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**IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY**

Robyn Driscoll; Montana Democratic Party; and
Democratic Senatorial Campaign Committee,

Plaintiffs,

v.

Corey Stapleton, in his official capacity as
Montana Secretary of State,

Defendant.

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. For over two decades, Montana has been ahead of the curve on access to absentee voting. Since 1999, Montana has allowed all eligible citizens to vote by absentee ballot, without excuse, in all elections. When Montana adopted no-excuse absentee voting, only 15 other states permitted all registered voters to cast absentee ballots. Today, only 17 states require an excuse.

2. Montana's broad acceptance of absentee voting paid off. More Montana voters began voting absentee, and more Montana voters voted overall: In 2000, just 15.68 percent of

voters cast absentee ballots. Montana Secretary of State, *Absentee Turnout 2000-Present* (Mar. 12, 2019), available at <https://sosmt.gov/elections/faq/#absentee-voting>. In the following presidential election, an additional 6 percent of voters voted absentee. *Id.* And by the 2016 election, 65.38 percent of Montana voters cast absentee ballots. *Id.* As the volume of absentee ballots increased, so too did the overall percentage of ballots cast: In 2000, only 59.9 percent of registered Montana voters voted. Montana Secretary of State, *Montana Voter Turnout*, (Mar. 12, 2019), available at <https://sosmt.gov/elections/voter-turnout/>. In the next presidential election, however, 71.4 percent of registered Montana voters did. *Id.* And 16 years after Montana expanded access to absentee voting, the percentage of registered voters who voted rose to 74.4. *Id.*

3. The increase in the volume of absentee voting—and in the overall increase in votes cast—coincided with an increase in organizing around absentee ballots. In the wake of Montana’s decision to expand absentee voting, organizations focused on getting out the vote undertook efforts to help Montana voters return their absentee ballots.

4. Over time, those efforts grew to include providing voters with convenient drop-off locations and door-to-door absentee ballot return assistance. In both cases, voters voluntarily chose to provide their sealed and signed absentee ballot return envelope to trusted representatives of community organizations or campaigns, who then transported the sealed absentee ballot return envelope to the county elections office or other county drop-off site.

5. These services were invaluable to voters whose work commitments, school schedules, family care responsibilities, mobility impairments, lack of access to postal mail service, or lack of access to transportation made returning their absentee ballot difficult or even impossible. These services were particularly necessary for voters voting by absentee ballot during the week

prior to an election, where postal delivery timeframes make the on-time delivery of a mailed-in absentee ballot far from certain.

6. The increase in the volume of absentee voting, and the uncertainties regarding whether and when a mailed-in absentee ballot would be received at a county elections office, also spurred county elections officials to introduce alternative methods for voters to return absentee ballots. These included secure drop boxes operated by county elections officials that enabled voters to submit their absentee ballots to county elections officials 24-hours a day, rather than just during the business hours of a county elections office. Voters could use a county's 24-hour drop box within the last week of the election and have confidence that their ballot would be received by the deadline.

7. Last year, however, that all changed. Twenty years after Montana expanded access to absentee voting, it restricted it. *See* Mont. Code § 13-35-701 *et seq.* Under the new and unnecessarily burdensome restrictions placed on absentee voting (the “Absentee Ballot Assistance Ban”), it is unlawful for a person to “collect”—which, under the statute, means to “gain possession or control of a ballot”—a voter’s absentee ballot unless the person is an election official, a postal worker, the voter’s family member, household member, or caregiver, or an “acquaintance” of the voter. *Id.* at 13-35-703(2). Even then, except for election officials and postal workers, no one may assist more than six voters by collecting and returning their absentee ballots. *Id.* at 13-35-703(3).

8. The Absentee Ballot Assistance Ban is coupled with a reporting requirement (the “Registration Requirement”). *See* Mont. Code § 13-35-704. A family member, household member, caregiver, or “acquaintance” who assists a voter by “collecting” and returning their absentee ballot *must* sign a registry maintained by election officials when delivering the ballot to the county election office, a polling place, or “a place of deposit.” *Id.* The assistor must also provide election

officials with their name, address, and telephone number, as well as the voter's name and address, and describe their relationship with the voter. *Id.* at § 13-35-704(1)-(3).

9. If someone attempting to help a voter return their absentee ballot violates any of these provisions, they could face a \$500 fine for each ballot collected. *Id.* at § 13-35-705.

10. To make matters worse, the Absentee Ballot Assistance Ban and the Registration Requirement do not exist in a vacuum. Absentee voters must still comply with Montana's general absentee voting requirements, including—crucially—the requirement that absentee ballots must be received by 8 p.m. on Election Day (the “Election Day Cutoff”). Mont. Code Ann. § 13-13-201.

11. The Election Day Cutoff means that regardless of when the ballot is postmarked, and regardless of whether the voter is responsible for any delay the ballot encounters in the mail, if the ballot is not received by 8 p.m., the voter is entirely disenfranchised. As a result, if an absentee voter returns her ballot by mail, she must send it well before Election Day to increase the odds that it will be counted.

