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

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

v.

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State,
Defendant and Appellant.

RESPONSE BRIEF OF APPELLEES

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

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STATEMENT OF THE ISSUES

1. Whether House Bill 176 ("HB 176"), which eliminates Election Day Registration ("EDR") in Montana, violates the right to vote and right to equal protection pursuant to the Montana Constitution.

2. Whether Section 2 of House Bill 530 ("HB 530"), which inhibits the collection, distribution, or conveyance of absentee ballots, violates the right to vote, right to equal protection, right to freedom of speech, and right to due process pursuant to the Montana Constitution.

STATEMENT OF THE CASE

At issue in this appeal are rights that support the foundations of our democracy. Without reason or need, the Montana Legislature in 2021 enacted laws that—independently and in concert—severely restrict the voting rights of Native Americans, who have previously been targeted for disenfranchisement and already face higher barriers to voting. HB 176 eliminates Montana's popular and turnout-driving EDR, a voting staple in Montana since 2006. HB 530, § 2 (hereinafter, "HB 530") effectively bans organized absentee ballot assistance efforts, even though just three years ago multiple courts struck down a substantially similar law as unconstitutional. With scalpel-like precision, these laws target Native American voters for disenfranchisement.

Appellees Western Native Voice ("WNV"), Montana Native Vote ("MNV"), Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community and Northern Cheyenne Tribe (collectively, "Appellees") filed suit challenging HB 176 and HB 530 on May 17, 2021. Appellees' case was consolidated with similar challenges filed by the Montana Democratic Party ("MDP") and Montana Youth Action ("MYA") (among others).[1] Following months of discovery, depositions, and the exchange of tens of thousands of pages of documents, the District Court convened a ten-day bench trial on August 15, 2022.

On September 30, 2022, the District Court issued a 199-page Findings of Fact, Conclusions of Law and Order (the "Order"). *See* Appendix. The Order exhaustively detailed the burdens that HB 176 and HB 530 impose on Native American voters. The District Court further found that Secretary Jacobsen ("the Secretary" or "Appellant") "has no valid state interest in HB 530, § 2" and "has failed to demonstrate why the elimination of EDR is actually necessary to serve the interests she articulates." The District Court permanently enjoined HB 176 and HB 530. This appeal followed.

[1] MDP and MYA challenged other voting restrictions as well, including Senate Bill 169 ("SB 169") and House Bill 506 ("HB 506").

STATEMENT OF FACTS

A. Native Americans face disproportionate barriers to vote in Montana.

Native Americans face "a panoply of socioeconomic disparities—the result of centuries of discrimination against Native Americans"—that increase their voter costs and make it harder for them to register and vote. Order ¶ 597.

1. Income and poverty

It is "quite clear" in the political science literature that higher poverty rates decrease political participation and voter turnout. *Id.* ¶ 218. Native Americans "consistently" have higher poverty rates than the rest of Montana's population. *Id.* ¶ 209. Approximately 34% of Native Americans in Montana live in poverty compared to 10% of white Montanans. *Id.* ¶ 210. Unemployment rates among Native Americans are significantly higher than that of the rest of Montana's population. *Id.* ¶ 212. Native Americans also disproportionately rely on food assistance. *Id.* ¶¶ 209, 213. More than 30% of Native Americans have experienced discrimination both at work and in job applications. *Id.* ¶ 217.

2. Housing

Homelessness, housing insecurity, and frequently having to move hinder voters' ability to maintain voter registration and participate politically. *Id.* ¶ 230. Despite making up less than 7% of Montana's total population, Native Americans comprise 20% of Montana's homeless population. *Id.* ¶ 222. Native American

homeownership in Montana is approximately 35%, about half of the rate for white Montanans. *Id.* ¶ 221. This homeownership rate is far lower than that of the lowest-ranked counties in Montana. *Id.* Reservation homes are often overcrowded and have poor infrastructure, including no indoor plumbing, electricity, heat, or running water. *Id.* ¶¶ 220, 226. For example, "Native American households in the United States are 19 times more likely than white households to lack running water." *Id.* ¶ 219. Housing shortages and inability to pay rent drive Native Americans' high rates of mobility in Montana. *Id.* ¶ 225. Native Americans face higher rates of housing discrimination than any other minority group in the United States. *Id.* ¶¶ 223-24.

3. Health

Poor health has a dramatic impact on the ability to vote. *Id.* ¶ 242. Native Americans face far worse health outcomes than any other racial group in Montana, and "are less healthy than even the least healthy county in the state." *Id.* ¶ 232. The three Montana counties with the highest Native American population post far worse health outcomes than the state as a whole. *Id.* ¶¶ 234-39. Native Americans have the highest disability rates for any ethnic or racial group nationwide. *Id.* ¶ 240. "Nearly one in four Native Americans report that they have been personally discriminated against in a health care setting." *Id.* ¶ 241.

4. Education

"Education is one of the best predictors of political participation." *Id.* ¶ 247. "Native Americans in Montana have 'significantly lower' rates of educational attainment than white Montanans," both in terms of college and high school graduation rates. *Id.* ¶¶ 243-45. Approximately 13% of Native Americans report experiencing discrimination in applying to or attending college. *Id.* ¶ 246.

5. Internet access

Limited or no internet access makes it more difficult to access elections information. *Id.* ¶ 255. Fewer households on Native American reservations—in both Montana and nationwide—have a computer or an internet subscription compared to the general population. *Id.* ¶¶ 249-52. In Montana's Native American areas, internet access is often expensive or "poor and spotty," or both. *Id.* ¶ 253.

6. Criminal justice

Incarceration negatively impacts future employment and earning potential, increasing voter costs. *Id*. ¶ 258. Native Americans comprise 18% of the incarcerated population in the state's jails and prisons, more than twice as high as their percentage of the statewide population. *Id.* ¶ 257.

High rates of violence and its associated fears are also barriers to political participation. *Id.* ¶ 260. Native Americans are disproportionately the victims of crime in Montana. *Id.* Nearly 30% of Native Americans report experiencing

discrimination in interactions with the police, rendering them more vulnerable to arrest and incarceration. *Id.* ¶ 259.

7. Mail service

Limited access to reliable mail service makes it difficult for Native Americans living on reservations to register to vote and cast mail ballots in Montana. *Id.* ¶¶ 200, 204. Mail service on Native American reservations is poor to nonexistent. *Id.* ¶ 201. Many Native Americans living on reservations do not have traditional mailing addresses or physical addresses, and therefore do not receive home mail delivery. *Id.* Even where mail service exists, limited mail routes and rural carriers render mail service often inefficient or unreliable. *Id.* ¶ 202. Native Americans report low levels of trust in the Postal Service. *Id.* ¶ 208.

