, she moved to Kalispell where she worked for 11 years with her husband, also a teacher. She was registered to vote there. Her husband died suddenly in 2013 and Ms. Cook moved to Bozeman to be closer to her family. The time following the loss of her husband was chaotic—she moved several times, first to a

rental in Bozeman and then into a house she purchased. Ms. Cook believes it is very important to vote. On election day in the 2016 general election, she went to the courthouse in Gallatin County, updated her registration, and voted. Had election officials turned her away in Bozeman, she could not have made it back to her old polling location in Kalispell in time to vote that day. If HB176 had been in effect, she would not have been able to vote.

C. Election day registration makes voting accessible for Montanans with disabilities

Election day registration also makes voting accessible for Montanans with disabilities, including MFPE members who are members of the disability community. Though the disability community in Montana is large, Montanans with disabilities vote at a lower rate than the population as a whole. Members of the disability community in Montana may face special barriers to voter registration and voting. For example, Montanans with vision or other disabilities may be unable to register to vote by mail, necessitating an in person visit where one would not be required for Montanans not in the disability community.

Many Montanans have multiple and overlapping disabilities—like a combination of mobility, vision, and mental health disabilities—that create severe impediments to in person voter registration or voting. The prospect of having to make multiple trips to a new location in a new county to register and return later may deter such Montanans from voting altogether. As a result, nationally and in

Montana, members of the disability community are less likely to register and vote than the population as a whole. The United States Election Assistance Commission determined that in the 2020 elections nationally, “[p]eople with disabilities were 7 points less likely to vote than those without disabilities after adjusting for age” and that “[t]he voting gaps were largest for people with vision and cognitive impairments.”¹

Election day registration is a key component of voting accessibility for members of the disability community in Montana because it reduces the number of physical trips necessary for many Montanans with disabilities to vote. Conversely, repealing election day registration decreases voting accessibility by increasing the number of trips necessary, which creates added burdens and barriers to voting for Montanans with disabilities than for the population as a whole.

D. Election day registration statistics

MFPE members’ stories are exceptionally common across Montana: working men and women devoted to their communities who cannot access a county election office during business hours; voters whose ballots never appeared; voters who moved to another county for a new opportunity to serve. For 14 years,

¹ United States Election Assistance Commission, “Disability and voting accessibility in the 2020 elections.” February 16, 2021. *Available at:* https://www.eac.gov/sites/default/files/voters/Disability_and_voting_accessibility_in_the_2020_elections_final_report_on_survey_results.pdf

from 2006 to 2020, each could rely on the ability to update their registration on election day and vote.

Election day registration has secured the right to vote for tens of thousands of Montanans. In the 2020 statewide general election alone, 8,172 Montanans utilized election day registration. Of these election day registration voters in the general election in 2020, 1,983 updated their voter registration from one precinct to another precinct in the same county. Another 866 of updated their voter registration from one county to another county. The remaining 5,323 registered or updated their voter registration for other reasons—new voters, new Montanans, infrequent voters, inactive voters, and a host of other situations.

In 2020, younger Montanans were more likely to register on election day in Montana; 60% of election day registrations were for Montanans under the age of 35. Men were also more likely to register on election day in Montana than women.

Every voter who utilized election day registration in 2020 was required to abide by Montana’s identity and eligibility verification requirements, including instantaneous communication with the State’s voter registration database to confirm eligibility.

E. House Bill 176 subjects Montanans to different requirements and burdens based on arbitrary characteristics

HB176 eliminates election day registration in Montana under most circumstances. In its place, the bill creates a new registration deadline of noon the

day before an election—upending more than 14 years of common practice in Montana. HB176 has no provision to publicize the change in registration requirements. HB176 contains no findings, statement of purpose, or other information on the state’s interest in removing election day registration.

During legislative debate on HB176, proponents offered non-specific testimony about vague threats to election integrity and election fraud.

In repealing the core components of election day registration in Montana, HB176 leaves behind a patchwork of laws that still permit some registration on election day, but subject Montanans to different requirements and burdens based on arbitrary characteristics. For example, HB176 does not repeal the provision that Montanans who change their name or move *within* their county may submit an updated voter registration on election day under § 13-2-512, MCA. But Montanans who move to *another* county are required to return to their old county on election day (an impossibility for Montanans like Mr. Murdoch) or they simply cannot vote. See § 13-2-514, MCA. New voters are prohibited entirely from registering on election day.

Curiously, HB176 retains the requirement that county election administrators maintain a central location to process election day voter registrations, but the bill effectively limits their use to voters who have name changes or move within a county. Section 13-2-512(1), MCA (requiring “a central

location designated by the election administrator” for precinct change voters). Counties will therefore maintain the same physical footprint they employed before HB176 to accommodate election day registration, but must refuse the vast majority of would-be election day registrants.