12. The combined effect of the Absentee Ballot Assistance Ban, the Registration Requirement, and the Election Day Cutoff is to make it significantly more difficult for voters to exercise their right to vote.

13. The Absentee Ballot Assistance Ban effectively outlaws organizations from providing ballot collection services by limiting ballot collection to a small number of individuals authorized to undertake the practice, and further limiting the number of ballots that any individual can collect and return.

14. The Registration Requirement forces county elections administrators to have a staff member available to interrogate any voter who attempts to return a ballot in person in order to

determine whether the voter is a “collector” who must sign the registry—which effectively prevents counties from providing 24-hour drop boxes and other convenient return options or locations.

15. Finally, the Election Day Cutoff prevents voters from using postal mail to return their ballots within about a week of the election without risking absolute disenfranchisement.

16. The Election Day Cutoff consequently forces absentee voters voting within a week of the election to have their ballot dropped off in person. But the Absentee Ballot Assistance Ban and the Registration Requirement now make doing so much more difficult: voters are only allowed to entrust their ballot to a limited group of people authorized to collect and return ballots, and anyone returning absentee ballots in person—whether the voter herself or a ballot collector—can only do so during the business hours of a drop-off site staffed by county election officials.

17. Taken together, the Absentee Ballot Assistance Ban, the Registration Requirement, and the Election Day Cutoff (collectively the “Challenged Provisions”) unreasonably burden the right to vote of some Montana voters and completely disenfranchise others. For these reasons, and the reasons stated below, Plaintiffs request that the Court declare that the Challenged Provisions violate the Montana Constitution.

PARTIES

18. Plaintiff Robyn Driscoll is the Chair of the Montana Democratic Party and a resident of Billings. In her personal capacity as Montana citizen, Ms. Driscoll is a voter and is actively engaged in assisting other Montana voters with voting, including voting by mail and absentee ballot. Ms. Driscoll’s goal is to elect Democratic Party candidates to public office throughout Yellowstone County and Montana. To accomplish this, Ms. Driscoll supports Democratic Party candidates through fundraising and organizing work, including providing Get Out the Vote (“GOTV”) assistance and actively supporting the development of programs

benefiting Democratic Party candidates. Ms. Driscoll plans to continue to engage in fundraising, GOTV assistance, and the development of programs to elect Democratic Party candidates in Yellowstone County and Montana. Prior to the passage of the Absentee Ballot Assistance Ban, Ms. Driscoll personally participated in assisting absentee voters through ballot collection efforts. The Absentee Ballot Assistance Ban, Registration Requirement, and the Election Day Cutoff will directly harm Ms. Driscoll in several ways. By imposing severe burdens on the right to vote, these provisions will directly harm Ms. Driscoll by frustrating her goal of, and efforts in, turning out voters in Yellowstone County and Montana who support Democratic Party candidates and by specifically preventing her from continuing to assist absentee voters through ballot collection efforts. Ms. Driscoll is aware of the effects that the Absentee Ballot Assistance Ban, Registration Requirement, and the Election Day Cutoff will cause, and to combat these effects in the 2020 general election in Yellowstone County and Montana, she will divert and expend additional time and resources in voter education and turnout efforts at the expense of her other efforts in Yellowstone County and throughout the state.

19. Plaintiff Montana Democratic Party (“MDP”) is a political party established pursuant to Montana Code Section 13-38-101 *et. seq.* Its mission is to elect Democratic Party candidates in local, county, state, and federal elections. MDP works to accomplish that mission by educating, mobilizing, assisting, and turning out voters throughout the state. These activities include absentee ballot collection services, efforts to encourage voters to return their absentee ballots, and the provision of information and advice to voters regarding how and when to return absentee ballots. In past elections, the MDP made expenditures in the millions of dollars to persuade and mobilize voters to support candidates up and down the ballot who affiliate with the

Democratic Party in Montana. The MDP again intends to make substantial expenditures to support Democratic candidates in the 2020 election and in future elections.

20. During general election years, the MDP operates a field office in Billings, which serves as the headquarters for the MDP's voter persuasion and mobilization activities. These activities include encouraging voting and assisting voters in returning absentee ballots. In 2018, the Billings office was staffed by approximately a half dozen MDP employees, including members of the MDP's senior leadership team. The Billings office served as the training facility for over 40 organizers whom the MDP deployed throughout the state and was also the base of operations for the MDP's voter protection team prior to election day. The office also hosted over one hundred MDP volunteers for voter persuasion and mobilization activities, including door-to-door canvassing in Billings and other locations in Yellowstone County, during which time MDP representatives offered absentee ballot collection services to voters. The MDP provided trainings to organizers and volunteers regarding absentee ballot collection services at its Billings office. The MDP is planning similar activities in its Billings office for the 2020 November election.