Native Americans living on reservations without regular home mail delivery must use a post office box ("P.O. box") to receive mail. *Id.* ¶ 201. But access to P.O. boxes is also limited for many Native Americans on reservations—because of the cost, limited supply, and the fact that tribal members that cannot establish their residence usually cannot obtain P.O. boxes. *Id.* ¶ 205. Tribal members may check their mail between once per week and once per month, with mail collection pooled among individuals during P.O. box pickups. *Id.* ¶ 205. It is also common for individuals living on reservations to share P.O. boxes. *Id.*

Weather conditions impair mail service on reservations. *Id.* ¶ 206. Rural reservations in Montana often have difficult weather conditions in November around elections. Trial Tr. vol. 3, 859:16-20 (Horse). On Blackfeet Reservation, post office trucks regularly deliver late during the winter months. Order ¶ 206. Post offices on reservations often operate with limited hours. *Id.* ¶ 207.

8. Transportation and voting off-reservation

Because of their higher poverty rates, Native Americans have less access to working vehicles, money for gasoline, car insurance, driver's licenses, and vehicular maintenance. *Id.* ¶ 261. "'There are dramatic differences between Native American vehicle availability and Anglo vehicle availability'" in Montana. *Id.* ¶ 262. This is especially troublesome in the colder months, when "only the most reliable vehicles" can transport people from their homes to main roads. *Id.* ¶¶ 265-66.

Native Americans on reservations must travel farther to reach post offices, the Department of Motor Vehicles ("DMV"), and county seats for voter registration. *Id.* ¶ 270. County election offices where ballot and voter application drop-offs occur are exclusively within county seats. The average distance of all reservations to their county seats is 73.6 miles roundtrip, and the distance is longer from more remote areas on reservations. *Id.* ¶ 271.

Towns bordering reservations, where Native Americans must often register to vote and cast in-person absentee ballots, are notorious sites of racism and discrimination towards Native Americans. *Id.* ¶ 272. Approximately 10% of Native Americans have experienced discrimination when attempting to vote or participate politically. *Id.* ¶ 273. Only some counties have satellite polling locations on reservations, and they have limited availability. *Id.* ¶ 275.

B. EDR in Montana

The Montana Legislature enacted EDR in 2005. *Id.* ¶ 314. EDR makes the late registration period inclusive of Election Day, allowing voters to register and cast their ballot all on that one day. *Id.* EDR is widely used in Montana. Over 70,000 Montanans have relied on EDR to cast ballots since it first became available in 2006. *Id.* ¶ 317. Usage of EDR has increased over time: 4,351 Montanans used EDR in 2006, while more than 12,000 Montanans did so in 2016. *Id.* ¶ 319. Election Day is by far the most utilized day of the late registration period: 23 times more Montanans use EDR than the average pre-election day of the late registration period. *Id.* ¶ 318. "In the 2020 general election … half of all late registrants registered to vote on Election Day." *Id.*

There is a "clear consensus" in political science literature that EDR increases voter turnout. *Id.* ¶ 320. EDR has the largest effect on increasing voter turnout compared to "any other singular elections administrative practice." *Id.* EDR

increases turnout "because it reduces the cost of voting by combining both registration and voting into a single administrative step" on a day when attention to the election has peaked. *Id.* ¶ 321. Nationally, states that have EDR experience turnout boosts of between two and seven percentage points, *id.* ¶ 320; EDR has increased turnout in Montana by 1.5 percentage points, *id.* ¶ 321.

Native Americans in Montana disproportionately rely on EDR. *Id.* ¶¶ 48, 149, 323, 567. Usage of EDR is higher on reservations to a statistically significant degree, and EDR is most prevalent in on-reservation precincts with greater Native American populations. *Id*.

C. Paid third-party ballot collection in Montana

Civic organizations—such as Appellees WNV and MNV—and tribes committed to get-out-the-vote ("GOTV") in their communities—such as Appellee Confederate Salish Kootenai Tribe—utilize paid ballot collection to civically engage the Native Americans they serve. *Id.* ¶¶ 31, 75.

WNV collected hundreds of ballots in 2020 and more than 800 ballots in the 2018 election, and collects ballots on all seven reservations and in urban Indian centers. *Id.* ¶¶ 31, 44. WNV hires organizers living within reservation communities and pays them an hourly wage. *Id.* ¶ 43. Without compensating these ballot collectors—who often come from impoverished communities themselves—WNV would be unable to do its work. *Id.* Ballot collection helps to remediate the voter

costs disproportionately faced by Native Americans, *see supra*—including poverty, lack of residential mail delivery, longer driving distances, and lack of vehicle access. Order ¶¶ 140, 146, 418.

Native Americans disproportionately rely on ballot collection. *Id.* ¶ 283. Those living on Native American reservations are also "'considerably more'" reliant on absentee voting. *Id.* ¶ 289. Ballot collection restrictions disproportionately affect on-reservation Native American communities, lowering their turnout as compared to the effect on non-Native communities. *Id.* ¶ 287. Likewise, the absentee ballot rejection rate on Native American reservations was lower when ballot collection was available versus when it was not, but the same pattern was not reflected for off-reservation voters. *Id.* ¶ 288.

D. Legislative Session

I. HB 176

HB 176 was introduced at the Secretary's request. *Id.* ¶ 337. Most legislative speakers "vociferously opposed the bill." *Id.* ¶ 340. Only one election administrator spoke in favor of the bill at the hearing; "the Secretary['s] Office solicited his involvement the night before." *Id*.

HB 176's proponents provided a "fuzzy rationale for its supposed necessity" principally concerning election integrity, but the Legislature furnished no evidence that election integrity faced any threats in Montana. *Id.* ¶¶ 343, 353-61. Speakers

testified that repealing EDR would disproportionately harm indigenous voters, given Native Americans' reliance on EDR. *Id.* ¶¶ 343-49. Testimony on behalf of the Montana Association of Clerks and Recorders and Election Administrators ("MACR") acknowledged that repealing EDR would result in fewer Montanans being able to vote. *Id.* ¶ 351.

II. HB 530

In 2017, the Legislature placed the Ballot Interference Protection Act ("BIPA"), which "severely restricted ballot collection," on the ballot. *Id.* ¶ 423. The Legislature heard testimony that BIPA disproportionately burdened Montana's Native American voters. *Id.* ¶ 424. MACR testified against BIPA, saying it was unnecessary and organized ballot collection was not a problem. *Id.* ¶¶ 424-25, 427.

In 2020, two Montana district courts issued preliminary injunctions against BIPA, finding it unconstitutionally "'burden[ed] the right to vote' for Native Americans and those living in rural tribal communities." *Id.* ¶ 429. This Court upheld the preliminary injunction in September 2020. *Driscoll v. Stapleton* ("*Driscoll III*"), 2020 MT 247, ¶ 21, 401 Mont. 405, 473 P.3d 386. BIPA was ultimately permanently enjoined by the district courts.

Fewer than six months later, the Montana House introduced HB 406, a new ballot collection ban that "would have effectively revived BIPA, with minor modifications that did not correct its constitutional infirmities." Order ¶ 432.