F. House Bill 176 disenfranchised Montanans during elections in the fall of 2021

In connection with its investigation, MFPE sought to determine whether HB176 prevented any otherwise-eligible Montana voters from voting during local elections in the fall of 2021. MFPE sent a public records request to all 56 county election administrators in Montana, seeking copies of voter registration forms received after 12:00PM on the day before election day, or on election day in November 2021. Thirty-seven counties had elections that fall (largely for municipal offices). Thirty-four of those counties eventually responded to MFPE’s records request. MFPE conducted a data analysis of these responses, excluding voter registration forms for voters who were allowed to vote, or had no election to vote in, for example. MFPE narrowed the responses down to voters who attempted to register during the relevant time period, were otherwise eligible to vote, but were prevented from voting because of the changes from HB176. MFPE’s data analysis concluded that a minimum of 59 otherwise-eligible Montanans were prevented from voting by HB176 during the local elections in fall 2021.

MFPE’s data consultant who performed the analysis, Kendra Miller, testified

at trial in support of the Plaintiffs and Appellees. She described in detail her experience in data analysis of voter files in Montana, Tr. 746:19-750:17, the process for her data analysis, Tr. 756:23-770:16, her analysis of how HB176 prevented several individual voters from voting, Tr. 770:17-783:21, and the overall results of her analysis that HB176 prevented at least 59 otherwise-eligible voters from voting, Tr. 786:19-23. The district court credited her testimony at Paragraph 167 of its order and found that “at least 59 Montanans were prevented from voting due to House Bill 176” in local elections in the fall of 2021. The number would likely be far greater during “on year” federal primary and general elections, which generally involve much higher voter turnout than “off year” fall local elections.

The district court’s finding on this score was well supported by Ms. Miller’s testimony and underlying analysis. It erases any ambiguity that HB176 has disenfranchised eligible Montana voters and will continue to do so if the trial court’s ruling is not upheld.

III. ARGUMENT

Had HB176 been in effect during the 2020 statewide primary and general elections, thousands of the 9,790 eligible Montana voters who used election day registration would not have been able to vote. The bill is unconstitutional for at least two independent reasons. HB176 does not advance any state interest that would justify its burden on fundamental constitutional rights.

First, HB176 directly burdens and interferes with the right to suffrage. The Montana Constitution requires that “[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Mont. Const. Art. II, § 13. The freedom from interference in the free exercise of the right of suffrage is a fundamental constitutional right in Montana. It is also a corollary of the fundamental rights of popular sovereignty and self-government. Mont. Const. Art. II, §§ 1-2.

Election day registration is a core component of the franchise in Montana. For the past eight statewide primary and general election cycles before HB176, over 70,000 Montanans have used election day registration. Montanans rely on its provisions to exercise their right to vote. In its absence, thousands of otherwise-eligible Montana voters will be directly denied the right to vote—even though they showed up to the polls, even though they were otherwise eligible to vote, and even though a simple administrative change would permit the full exercise of their constitutional rights.

The elimination of election day registration therefore restricts the “free and open” nature of the franchise in Montana and “interfere[s] to prevent the free exercise of the right of suffrage.” *Id.*

Second, HB176 violates the Montana Constitution’s guarantee to equal protection of the laws. Mont. Const. Art. II, § 4. HB176 discriminates against new

Montanans and Montanans who move to a new county by denying them the right to register and vote on election day in their county of residence, while permitting Montanans who have moved *within* a county to register and vote on election day. HB176 also discriminates against new or infrequent Montana voters by denying them the right to exercise the franchise on election day unless they undergo additional registration burdens not imposed on routine voters or voters who move within the same county. These distinctions burden a fundamental right.

HB176 does not advance any state interest. The State of Montana has no interest in denying eligible voters the right to vote. Mont. Const. Art. II, § 4.

HB176 does not promote election integrity. Montana's elections are exceptionally secure. Based on MFPE's investigations and the testimony before the trial court below, there have been no widespread issues with election integrity in Montana. Denying eligible voters the right to vote on election day does not increase the integrity or security of Montana's elections.

HB176 is not tailored in a way that advances any state interest, either. Based on MFPE's longstanding relationships with local election officials, its investigation into HB176, and the trial testimony below, election day registration did not overburden election officials in Montana. HB176 does not reduce an administrative burden on election officials in Montana that election officials are not otherwise prepared to handle.

IV. CONCLUSION

For the foregoing reasons, the trial court ruling should be affirmed.

DATED this 29th day of June, 2023.

By: /s/ Raph Graybill
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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points, is double-spaced; and the word count, calculated by Microsoft Word for Microsoft 365 is 4955 words, excluding Certificate of Service and Certificate of Compliance.

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