21. Plaintiff Democratic Senatorial Campaign Committee ("DSCC") is the national senatorial committee of the Democratic Party as defined by 52 U.S.C. § 30101(14). Its mission is to elect candidates of the Democratic Party to the U.S. Senate, including from Montana. DSCC works to accomplish that mission in Montana by assisting the MDP in educating, mobilizing, assisting, and turning out voters. In 2018, DSCC made contributions and expenditures in the millions of dollars to persuade and mobilize voters to support Senate candidates who affiliate with the Democratic Party. In 2020, there will be a Senate election in Montana, and DSCC will work to elect the Democratic candidate. As a result, DSCC again intends to make substantial

contributions and expenditures to support the Democratic candidate for U.S. Senate in Montana in 2020.

22. The Absentee Ballot Assistance Ban, Registration Requirement, and the Election Day Cutoff directly harm MDP and DSCC. The Absentee Ballot Assistance Ban frustrates MDP's and DSCC's missions by prohibiting the acts of individuals and organizations, including but not limited to the MDP itself, that want to assist voters in returning their ballot. The Registration Requirement and Election Day Cutoff similarly impede the MDP's and DSCC's ability to turn out absentee voters. To combat the effects of the Absentee Ballot Assistance Ban, Registration Requirement and the Election Day Cutoff in the 2020 general election, the MDP and DSCC will have to expend and divert funds and resources in voter mobilization efforts at the expense of its other efforts in Montana and, in the case of DSCC, in other states. The MDP, the DSCC, and their members, volunteers, and constituents will also be prevented from fully exercising their speech and associational rights to engage in these voter assistance efforts as long as the Absentee Ballot Organizing, Registration Requirement, and Election Day Cutoff remain in effect.

23. The Secretary is the chief elections officer of the State of Montana and is responsible for maintaining uniformity in the application, operation, and interpretation of election laws. Mont. Code § 13-1-201. In carrying out these responsibilities, the Secretary has the duty of preparing and delivering to election administrators written directives and instructions relating to election law. Mont. Code § 13-1-202(1). The Secretary is named as a Defendant solely in his official capacity.

JURISDICTION AND VENUE

24. Plaintiffs bring this action under the Montana Constitution. As a court of general jurisdiction, this Court has authority to hear these claims. Mont. Code § 3-5-302.

25. This Court has jurisdiction to grant declaratory and injunctive relief pursuant to the Montana Uniform Declaratory Judgment Act. Mont. Code §§ 27-8-101 *et seq.*, 27-8-201 *et seq.*

26. Venue is proper in this Court, as Plaintiff, Robyn Driscoll resides in Billings. In addition, the unlawful effects of the Absentee Ballot Assistance Ban, the Registration Requirement, and the Election Day Cutoff directly effect and interfere with the election and voting-related activities that the MDP and Ms. Driscoll conduct in Yellowstone County, including the activities coordinated from the MDP's Billings office. There is direct injury to the MDP, Ms. Driscoll, and the DSCC in Billings.

FACTUAL ALLEGATIONS

A. Legislative History and Statutory Framework

27. On March 16, 2017, Republican Senator Albert Olszewski introduced Senate Bill 352 ("SB 352") to the Montana Senate. In the spring of 2018, the Legislature voted to put SB 352 on the 2018 midterm election ballot as Legislative Referendum 129 ("LR 129").

28. Leading up to that vote, several Montanans testified in opposition to SB 352 at public hearings before the House and Senate. No members of the public testified in support of it.

29. Nonetheless, on a heavily partisan basis, SB 352 passed through the Montana Senate and House of Representatives. On March 20, 2017, the Senate passed SB 352 with a vote of 30 to 19. All 30 votes in favor of the bill were cast by Republican senators, as were two of the votes against it. The rest of the votes against the bill were cast by Democratic senators. On April 13, 2017, the House of Representatives approved the measure by just two votes. And those votes were similarly split: 50 Republican members and one Democratic member voted in favor of the bill while nine Republican and 40 Democratic members voted against it. With that partisan record,

the measure was placed on the 2018 midterm election ballot under the title “Montana Ballot Interference Prevention Act.” On November 6, 2018, Montana voters approved it.

30. The statute defines “collect” as “gain[ing] possession or control of a ballot,” Mont. Code § 13-35-702(3), and provides that a person may not knowingly collect a voter’s voted or unvoted ballot, Mont. Code § 13-35-703(1).

31. The statute specifies that despite the general ban on ballot collection, it does not apply to election officials, postal workers, and individuals “specifically authorized by law to transmit United States mail.” Mont. Code § 12-35-703(2)(a)-(b).

32. The statute also permits certain other individuals to collect ballots subject to additional requirements. A voter’s caregiver, family member, household member, or “acquaintance” may collect a voter’s ballot. Mont. Code § 12-35-703(2)(c)-(f). The statute defines “acquaintance” as “an individual known by the voter.” Mont. Code § 13-35-702(1).

33. However, an individual authorized to collect a voter’s ballot because they are a caregiver, family member, household member, or “acquaintance” may not “collect and convey” more than six ballots. Mont. Code § 12-35-703(3).