Numerous groups testified against the bill. *Id.* ¶ 433. While HB 406 did not pass, a new ballot collection restriction was slipped into another bill late in the legislative cycle: HB 530. *Id.* ¶ 434. HB 530 requires the Secretary to adopt an administrative rule "in substantially the [] form" such that "[f]or the purposes of enhancing election security, a person may not provide or offer to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots." *Id.* ¶ 437. A person violating the rule is subject to a monetary civil penalty. *Id.*

HB 530's proponents did not address the bill's constitutionality despite prior courts' holdings that BIPA was unconstitutional. *Id.* ¶ 435. Before voting on the bill, Senator Hertz, HB 530's sponsor, did not consider the disproportionate effect that ballot collection restrictions have on Native American communities. *Id.* ¶¶ 431, 435. There is "no evidence that the Legislature considered what was unconstitutional about BIPA or made any effort to craft HB 530 to remediate the access issues identified by the courts." *Id.* ¶ 431. HB 530 is "even more restrictive than BIPA." *Id.* ¶ 447.

STANDARDS OF REVIEW

"A district court's grant of a permanent injunction will not be reversed absent a showing of manifest abuse of discretion." *Va. City v. Estate of Olsen*,

2009 MT 3, ¶ 31, 348 Mont. 279, 288, 201 P.3d 115, 121. "A 'manifest' abuse of discretion is one that is obvious, evident or unmistakable." *Id.*

"Findings of fact are entitled to great deference and reviewed only for clear error." *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 11, 410 Mont. 114, 123, 518 P.3d 58, 63 (internal quotation marks omitted). This Court "review[s] this evidence in the light most favorable to the prevailing party and leave[s] the credibility of witnesses and weight assigned to their testimony to the determination of the District Court." *Kurtzenacker v. Davis Surveying, Inc.*, 2012 MT 105, ¶ 14, 365 Mont. 71, 74-75, 278 P.3d 1002, 1005. This Court "review[s] a district court's conclusions of law in this context for correctness." *Id.*

While statutes are generally presumed to be constitutional, legislation infringing upon fundamental rights must be reviewed under strict scrutiny, "which necessarily shifts the burden to the State to demonstrate that the legislation is 'justified by a compelling state interest and [is] narrowly tailored to effectuate only that compelling interest.'" *Weems v. State*, 2023 MT 82, ¶ 34, 412 Mont. 132, 149, 529 P.3d 798, 808.

SUMMARY OF THE ARGUMENT

In its meticulous review of the detailed factual record, the District Court did not manifestly abuse its discretion when it determined that HB 530 and HB 176 violated Appellees' constitutional rights.

As to HB 530, the District Court determined that "[t]he factual record … is essentially identical to the one" before this Court when it affirmed a preliminary injunction against "a less onerous prohibition" on third-party ballot collection just three years ago: BIPA. Order ¶ 600. "Little has changed in the intervening" years since that decision, *id.* ¶ 597—today, as before, it is uncontested that Native Americans in Montana face significant disparities across a panoply of socioeconomic areas that make it harder for them to register and vote; Native Americans disproportionately rely on organizations to collect and convey their ballots; and the Secretary has presented no evidence of voter fraud or any other state interest that might justify the law. Because of the severe and disproportionate burdens HB 530 imposes on Native Americans, and absent any state interest, this law violates both the constitutional rights to vote and equal protection.

The District Court correctly determined that HB 530 also violates Appellees' fundamental right to free speech because it inhibits their core political speech by preventing them from communicating and coordinating with voters for ballot collection purposes. And HB 530 is unconstitutionally vague. The Secretary is unable to clarify *any* of the law's three statutory ambiguities, chilling Appellees from engaging in virtually all ballot collection activities. The Secretary's claim that Appellees' vagueness claim is not ripe is meritless because it ignores the past, ongoing, and virtually certain future harms the law imposes on Appellees.

The story of HB 176 is almost identical. The District Court found, based on the uncontested record, that Native Americans disproportionately face significant voter costs, and consequently rely more heavily on EDR than does the general population. Registration on Election Day is used much more often than other days during the "late registration" period because Election Day is when voter interest and awareness is highest. While the Secretary attempts to frame this appeal as a quibble about registration deadlines, this case is about the *elimination* of a registration opportunity that is has been relied on by thousands of voters, and which indisputably boosts turnout among vulnerable populations. HB 176 has a severe and disproportionate effect on Native Americans, violating their rights to vote and equal protection.

Finally, this Court should reject the Secretary's invitation to overturn decades of precedent holding that restrictions on the right to vote are subject to strict scrutiny under the Montana Constitution, rather than the federal *Anderson-Burdick* balancing test. Regardless, even applying the Secretary's preferred test would make no difference to the substantive analysis in this case, because the *Anderson-Burdick* inquiry requires strict scrutiny when a challenged law imposes severe burdens on the right to vote, and here, both HB 530 and HB 176 do exactly that. Ultimately, it makes no difference whether this Court, consistent with its longstanding precedents, applies strict scrutiny, or upends those decisions and

applies the *Anderson-Burdick* balancing test: under either approach, HB 530 and HB 176 constitute blatant violations of Appellees' most fundamental rights.

ARGUMENT

I. The District Court Correctly Found that HB 530 Unconstitutionally Burdens Appellees' Rights.

A. The District Court Correctly Found that HB 530 Unconstitutionally Burdens Appellees' Right to Vote.

The District Court did not manifestly abuse its discretion in finding—for reasons substantially similar to the holding in *Driscoll III*—that HB 530 unconstitutionally violates Appellees' fundamental right to vote "under any standard." Order ¶ 610.

1. Where fundamental rights are implicated, Montana courts apply strict scrutiny.

"Strict scrutiny … is applied to a statute that implicates, infringes on, or interferes with a fundamental right." *Mont. Democratic Party*, ¶ 18; *see also Driscoll III*, ¶ 18 ("[S]trict scrutiny [is] used when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights."); *Mont. Cannabis Indus. Ass'n v. State* ("*MCIA*"), 2016 MT 44, ¶ 16, 382 Mont. 256, 263, 368 P.3d 1131, 1139 (similar). "As a right included in the Montana Constitution's Article II Declaration of Rights, the right to vote is fundamental." *Mont. Democratic Party*, ¶ 19 (citing Mont. Const. art. II, § 13); *see also Willems*

v. State, 2014 MT 82, ¶ 32, 374 Mont. 343, 352, 325 P.3d 1204, 1210 ("The right of suffrage is a fundamental right.").

In the face of this overwhelming precedent requiring application of strict scrutiny to Appellees' right-to-vote claims, the Secretary first argues that strict scrutiny applies only when a law "impermissibly interferes" with the constitutional right to vote. Appellant Br. 18-19. This argument—which offers no explanation as to how to distinguish between "permissible" and "impermissible" interferences with fundamental constitutional rights *before* a standard of review is even applied to assess the challenged law—ignores the plain, more expansive language in this Court's many decisions finding that strict scrutiny applies to laws that "*implicate[]*, infringe on, or interfere[] with" the fundamental right to vote. *Mont. Democratic Party*, ¶ 18 (emphasis added); *Driscoll III*, ¶ 18.[2]

Next, the Secretary argues that this Court should ignore decades of its unbroken precedents and instead "adopt a new standard," *Mont. Democratic Party*, ¶ 20: the federal *Anderson-Burdick* sliding-scale test. *See* Appellant Br. 17 (urging invalidation of "this Court's traditional test" of strict scrutiny). The Secretary argues that this test is warranted because Article IV, Section 3 of the Montana

[2] Even if the Secretary were correct, the difference is immaterial, because the undisputed factual record, *see infra*, makes clear that HB 530 and HB 176 impermissibly interfere with—and indeed gravely burden—Appellees' right to vote.