34. In addition, an individual authorized to collect a voter’s ballot because they are a caregiver, family member, household member, or “acquaintance” “shall sign a registry when delivering the ballot to the polling place, a place of deposit, or the election administrator's office.” They must also provide their name, address, telephone number, the voter’s name and address, and the individual’s relationship to the voter. Mont. Code § 13-35-704.

35. A violation of a provision of the statute is punishable by a fine of \$500 for each ballot unlawfully collected. Mont. Code § 13-35-705.

36. Notably, the Absentee Assistance Ban and Registration Requirement did not displace Montana's existing absentee voting requirements. They added to them. For instance, the provisions work in concert with Montana's requirement that absentee ballots be received by election officials by 8 p.m. on Election Day. The Election Day Cutoff means that, regardless of the date a ballot is postmarked, and regardless of how responsible a voter was in timely mailing their absentee ballot, if an absentee ballot is not received by 8 p.m. on Election Day, it is not counted.

B. The challenged provisions burden Montana voters' right to vote.

37. In Montana, the vast majority of voters vote absentee. In 2018, over 73 percent of votes cast in Montana were cast by absentee ballot. Secretary of State, *Absentee Turnout 2000-Present* (Mar. 12, 2019), available at <https://sosmt.gov/elections/faq/#absentee-voting>. That is 360,530 voters. *Id.* The Challenged Provisions, individually and collectively, will burden each of them.

38. Absentee voting is invaluable to voters whose work commitments, school schedules, family care responsibilities, mobility impairments, or lack of access to transportation make voting on election day difficult or even impossible. But these barriers to participation also apply to the process of obtaining and returning an absentee ballot itself, particularly for voters voting by absentee ballot during the week prior to an election, when postal delivery timeframes make the on-time delivery of a mailed-in absentee ballot far from certain.

39. Absentee ballot return services helped reduce these barriers by allowing voters to choose to give their absentee ballot to a trusted representative of a community organization or campaign, who then transported the sealed absentee ballot return envelope to the county elections office or other county drop-off site.

40. The Absentee Assistance Ban effectively bans these organized absentee ballot assistance efforts. Representatives of organizations like the MDP who engage in get-out-the-vote efforts will not fall into the category of family member, household member, or caregiver for the overwhelming majority of voters with whom they come into contact. And the term “acquaintance” is too vague to provide meaningful guidance regarding whether a representative of an organization who has met a voter for the first time while performing get-out-the-vote efforts is “known to the voter,” such that the representative of an organization can provide absentee ballot return services to the voter without risking a \$500 per-ballot fine. As a result, the Absentee Assistance Ban chills organizations like the MDP from providing absentee ballot return services at all. Moreover, the six-ballot limit on absentee ballot collection puts strict limitations on the amount of assistance that any person (with the exception of election officials and postal workers) can provide to their family, friends, and neighbors.

41. The Registration Requirement will significantly reduce voters’ options for returning their ballots in person. Prior to the enactment of the Registration Requirement, some counties placed locked boxes where voters could drop off their absentee ballots at any time in various locations around the county; for instance, outside the county courthouse. But because of the Registration Requirement, Montana voters will now have to deliver absentee ballots to an election official. Normal operating hours for most county election offices are 8-5 p.m. on weekdays, which means that voters can no longer return their ballots in the evenings or on weekends. And county election offices may be located many miles away from a voter’s home or place of work, especially in more rural counties, so a quick trip to the election office is not always possible.

42. Additionally, the Registration Requirement will increase the length of time that some voters must stand in line to cast a ballot. In some election locations, as many as 5,000 absentee ballots are dropped off during the 25 work days before the election. And when they are, an election official must find out whether each person is dropping off their own ballot or the ballot of another voter. In the latter case, the election official will have to ensure that the person dropping off the ballot completes the Ballot Collection Registry Form and provides the information required by the Registration Requirement. This new interaction will cause bottlenecks at election offices and polling locations, which will result in another burden on voting. It has already resulted in voter frustration. *See, e.g., Amy Beth Hanson, Election Clerks Say Absentee Ballot Rule Suppresses Votes, AP News (Feb. 27, 2020), available at <https://apnews.com/f150715d1dca604672121f84c40f757b>* (noting that “one voter became so frustrated last year when he came in to drop off ballots for himself and his wife that he ripped up the ballots and threw them at the clerks.”). According to at least one county elections supervisor, this registry—a list of voters and assistants who are following the law—adds no administrative value to their election facilitation efforts.

43. Because of the Absentee Ballot Assistance Ban, those voters no longer have access to ballot return assistance from organizations or campaigns, which would obviate the need for an absentee voter to stand in line after traveling to the county elections office during standard working hours.

44. The Election Day Cutoff ensures a severe burden on voters who opt to return their absentee ballots by mail. If an absentee voter returns her ballot by mail, she must send it well before Election Day to ensure that it will be counted. *See, e.g., United States Postal Service, News for the 2018 Election Cycle, <https://about.usps.com/postal->*

bulletin/2018/pb22498/html/cover_006.htm (last visited Mar. 5, 2020) (recommending that voters mail their ballots at least one week before the due date).

45. The Election Day Cutoff also severely burdens voters because similarly situated voters face different effective deadlines for returning their ballot by mail. Voters in rural areas face longer mail transit times than voters in larger cities and must mail their ballots sooner than voters in larger cities to ensure that they are received on time.

46. The Election Day Cutoff requires the voter to vote without complete information. Within days of an election, a single event could influence voters' decisions. Alex Samuels, *They voted early for Buttigieg and Klobuchar in Texas. Now some feel they threw their votes away*, The Texas Tribune (Mar. 2, 2020), available at <https://www.texastribune.org/2020/03/02/buttigieg-klobuchar-early-vote-drop-out/>. But because of the Election Day Cutoff, absentee voters returning their ballots by mail will have already cast their ballots.

47. Waiting any longer to mail an absentee ballot risks complete disenfranchisement because, regardless of when the ballot is postmarked, and regardless of whether the voter is responsible for any delay the ballot encounters, if it is not received by 8 p.m., it is tossed out entirely. Thus, the Election Day Cutoff forces voters between a rock and a hard place: the voter can wait to be completely informed and risk losing their vote entirely or they can mail their ballot well in advance and risk casting their vote without complete information, or even wasting their vote.

48. The Challenged Provisions impose particularly severe burdens on Native American voters. Many Native American voters live in remote areas with limited access to transportation, often located far from county elections offices. Mailing absentee ballots can be difficult for Native voters because they often have limited access to postal services, and mail sent from tribal nations

may face a longer transit time to and from postal service processing centers than voters residing elsewhere in the state.

49. In order to help overcome these obstacles to the accessing absentee voting, Native American voters have relied upon organized ballot return assistance programs provided by civic organizations. But the Absentee Ballot Assistance Ban—in particular, the 6-ballot limit—effectively prevents these organizations from providing assistance to Native voters with their absentee ballots.

50. The restrictions also burden senior and disabled voters. These voters' varying capabilities with mobility makes obtaining, completing, and returning absentee ballots challenging. It can also be difficult for these voters to stand in line at polling locations or elections offices. And these voters may not have a caregiver, family member, or acquaintance who has the time and ability to make sure that their absentee ballots make it to the polls on time.

51. The Challenged Provisions will similarly burden young voters. Many young voters do not have access to personal transportation. And students have come to rely on ballot return assistance programs. But the Absentee Ballot Assistance Ban leaves organizations that run ballot return assistance programs on college campuses unable to assist college students. These groups will no longer be able to provide secure lock boxes on campuses where students can drop off their absentee ballots. Nor will they be able to run door-to-door assistance programs.

52. But perhaps the most significant burden placed on all voters who vote absentee, and particularly on the groups mentioned above, is the burden that the Challenged Provisions create when they are enforced simultaneously. Because the Election Day Cutoff forces voters who return their absentee ballots by mail to choose between casting their vote without complete information or risking losing their vote entirely, it encourages voters to return their absentee ballots

in person. Because of the Absentee Ballot Assistance Ban, those voters no longer have access to organized ballot collection services to return their ballots in person. Finally, the Registration Requirement now requires absentee voters who return their ballots in person to do so during business hours in order to hand their ballot to an election official. The Registration Requirement will create bottlenecks at elections offices, the volume of which will increase in the last week of the election because the Election Day Cutoff leaves voters with no choice but to return their ballots in person.

C. The Absentee Ballot Assistance Ban burdens protected political speech and association rights.

53. Plaintiffs engage in voter turnout efforts including campaigns and drives during which they, their members, and their volunteers help voters submit their absentee ballots.

54. These efforts are among the most important mediums through which Plaintiffs communicate their belief in the power and importance of participating in democratic elections, including for voters who have experienced historically low turnout rates when compared to the rest of the population, or who for various reasons—disability, advanced age, or lack of access to transportation—would have difficulty voting. And these initiatives facilitate the political participation of such voters.

55. Plaintiffs engage in protected political speech and association when they interact with Montana voters to encourage them to cast their absentee ballots and assist voters in submitting absentee ballots, including, at the voter's request, collecting and returning a voter's absentee ballot to an appropriate election official by the deadline. Encouraging voters to participate in the democratic process through voting and assisting voters in submitting their ballots are forms of political speech and expressive conduct inherently tied to Plaintiffs' missions.

56. But the Absentee Ballot Assistance Ban prevents Plaintiffs from providing absentee ballot return services to almost all voters they encounter. In particular, the uncertain scope and meaning of the term “acquaintance” chills Plaintiffs’ representatives from offering to provide ballot return services to voters. And even in situations where representatives of Plaintiffs may permissibly collect ballots under the narrow, permissible forms of ballot collection under the statute, the statute severely and arbitrarily limits the size of the audience that a single volunteer can reach.