Constitution provides the Legislature with discretion to set voter registration laws. This Court should reject the Secretary's invitation to re-write well-settled case law for several reasons.

First, "[i]n interpreting the Montana Constitution, the Montana Supreme Court has repeatedly refused to 'march lock-step' with the United States Supreme Court, even where the state constitutional provision at issue is nearly identical to its federal counterpart." *State v. Guillaumne*, 1999 MT 29, ¶ 15, 293 Mont. 224, 231, 975 P.2d 312, 316. This is largely because "the rights and guarantees afforded by the United States Constitution are minimal, and … states may interpret provisions of their own constitutions to afford greater protection than the United States Constitution." *Id.* As this Court has recognized, "suffrage is the basic right without which all others are meaningless," and "is perhaps the most foundational of our Article II rights and stands, undeniably, as the pillar of our participatory democracy." *Mont. Democratic Party*, ¶ 19 (citing materials from the Montana Constitutional Convention). It is profoundly dangerous to our democracy to overrule decades of precedent to offer lesser protections to the fundamental right of suffrage.

Second, this Court has long applied strict scrutiny to constitutional right-to-vote challenges even after federal courts adopted *Anderson-Burdick*. *See Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 15, 314 Mont. 314, 320, 65 P.3d 576, 580;

Johnson v. Killingsworth (1995), 271 Mont. 1, 4, 894 P.2d 272, 273-74. The Secretary presents no reason why this standard, which this Court has successfully applied for decades, is now suddenly unworkable.

Third, Article IV, Section 3 of the Montana Constitution has no bearing on the appropriate standard of review here. As this Court has explained, "the Montana Constitution first grants the explicit right of suffrage in Article II, and only then delegates to the Legislature specific powers to regulate elections in Article IV." *Mont. Democratic Party*, ¶ 36. If anything, this Court has observed that the framers did not intend—as the Secretary envisions—Article IV, Section 3 to provide discretion to the Legislature to *narrow* access to the franchise. Rather, the framers "understood Article IV, Section 3 as ultimately protecting the fundamental right to vote," insofar as it conveyed that "the right to vote [is] so precious and so cherished that you shall not limit it by the artificial barrier of registration." *Id.* ¶ 35. In order words, Article IV, Section 3 was meant to bolster protections for the fundamental right to vote, not to authorize the Legislature to restrict it. Thus, while Article IV, Section 3 confers some discretion on the Legislature to regulate elections, the Legislature must "not exercise this power in a manner that unconstitutionally burdens the fundamental right to vote." *Id.* ¶ 36; *see also Larson v. State*, 2019 MT 28, ¶ 21, 394 Mont. 167, 184, 434 P.3d 241, 254 (Legislature

must exercise discretion "within constitutional limits"); *State v. Savaria* (1997), 284 Mont. 216, 223, 945 P.2d 24, 29 (similar).

Three years ago, the Secretary made the exact same argument that she presses in appeal in the defense of BIPA, arguing that Article IV, Section 3—which also gives the Legislature the right to regulate absentee ballots—gave the Legislature sufficient regulatory power such that strict scrutiny should not apply to BIPA. *See Driscoll III*, ¶ 19. As such, under the Secretary's reading, the Legislature had the same discretion to pass BIPA as it did HB 530 and HB 176. Yet in *Driscoll III*, this Court found that any powers under Article IV, Section 3 could not be exercised to infringe on the right to vote and declined to "set forth a new level of scrutiny" for right-to-vote claims. *Id.* ¶ 20. It would be incongruous set forth a new legal standard for HB 176 and HB 530 but not for BIPA.

Fourth, even though this Court has never been afraid to "walk alone" in subjecting constitutional claims to a higher standard than what is required under federal law, *State v. Long* (1985), 216 Mont. 65, 69, 700 P.2d 153, 156, it is far from the only state supreme court that has applied stronger protections to the right to vote under state constitutional law than are available under the federal constitution. Many states—including neighboring Idaho—have similarly applied strict scrutiny to laws that implicate the constitutional right to vote. *See, e.g.*, *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000) (noting

"*Burdick* did not deal with the Idaho Constitution and instead was decided under the United States Constitution"); *Madison v. State*, 163 P.3d 757, 767 (Wash. 2007); *Tully v. Edgar*, 664 N.E.2d 43, 47 (Ill. 1996); *Moore v. Shanahan*, 486 P.2d 506, 511 (Kan. 1971).

Accordingly, this Court should apply decades of unbroken precedent in determining that HB 530 and HB 176—which implicate the fundamental right to vote—are subject to strict scrutiny.

2. The federal standard is not the same as rational basis review.

Even were this Court to apply the federal *Anderson-Burdick* standard, there would be no material difference in the constitutional analysis here. *Anderson-Burdick* is a sliding-scale balancing test that "requires strict scrutiny" when "the burden imposed [by the law] is severe." *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018). And here, HB 530 imposes a significant burden on Appellees' right to vote. *See infra* Part I.A.3. Therefore, even under the *Anderson-Burdick* standard, strict scrutiny applies to HB 530.

Appellant appears to be under the misapprehension that, under the *Anderson-Burdick* standard, if a law imposes a burden on the right to vote that is less than severe, rational-basis review applies. Yet, even for less-than-severe burdens, *Anderson-Burdick* is not a "rational basis test" but rather a "means-end fit framework" that requires the state to set forth more than mere speculative concerns

to justify voting restrictions. *Soltysik v. Padilla*, 910 F.3d 438, 449 (9th Cir. 2018); *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016) (*en banc*) (rejecting argument that *Anderson-Burdick* calls for "rational basis review"). Even a "minimal" burden under *Anderson-Burdick* "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 538 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) ("*Ohio NAACP*") (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008)). Regardless of the burden, the Secretary must "articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses the interest put forth." *Id.* at 545.

Appellant's *Anderson-Burdick* analysis is particularly flawed because it ignores the disproportionate impact HB 530 and HB 176 have on Native Americans in Montana. Under *Anderson-Burdick*, courts must consider "not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe." *Pub. Integrity All.*, 836 F.3d at 1024 n.2; *see also Crawford*, 553 U.S. at 198, 201 (controlling op.) ("The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a [photo ID]"). In this way, it is the law's burden on Native Americans—as opposed to the general

population—that is centrally at issue for any *Anderson-Burdick* analysis. *See Ohio NAACP*, 768 F.3d at 545 (noting burden disproportionately impacted Black voters likely to use the voting opportunities at issue).

3. HB 530 constitutes a severe burden on the right to vote.

Three years ago, this Court upheld a preliminary injunction against BIPA, holding that BIPA's restriction on third-party ballot collection "will disproportionately affect the right of suffrage for … Native Americans." *Driscoll III*, ¶ 21. In that decision, this Court found that "the importance of absentee ballots and ballot-collection efforts is more significant for Native American voters than for any other group." *Id.* ¶ 6. That was because, as this Court observed, "Native American voters as a group face significant barriers to voting"—including "higher rates of poverty," longer distances "from county elections offices and postal centers," "limited access to transportation," "limited access to postal services," and "lack [of] a uniform and consistent addressing system." *Id.* This Court therefore concluded that this "evidence of various [socioeconomic] factors contributing to unequal access to the polls for Native American voters would be exacerbated by" the restriction on third-party ballot collection, "burdening this subgroup's constitutional right to vote." *Id.* ¶ 21.

As the District Court found, "the factual record regarding the burdens on voters in this case is essentially identical to the one the Montana Supreme Court"

had before it in *Driscoll III*—with the exception that BIPA was actually "*less onerous*" than HB 530 is. Order ¶ 600 (emphasis added). The District Court's detailed factual findings—entitled to "great deference," *Mont. Democratic Party*, ¶ 11—demonstrate Native Americans in Montana face consistent and stark socioeconomic disparities and thus have "disproportionate voter costs as compared to their non-Native counterparts." Order ¶ 140. "These include higher poverty and unemployment rates, worse health outcomes, worse educational outcomes, including much lower high school and college graduation rates, less internet access, lack of home mail delivery, less stable housing, higher homelessness rates, and overrepresentation in the criminal justice system." *Id.* ¶ 597. Further, Native Americans living on reservations disproportionately, compared to the general population: (1) live farther away from the post office, DMV, and county seats; (2) lack access to vehicles or gas money; and (3) lack mail access. *Id.* ¶ 598. And the District Court concluded that—largely due to these overwhelming disparities—Native Americans "rely more heavily on organizations to collect and convey their ballots than the general population"; are "considerably more reliant on absentee voting" than the general population; and that BIPA's restriction on third-party ballot collection, empirically speaking, disproportionately harmed Native Americans. *Id.* ¶¶ 287-89, 599. In this way, HB 530—which effectively eliminates third-party ballot collection in Native American communities because ballot

collection organizations "rel[y] specifically on paid organizers," *id.* ¶ 459—constitutes a severe and disproportionate burden on Native Americans' right to vote.

As in *Driscoll III*, the Secretary once again "has pointed to no evidence in the … record that would rebut the District Court's finding of a disproportionate impact on Native American voters, and [s]he leaves the contention largely undisturbed in [her] briefing on appeal." *Driscoll III*, ¶ 22.[3] The Secretary does not contest any of this overwhelming evidence, and indeed barely mentions the law's burdens impact on Native Americans at all. As for the Secretary's halfhearted attempt to claim that BIPA was more sweeping than HB 530, Appellant Br. 63, the District Court concluded just the opposite: "HB 530 … is, in fact, even more restrictive than BIPA," because it "also restricts distribution, ordering, requesting, and delivering ballots," Order ¶ 447. That finding was not clearly erroneous, as it was based on unrebutted record evidence demonstrating that HB 530 will severely burden Appellees' right to vote.

[3] Appellant claims only that the record is somehow "devoid of statistical support." Appellant Br. 68. It is Appellant's argument that lacks support. All three of Appellees' experts—whom the Court found credible and whose opinions the Court found were "entitled to substantial weight," Order ¶¶ 143, 147, 151—relied heavily on statistical support, whether in analyzing Native Americans' disproportionate reliance on EDR and ballot collection; Native Americans' more significant distances to post offices and county seats; or socioeconomic disparities between Native Americans and Montana's general population.

4. HB 530 cannot be justified under any standard.

Appellant identifies two state interests that HB 530 purportedly serves: "preventing mail-in ballot fraud as well as coercion and intimidation of voters," Appellant Br. 61-62, and preserving voter confidence in the electoral process, *id.* 63-64. Given that Appellant lacks any evidence as to either of these two interests, HB 530 cannot satisfy "*any* standard" of review, let alone strict scrutiny. Order ¶¶ 603, 610 (emphasis added).

a. HB 530 is not necessary to prevent voter fraud, coercion, or intimidation.

"Voter fraud in Montana is vanishingly rare." *Id*. ¶ 466. A database maintained by the conservative thinktank the Heritage Foundation—"which has a very expansive definition of voter fraud"—details *one* voter fraud conviction out of millions of votes cast in Montana in the past four decades. *Id.* This conviction did not concern third-party ballot collection. *Id.* Neither HB 530's supporters, nor Appellant's own witnesses, "provided any evidence of voter fraud in Montana," related to third-party ballot collection and otherwise. *Id.* ¶¶ 469-72, 491-95. "The Secretary cites no evidence of any connection between ballot assistance and voter fraud in Montana." *Id.* ¶ 488; *see also id.* ¶¶ 472, 486.

Voter fraud is also vanishingly rare in the United States; according to the same expansive dataset, voter fraud constitutes about .00006% of total votes cast.

Id. ¶ 478. And "the rate of voter fraud is actually higher in states that *ban* third-party ballot collection than it is in states that permit it." *Id.* ¶ 490.

Unable to summon any evidence of voter fraud and/or its connection to third-party ballot collection, the Secretary instead cites federal case law to argue that "a State may take action to prevent election fraud without waiting for it to occur." Appellant Br. 66 (quoting *Brnovich v. Democratic Nat'l Committee*, 141 S. Ct. 2321, 2348 (2021)). Yet this Court already determined that BIPA could not be upheld under *any* standard because, as here, the Secretary "did not present evidence in the [record] of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana." *Driscoll III*, ¶ 22. And even if federal case law were relevant, HB 530 is simply not an "action to prevent election fraud," given that Montana law *already criminalizes* precisely the sort of election fraud that HB 530 supposedly targets, *see* Order ¶¶ 473-76; *see also generally id.* ¶¶ 45, 286, 420 (finding no complaint has ever been lodged against any paid ballot collector in Montana based on fraud, coercion, or intimidation).

b. HB 530 is not necessary to increase voter confidence.

The Secretary "has failed to provide any evidence that Montana has a problem of … voter confidence related to ballot collection, or that HB 530 … would improve those purported problems." *Id*. ¶ 609. "[V]oter confidence in Montana is quite stable and relatively high over time," *id.* ¶ 152; indeed, "Montana

ranks among the highest in the nation in terms of voter confidence," *id.* ¶ 157. 74% of Montana voters in 2012, 76% of Montana voters in 2016, and 72% of Montana voters in 2020 were "very confident" their vote was counted as intended, Trial Tr. vol 2, 395:12-18 (Street)—a consistent level that does not necessitate legislative change.