57. The Absentee Ballot Assistance Ban, by its plain terms, specifically targets and penalizes protected political speech and associational activity by restricting the types of people who may permissibly collect ballots and imposing a six-ballot collection limit. Organizations that provide absentee ballot return services, such as the MDP, often do so through their representatives, including paid staff and volunteers, any one of whom may interact with hundreds of voters in different communities through door-to-door canvassing and other forms of voter contact. As a direct result of these activities, representatives of these organizations are much more likely to encounter voters in need of absentee ballot return services who are not family members, household members, or “acquaintances,” and are much more likely to encounter more than six voters in need of such services. The restrictions on absentee ballot collection services specifically target this form of large-scale, sustained associational activity by representatives of organized groups, prohibiting political speech and expressive conduct precisely because organizations are engaging in too much speech and associational conduct.

58. The Absentee Ballot Assistance Ban also restricts expression because it makes it less likely that Plaintiffs’ activities will result in increased voting. And the threat of financial

penalties for violating the Challenged Provisions deters volunteers and canvassers from engaging even in the narrow, permissible forms of ballot collection for fear of prosecution.

D. The State has no legitimate interest in enforcing the Challenged Provisions.

59. Montana has no legitimate interest in enforcing the Challenged Provisions. To the extent that the Absentee Ballot Assistance Bans are intended to protect election integrity by preventing voter coercion or ballot tampering, they are redundant. Montana law already criminalizes attempts to coerce voters or fraudulently manipulate ballots. *See* Mont. Code Ann. § 13-35-205. Moreover, there is no evidence that interference with absentee ballots is an issue in Montana. Nor is there any evidence that any organized absentee ballot assistance program led to voter coercion or manipulated or diverted ballots. Indeed, the legislative history of SB 352 identifies no instances of abuse of organized absentee ballot assistance.

60. In past elections, organizations conducting absentee ballot assistance programs already proactively put measures in place to ensure transparency and the timely return of the absentee ballots they collect. For example, some organizations required voters who wanted the organization to collect and return their ballot to complete a form, listing the voter's name, address, telephone number, and the date. Similarly, some organizations provided voters with a receipt containing the organization's contact information and instructions on how to track the status of their absentee ballot. If organizations were unable to return an absentee ballot to election officials the same day, they stored ballots in a locked box or a locked room in an office.

61. Regarding the Election Day Cutoff, although Montana may certainly set a reasonable deadline to receive ballots to ensure the finality of the election results, the State could easily serve that interest by accepting ballots postmarked by Election Day and received within a reasonable time—five business days, at a minimum—thereafter. Montana does not limit the

number of days the state has to certify election results after Election Day. Mont. Code Ann. § 13-15-507. And the results of elections in Montana are often not certified as final until many days or even weeks after election day. *See, e.g., Secretary of State, 2018 General Election – Post Election Audit Summary* (Nov. 14, 2018), available at <https://sosmt.gov/Portals/142/Elections/Documents/2018-PEA-Summary-Stmt.pdf> (noting that Montana’s Post-Election Audit Random Selection Meeting, during which the Secretary of State’s office reviewed the post-election audit results of randomly selected counties was held and conducted on November 14, 2018, eight days after the November 2018 elections). In fact, Montana will count a provisional ballot as long as the information used to verify it is postmarked by 5 p.m. on the day after the election and received by 3 p.m. on the sixth day after the election. Mont. Code § 13-15-107. The state has no interest in completely disenfranchising voters whose absentee ballots that are received during that time.

CLAIMS FOR RELIEF

COUNT I

Montana Constitution, Article II, § 13

Absentee Ballot Assistance Ban and Registration Requirement - Undue Burden on the Right to Suffrage

62. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

63. Article II, § 13 of the Montana Constitution provides 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.” The right of suffrage is a fundamental right. *Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, 325 P.3d 1204.

64. Other state courts and the federal courts have applied a balancing test to restrictions on the right to vote challenged under analogous provisions of state and federal constitutions that

protect the fundamental right to vote. For example, when considering whether state action impermissibly burdens the right to vote, the U.S. Supreme Court uses what has come to be known as the Anderson-Burdick test, which requires courts to weigh “the character and magnitude of the asserted injury” against “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982)). Under this balancing test, even a minimal burden must be justified by “sufficiently weighty” state interests. *See Norman v. Reed*, 502 U.S. 279, 288-89 (1992); *see also, e.g., Guare v. State*, 167 N.H. 658, 667 (2015) (holding that a burden on the right to vote that is more than minimal but not severe requires the state to “articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest set forth.”).

65. By imposing barriers to returning absentee ballots, the Absentee Ballot Assistance Ban and Registration Requirement severely burdens the right to vote of absentee voters in Montana, and particularly burdens senior, disabled, Native American, and young voters. The Absentee Ballot Assistance Ban eliminates access to organized absentee ballot return services on which those voters have come to rely, and limits the assistance that family members, housemates, or acquaintances can provide voters. The Registration Requirement restricts all absentee voters—including both those who do or not rely upon absentee ballot return services—from having their ballots returned in person at times and locations other than business hours at sites staffed by elections officials.