Even if voter confidence were a problem in Montana—which it is not—there is no evidence that HB 530 would have any effect on it. *See* Order ¶ 484 (HB 530 sponsor admitting "he has no data on voter confidence in Montana"). The record, in Montana and otherwise, shows that voter confidence is driven largely by two things wholly unrelated to HB 530: (1) cues from party leaders, and (2) the "winner's effect," wherein people are likelier to be confident in elections when their preferred candidate wins and less likely when their preferred candidate loses. Trial Tr. vol 2, 391:12-15, 394:7-395:19-25 (Street); Trial Tr. vol. 6, 1371:16-19 (Mayer). The Secretary's own expert acknowledged that election laws like HB 530 largely do not affect voter confidence because "the public doesn't have a very specific knowledge of legal regimes." Trial Tr. vol. 8, 2025:21-23 (Trende).

B. The District Court Correctly Found that HB 530 Unconstitutionally Burdens Appellees' Right to Equal Protection.

The District Court rightly held HB 530 violates equal protection. "When evaluating whether a facially neutral law violates equal protection," this Court applies a two-step test. Order ¶ 582. First, courts "identify the classes involved and

determine whether they are similarly situated." *Snetsinger v. Mont. Univ. Sys.*, 104 P. 3d 445, ¶ 16 (2004). Second, courts "determine the appropriate level of scrutiny." *Id.* ¶ 17.

As to *Snetsinger*'s first step, "Native American voters and non-Native voters are otherwise similarly situated, but HB 530"—as the undisputed record evidence, discussed *supra*, shows—"levies disproportionate burdens on Native American voters compared to other voters." Order ¶ 612. As to the second step, "[s]trict scrutiny applies if a … fundamental right is affected." *Snetsinger*, ¶ 17. Because the right to vote is fundamental, and HB 530 cannot satisfy strict scrutiny or any standard of review, *see supra*, HB 530 fails under a straightforward equal protection analysis.

The Secretary erroneously argues there must be discriminatory intent for HB 530 to violate equal protection. Appellant Br. 29, 68. Yet a facially neutral classification is still unconstitutional if "in reality it constitutes a device designed to impose different burdens on different classes of persons." *Snetsinger*, ¶ 16. As such, "[Appellees] are *not* required to make a showing of discriminatory purpose to establish an equal protection violation." Order ¶ 581.

Regardless, the District Court found "significant evidence of discriminatory purpose." *Id.* ¶ 614. In particular, HB 530 "was advanced at the last moment without any committee hearings or opportunity for public testimony. This irregular

procedure is itself indicative of discriminatory intent." *Id.* ¶ 616; *see also id.* ¶ 434 (Montana representative testifying that "the Senate blasted [HB 530] to the Senate floor so that it did not have to go through committee and was passed without the opportunity for public testimony," and "was jammed in at the last minute") (internal quotation marks omitted). This was a "[d]eparture from the normal procedural sequence" and is thus probative of discriminatory intent under the seminal inquiry in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977); *see also* Order ¶ 179 (Montana representative testifying that "HB 530 was hijacked at the last minute" and was "a play to pass a bill that has not been well vetted by public debate") (internal quotation marks and alterations omitted). The Legislature was also "plainly on notice of the discriminatory impact of HB 530" because multiple courts held BIPA was unconstitutional and the Legislature heard testimony about how both HB 530 and BIPA disproportionately harm Native Americans. Order ¶ 614.

C. The District Court Correctly Found that HB 530 Violates Appellees' Right to Free Speech.

Freedom of speech is a "fundamental" right and is "essential to the common quest for truth and the vitality of society as a whole." *State v. Dugan*, 2013 MT 38, ¶ 18, 369 Mont. 39, 44, 303 P.3d 755, 761 (citations omitted). Core political speech is accorded "the broadest protection." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995). Because ballot collection is "the type of interactive

communication concerning political change that is appropriately described as 'core political speech,'" *Meyer v. Grant*, 486 U.S. 414, 422-23 (1988), multiple courts have already determined that third-party ballot collection restrictions violate the Montana Constitution's right to free speech, *see Driscoll v. Stapleton* ("*Driscoll II*"), No. DV 20 408, slip op. at 24, ¶ 9 (Mont. Dist. Ct. Sept. 25, 2020); *Western Native Voice v. Stapleton* ("*WNV I*"), No. DV 20-0377, 2020 WL 8970685, at 49, ¶ 27 (Mont. Dist. Ct. Sept. 25, 2020).

The Secretary—ignoring WNV Appellees and focusing only on MDP—asserts that paid ballot collection "communicates no particular message." Appellant Br. 71-72. But when paid workers from WNV Appellees knock on the door of underserved Native Americans asking them to collect their ballots, doing so conveys a "message that the Native American vote should be encouraged and protected, and that voting is important as a manner of civic engagement." Order ¶ 624. In Montana, "[t]he constitutional guaranty [sic] of free speech provides for the opportunity to persuade to action, not merely to describe facts," *id*. ¶ 623 (quoting *Mont. Auto Ass'n v. Greely* (1982), 193 Mont. 378, 387, 632 P.2d 300, 305)—which includes the right to persuade voters to civically engage.

Moreover, prohibiting *paid* ballot collection is particularly pernicious, insofar as it "limits speech to the wealthy, that is, those who are able to forgo remuneration for hours of work." *Id.* ¶ 628. Particularly given the severe

socioeconomic disparities facing Native Americans, *see supra* Part I.A.3, prohibiting paid ballot collection gravely imperils the "unfettered interchange of ideas for bringing about of political and social changes desired by the people." *Dorn v. Bd. of Trustees of Billings Sch. Dist. No. 2* (1983), 203 Mont. 136, 145, 661 P.2d 426, 431 (internal quotation marks omitted).

D. The District Court Correctly Found that HB 530 Violates Appellees' Right to Due Process.

A statute is unconstitutionally vague and void on its face if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Dugan*, ¶ 66 (quoting *City of Whitefish v. O'Shaughnessy* (1985), 216 Mont. 433, 440, 704 P.2d 1021, 1025). "[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Id.*

HB 530 is unconstitutionally vague in three distinct ways. Order ¶¶ 632-47. First, "pecuniary benefit" is not statutorily defined, making it unclear to whom it applies and what benefits it covers. *Id.* ¶ 639. Multiple Appellees are confused about the meaning of "pecuniary." *Id.* ¶¶ 67, 89. "Second, the statute leaves unclear whether, if an individual 'distribut[es],' 'request[s],' 'collect[s],' and 'deliver[s]' a single ballot for pecuniary gain, that individual would be subject to multiple fines or just one." *Id.* ¶ 641. Third, "the statute does not define what constitutes an exempt 'government entity,'" which, critically, means sovereign

tribal governments and their paid organizers cannot know if they are exempt. *Id.* ¶ 642; *see also id.* ¶¶ 68-69, 80, 90, 103, 640 (evidence of actual confusion).

The Secretary all but concedes HB 530 is vague. She "has had countless opportunities throughout this litigation to provide clarity as to the many statutory ambiguities [Appellees] have raised. She has failed to clarify *any* of them." *Id*. ¶ 646 (emphasis original). To the extent she now belatedly attempts to define "pecuniary" as applying only to compensation per ballot collected, Appellant Br. 63, HB 530's sponsor contradicts her; he testified that his understanding of "pecuniary benefit" encompassed salaried employees, Order ¶ 191.

Absent statutory clarity, and with HB 530's threat of monetary sanction, Appellees have been forced "to steer far wider of the unlawful zone than if the forbidden areas were clearly marked." *City of Whitefish*, 216 Mont. at 440. For example, "WNV had to cease all its paid ballot collection operations." Order ¶ 644. This is the exact chilling effect unconstitutionally vague laws cause.

E. The District Court Correctly Found that Appellees' Due Process Challenge to HB 530 Is Ripe for Review.

Appellant insists that Appellees' vagueness claim is not ripe because the Secretary's administrative procedure can cure HB 530's constitutional defects. Appellant Br. 51-55. Yet prior to the injunction entered in this case, Appellees severely curtailed their ballot collection and GOTV activities due to the statutory ambiguities. *See* Order ¶¶ 43, 455, 640, 642, 644, 646. This case is no "abstract

disagreement[]"; rather, HB 530's ambiguities have already harmed Appellees. *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 54, 365 Mont. 92, 116, 278 P.3d 455, 472.

Even if this Court ignored Appellees' past injury, ripeness "asks whether an injury that has not yet happened is sufficiently likely to happen." *Id.* ¶ 55. Absent affirmance of the injunction, harm is a near certainty. HB 530's plain text requires that the Secretary's administrative rule must be "in substantially" the same form as the statutory text. Order ¶ 437(a). "As such, … [there is] 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." *Id.* ¶ 592. The Secretary appears to agree, noting that "HB 530 does not vest the Secretary with arbitrary and uncontrolled discretion" and that HB 530 "provides objective guidance that defines with reasonable clarity the intended limits of the delegation." Appellant Br. 58 (internal quotation marks and citations omitted). Both parties agree that any rule must hue closely to the statute, ensuring Appellees will be harmed. Indeed, even HB 530's sponsor believes that any rule would prohibit all ballot collection by organizations such as Appellee WNV. Order ¶¶ 34, 43; Trial

Tr. vol. 8,1888:19-1889:7 (Hertz). Appellees' injuries from HB 530 are not contingent or remote; they are occurring and imminent.[4]

II. The District Court Correctly Found that HB 176 Unconstitutionally Burdens Appellees' Rights.

A. The District Court Correctly Found that HB 176 Unconstitutionally Burdens Appellees' Right to Vote.

1. HB 176 constitutes a severe burden on Appellees' right to vote.

For reasons explained in Section I.A.1, strict scrutiny applies to Appellees' right-to-vote challenge to HB 176 because the law "implicates, infringes on, or interferes with a fundamental right." *Mont. Democratic Party*, ¶ 18. And for reasons explained in Section I.A.2, the analysis would be identical under the federal *Anderson-Burdick* standard, because HB 176 constitutes a severe burden on Appellees' right to vote.

As laid out fully in the Statement of Facts, "[t]he uncontested factual record shows that (1) EDR has been widespread in Montana; (2) Native Americans face disproportionate and severe voter costs due to dramatic socioeconomic and logistical disparities; [and] (3) in part due to the higher voter costs they face, Native American voters disproportionately rely on EDR and thus will be burdened

[4] Appellant claims, without authority, that Appellees somehow "failed to exhaust administrative remedies." Appellant Br. 57. Nothing in Montana law requires parties to refrain from suit and endure significant harms until administrative rulemaking is complete.

disproportionately by its elimination." Order ¶ 567. On this first point, given that Election Day is by far the "most utilized day for late voter registration," *id.* ¶ 318, and EDR has the greatest effect on voter turnout of any possible governmental intervention, *id.* ¶ 320, eliminating EDR has a uniquely disenfranchising effect. And the undisputed record shows that Native Americans use EDR at higher rates than the general population, *id.* ¶ 282—likely because Native Americans use EDR "to mitigate" a slew of stark socioeconomic disparities that affect political participation, such as driving distances, vehicle access, and poverty, *id.* ¶ 583. As with HB 530, the exact same logic this Court used in *Driscoll III* applies with equal force to HB 176.

Appellant ignores this devastating factual record. Instead, she attempts to distract this Court with a series of misdirections. She again appeals to the Legislature's purported discretion in Article IV, Section 3; this Court dispatched this argument in *Montana Democratic Party*, ¶ 36 (noting Article IV, Section 3 "cannot logically be read to nullify the fundamental right to vote in free and open elections separately and principally enshrined in Article II, Section 13"), and *Driscoll III*, as laid out fully in Section I.A.1.

Appellant then points to courts in other states that have upheld certain registration deadlines. Appellant Br. 17-18. But these non-binding, out-of-state cases are unavailing: None involved the question presented here—whether, under

Montana's constitution, a state may *eliminate* a method of registration and voting that thousands of voters have relied upon in the past two decades. This distinction is crucial for two reasons.

First, as a factual matter, those out-of-state cases lack this case's overwhelming record not just that EDR boosts voter turnout in Montana, Order ¶ 320, but also that (1) thousands of voters have relied on EDR in recent elections, *id.* ¶ 601, and (2) Appellees have built their civic engagement efforts for Native American voters in reliance on EDR's availability, *see id.* ¶¶ 43, 46-47, 53, 62, 64, 74-76, 85-86, 98-100. EDR's lengthy and meaningful track record for aiding in Native American turnout in particular distinguishes this case.[5]

Second, as a legal matter under both Montana and federal law, once a state offers a voting opportunity, the elimination of that opportunity is subject to particular constitutional limitations. *See Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 261, 109 P.3d 219, 222 ("Having once granted the right to vote on equal terms, the State may not, by later and arbitrary treatment, value one person's

[5] For similar reasons, Appellant's vague allusion to how it is generally "easy" to register and vote in Montana, Appellant Br. 15-16, is irrelevant. The Secretary provides no legal framework for determining whether or not it is easy to vote in a jurisdiction, nor why that question has any bearing on whether a particular law has a disenfranchising effect. More importantly, the Secretary's flip statements ignore the unrebutted factual record that registering and voting is *not* easy for Native Americans in Montana and, in fact, is far harder for them than the general population. It is this subgroup that is centrally relevant to this case and whom the Secretary appears allergic to addressing.

vote over that of another.") (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)); *Harper v. Va. State Bd. of Elec.*, 383 U.S. 663, 665 (1966) (similar). Notably, in her brief, Appellant omits the most analogous case to this one: the Fourth Circuit enjoined the *elimination* of same-day registration because of the "unrebutted testimony that African American North Carolinians have used same-day registration at a higher rate than whites," which led that court to find that "the *elimination* of same-day registration would bear more heavily on African-Americans than whites." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014) (emphasis added) (internal quotation marks and alterations omitted). The Fourth Circuit explicitly admonished the lower court for "refusing to consider the *elimination* of voting mechanisms successful in fostering minority participation." *Id.* at 242 (emphasis added). This legal framework—focusing on how the *elimination* of EDR disproportionately affects the right to vote for a specific minority group—is the exact same approach this Court took in *Driscoll III* and should take here.