66. The burdens imposed on the right to vote by the Absentee Ballot Assistance Ban and Registration Requirement are not justified by any state interests, let alone ones sufficiently weighty. Montana has no legitimate interest in enforcing the Challenged Provisions. Neither the

Absentee Ballot Assistance Ban nor the Registration Requirement is necessary to prevent coercion or ballot tampering because Montana law already criminalizes attempts to coerce voters or fraudulently manipulate ballots. *See* Mont. Code Ann. § 13-35-205. But even if the Absentee Ballot Assistance Ban and Registration Requirement were not redundant, there is no evidence that interference with absentee ballots is an issue in Montana. Nor is there any evidence that any organized absentee ballot assistance program has led to voter coercion or manipulated or diverted ballots. The Absentee Ballot Assistance Ban and the Registration Requirement address a problem that simply does not exist.

COUNT II

Montana Constitution, Article II, § 13

Election Day Cutoff - Undue Burden on the Right to Suffrage

67. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

68. Like the Absentee Ballot Assistance Ban, the Election Day Cutoff imposes a severe burden on many Montana voters. Voters must first learn about the Election Day Cutoff and accurately predict when their ballot must be mailed for it to be counted. For voters who misjudge how long it will take for their ballot to arrive back to their county, or for those who never learn about Montana's Election Day Cutoff, the punishment is swift and severe: total disenfranchisement.

69. Montana's Election Day Cutoff also severely burdens all voters who vote by mail even if those voters' ballots are successfully counted. By requiring its voters to cast their mail ballots a week before the election in order for those ballots be counted, the Election Day Cutoff forces Montana voters to cast their ballots before they can account for any critical information about the election or the candidates that arises during the final week leading up to Election Day—

arguably, the most critical week in an entire election cycle. Montana's Election Day Cutoff thus deprives voters of the ability to engage in this robust period of civic engagement, because it effectively requires them to have already cast their vote.

70. While Montana's Election Day Cutoff burdens all Montana voters who vote by mail, it also particularly burdens seniors, students, disabled voters, and Native voters. Those voters have limited mobility, lack access personal or public transportation, and face financial and time constraints that make traveling to a polling location to drop off an absentee ballot challenging. The Election Day Cutoff requires these voters, in particular, to choose between submitting their ballots abundantly early, often before they are aware of all of the facts that might influence their decision, or submitting their ballots potentially too late.

71. While Montana has a legitimate regulatory interest in a cutoff for receiving ballots in general, the State derives no meaningful benefit from imposing the *Election Day* Cutoff, particularly where it has encouraged over 70 percent of its electorate to vote by mail. Further, Montana does not have a deadline by when it must certify final election results. Accordingly, Montana would suffer no significant administrative burden if it, at a minimum, extended that same five-business-day deadline to permit for the receipt of ballots that were postmarked on or before Election Day, but which arrive within five business days after the election. In fact, the extension of the deadline would likely decrease administrative burdens and improve election outcomes in Montana by providing the State and counties with the opportunity to count all votes cast in close races, avoiding potential recount and post-election litigation costs. Montana thus has no legitimate interest, and certainly no compelling interest that is narrowly drawn, in rejecting ballots that are postmarked before or on Election Day and which are received within, at a minimum, five business days after Election Day.

72. In short, Montana’s Election Day Cutoff is not supported by a state interest that is sufficient to justify the resulting burden on the right to vote and thus unduly burdens the right to vote of Montana voters in violation of the First and Fourteenth Amendments.

COUNT III

Montana Constitution, Article II, §§ 6, 7

Absentee Ballot Assistance Ban and Registration Requirement - Infringement on Speech and Expression Rights

73. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

74. Article II, § 6 of the Montana Constitution provides that “[t]he people shall have the right peaceably to assemble, petition for redress or peaceably protest government action.” And Article II, § 7 provides that “[n]o law shall be passed impairing the freedom of speech or expression.” Together these provisions, like the First Amendment to the United States Constitution, protect “the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Dorn v. Bd. of Trs. of Billings Sch. Dist. No. 2* (1983), 203 Mont. 136, 145, 661 P.2d 426, 431.

75. Other state courts and the federal courts interpreting analogous provisions of state and federal constitutions have held that activities aimed at encouraging voters to participate in the political process are constitutionally protected speech and association. *See Buckley v. Am. Const’l Law Found.*, 525 U.S. 182, 186 (1999); *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

76. For example, the U.S. Supreme Court has applied “exacting scrutiny” to review laws governing election-related speech. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345 (1995); *see also League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 722 (M.D. Tenn. 2019) (“[L]aws that govern the political process surrounding elections—and, in particular, election-related speech and association—go beyond merely the intersection between voting rights

and election administration, veering instead into the area where ‘the First Amendment has its fullest and most urgent application.’”) (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)). Thus, restrictions on such speech are unconstitutional when they “significantly inhibit” election-related speech and association and are “not warranted by the state interests . . . alleged to justify [the] restrictions.” *Buckley, Inc.*, 525 U.S. at 192.