2. HB 176 cannot be justified under any standard.

Appellant identifies two purported interests in HB 176: (1) "reducing administrative burdens on election workers," and (2) "reducing delays at county election offices on election day," which the Secretary claims is important to

preserve voter confidence. Appellant Br. 22, 27. Neither interest satisfies any level of scrutiny.

a. HB 176 is not necessary to ameliorate administrative burdens.

As a preliminary matter, "there is no support for an argument that avoiding [administrative] burdens and costs are a compelling state interest." *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1254 (D. Utah 2017) (internal quotation marks omitted). It is axiomatic that administrative burdens cannot trump constitutional rights. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) ("There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by [the Secretary of State's] office and other state and local offices involved in elections."); *United Utah Party*, 268 F. Supp. 3d at 1254 ("Reducing administrative burdens is … not a sufficient state interest to outweigh Plaintiffs' First and Fourteenth Amendment rights."); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2012) (finding that administrative, time, and financial burdens are "minor when balanced against the right to vote, a right that is essential to an effective democracy").

Regardless, the District Court properly found that "[t]he Secretary's claim that HB 176 … eas[es] administrative burdens is not supported by the evidence." Order ¶ 496. HB 176 does "not eliminate any administrative burdens associated with EDR but rather just shift[s] them to an earlier date," when election

administrators are already "really busy." *Id.* ¶ 507; *see also id.* ¶ 360. To the extent HB 176 can reduce administrative burdens, it is only because it would result in fewer eligible citizens being able to register and vote, *see id.* ¶¶ 498, 508, which is antithetical to the State's core interest in ensuring "as many eligible voters can vote as desire to," *Priorities USA v. Nessel*, 978 F.3d 976, 985 (6th Cir. 2020).

Further, the District Court found that, for several reasons, "[i]f anything, HB 176 might create further administrative burdens for election administrators." Order ¶ 513. First, election administrators "in many counties have already had to spend time turning away individuals looking to register and vote on Election Day." *Id.* Second, election administrators testified that "it's confusing to constantly try to keep up with new laws passed by the Montana legislature," including HB 176, and that election administrators and voters alike had gotten comfortable with EDR, which has been part of Montana elections for nearly two decades. *Id.* Third, while "there is no evidence of any errors resulting [from EDR]," *id.* ¶ 501, "[t]here are, however, errors that occur with voter registration *before* Election Day," such that "EDR gives voters and election administrators the opportunity to fix mistakes up to the last minute," *id.* ¶¶ 502-04 (emphasis original). The Secretary—relying principally on the testimony of a former elections administrator whose "credibility" the District Court found was "diminished by his personal beliefs," *id.* ¶ 185—focuses heavily on the burden on rural counties. But she ignores that

another rural election administrator testified that "the implementation of EDR had no ultimate impact on her Election Day schedule," *id.* ¶ 509, and that rural counties are better staffed than larger counties like Missoula, which administers EDR without incident, *id.* ¶ 500-01. On this record, the District Court did not clearly err in finding that "HB 176 does not reduce administrative burdens." *Id.* ¶ 573.

Finally, the Secretary claims that EDR "causes long lines at county election offices, which dissuade voters and diverts counties' trained staff from focusing on running the election." Appellant Br. 25. Yet "wait times in Montana are consistently below 10 minutes, have been decreasing across time,[6] and are well below the national average." Order ¶ 152; *see also id.* ¶¶ 521-23. And EDR almost never occurs at polling places, meaning that "EDR has no effect on lines at polling places, where the vast majority of in-person voting occurs." *Id.* ¶¶ 515, 517. Any lines at county election offices on Election Day consist of unregistered voters "who would be unable to vote absent [EDR]," *id.* ¶ 517, and as with other administrative burdens, HB 176 "'doesn't get rid' of any long lines, but 'just moves them' to the new, earlier late registrant deadline," *id.* ¶ 518. "All data indicate that EDR is not associated with long wait times in Montana." *Id.* ¶ 524.

[6] If EDR really does increase wait times, wait times would have increased since EDR went into effect in 2006 in Montana, rather than decreased as they have.

Even if HB 176 reduced administrative burdens—which it does not—it is not narrowly tailored. The Secretary claims "HB 176 is the least restrictive means available to reduce these burdens." Appellant Br. 25. Yet, the District Court found precisely the opposite, noting—in part relying on the Secretary's own witnesses—"[t]here are myriad ways for the State to reduce administrative burdens on elections officials without the disenfranchising effects of ending EDR, including hiring more poll workers…, offering simpler or more frequent training to election administrators, and modernizing equipment." Order ¶ 510. Neither the Secretary nor the Legislature tried any of these options. *Id.* ¶ 511. As to wait times, given that the principal reason to reduce wait times is to prevent disenfranchisement, "HB 176 is thus completely self-defeating as to its stated purpose, since the people actually waiting in any lines at issue need to make use of EDR in order to be able to vote." *Id.* ¶ 525. And given the unrebutted evidence that HB 176 makes it harder for Montanans, and especially Native Americans, to vote, *see supra*, it cannot possibly be narrowly tailored to the goal of ensuring eligible voters can participate.

b. HB 176 is not necessary to reduce delays at county elections offices.

The District Court, relying in part upon the Secretary's own witnesses, correctly found that "EDR has not resulted in delays in tabulating election results." *Id.* ¶ 512. "The Secretary cannot point to a single instance where an election administrator was unable to report election results in a timely manner due to

EDR." *Id.* The Secretary also has no evidence—beyond the say-so of the bill's sponsor, who admitted his support for HB 176 was based on "just [his] feelings," *id.* ¶ 191 (alteration in original)—that any purported delays in tabulating election results based on EDR affects voter confidence, *see* Appellant Br. 27-28. As noted *supra*, all evidence in the record suggests that voter confidence is affected by partisan ideology and targeted messaging, not EDR or any imagined delays in tabulating election results.

B. The District Court Correctly Found that HB 176 Violates Appellees' Right to Equal Protection.

For reasons substantially similar to those listed in Section I.B, "HB 176 violates [Appellees'] right to Equal Protection." Order ¶ 579. HB 176 is subject to strict scrutiny under the *Snetsinger* two-part inquiry, given that Native Americans and non-Natives are similarly situated and HB 176 implicates a fundamental right. And for the reasons listed in Section II.A.2, HB 176 cannot satisfy any level of scrutiny, let alone strict scrutiny. To the extent this Court believes discriminatory purpose is required, the District Court found that there was sufficient evidence of such improper intent because the Legislature "was motivated to pass HB 176" because it believed that the individuals aided by EDR "tend to be liberal," Order ¶ 178—evidence of pretext and bad faith. The Legislature was also fully aware that HB 176 would disproportionately harm Native American voters. Order ¶ 585.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's permanent injunction of HB 530 and HB 176.

Respectfully submitted June 30, 2023.

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the Response Brief of Appellees is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word Office 365 is 9,999 words.

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