77. Voter turnout efforts, including organized efforts to help voters submit absentee ballots, are a means by which Plaintiffs communicate their belief in the power and importance of participating in democratic elections. Federal courts have held that such activity is “the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer*, 486 U.S. at 422-23. See *League of Women Voters*, 400 F. Supp. 3d at 720 (“Encouraging others to register to vote is pure speech, and, because that speech is political in nature, it is a core First Amendment activity.”) (internal quotation marks and alterations omitted). The act of assisting voters to complete and submit ballots is inherently expressive, and an individual or organization that conducts such activities engages in protected speech by encouraging voting. See *Bernbeck v. Moore*, 126 F.3d 1114, 1115 (8th Cir. 1997) (rejecting the argument that regulating an election “process” raises no First Amendment concerns).

78. Furthermore, under analogous provisions of the United States Constitution, First Amendment rights “include the right to band together for the advancement of political beliefs.” *Hadnott v. Amos*, 394 U.S. 358, 364 (1969). “An organization’s attempt to broaden the base of public participation in and support for its activities is conduct ‘undeniably central to the exercise of the right of association.’” *Am. Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1202 (D.N.M. 2010) (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15 (1986)).

79. The conversations and interactions between Plaintiffs, their members, and voters surrounding the submission of absentee ballots are forms of protected political speech and association under the Montana Constitution, as they are under analogous provisions of the U.S. Constitution. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (describing the “overlapping” rights “of individuals to associate for the advancement of political beliefs” and “of qualified voters . . . to cast their votes effectively”); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006) (explaining that “participation in voter registration implicates a number of both expressive and associational rights which . . . belong to—and may be invoked by—not just the voters seeking to register, but by third parties who encourage participation in the political process through increasing voter registration rolls”). Thus, by limiting most of Plaintiffs’ and others’ ability to assist voters to collectively submit absentee ballots, the Absentee Ballot Assistance Bans burden the speech and associational rights of Plaintiffs, their members, and their volunteers.

80. Moreover, the threat of significant fines for violating these laws deters individuals from participating in Plaintiffs’ GOTV efforts and has a chilling effect on the entirety of Plaintiffs’ GOTV efforts, including their speech. *See League of Women Voters*, 400 F. Supp. 3d at 720 (noting that the threat of civil penalties “is likely to have a chilling effect on the entirety of [a voter registration] drive, including its communicative aspects.”).

81. The restrictions on absentee ballot collection services also specifically targets Plaintiffs’ and other organizations’ associational activity, prohibiting political speech and expressive conduct precisely because organizations are engaging in too much disfavored speech and associational conduct.

82. These burdens are severe, and the Absentee Ballot Assistance Ban and Registration Requirement are not narrowly tailored to advance a compelling state interest and thus represent an

overbroad restriction on political speech and political organizing that infringes Plaintiffs’ and other Montanans’ rights under the Montana Constitutions.

COUNT IV

Montana Constitution, Article II, § 17

Absentee Ballot Assistance Ban and Registration Requirement - Denial of Procedural Due Process

83. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

84. Article II, § 17 of the Montana Constitution prohibits the states from depriving a person of “life, liberty, or property without due process of law.” Deciding what protections are due in a given case requires a careful analysis of the importance of the rights and the other interests at stake. *See Goble v. Montana State Fund*, 2014 MT 99, ¶ 46, 374 Mont. 453, 467-68, 325 P.3d 1211, 1223 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). Specifically, it requires considering: (1) the nature of “the interest that will be affected” by the government’s action, (2) “the risk of an erroneous deprivation of such interest through the procedures used” as well as the “probable value, if any, of additional or substitute procedural safeguards,” and (3) the government’s interest. *Id.* (quoting *Mathews*, 424 U.S. at 347). Overall, “due process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S. at 334 (quotation and citation omitted).

85. The right to vote—and the right to have that voted counted—is a precious liberty interest. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670. And the degree of potential deprivation is at its height because Montana’s absentee voting procedures do not adequately protect against complete disenfranchisement. Voters who rely on voting absentee because they have work, school, or childcare obligations, live prohibitively far from polling locations, or do not have access to personal or public transportation, now can no longer rely on organized assistance

returning their absentee ballot, and might not have a friend or neighbor willing to register to assist them. Those voters face complete deprivation of the most important liberty interest: the liberty interest that protects all other basic civil and political rights.

86. Further, Montana's absentee voting procedures will result in erroneous deprivation because the terms are arbitrary and vague. The restrictions arbitrarily limit a single person from helping more than six voters. There is no significance to the number six and surely the seventh voter in need of assistance poses no greater threat to election integrity than the sixth. Nonetheless, that seventh voter is arbitrarily and unfairly prevented from receiving assistance. Even the sections of the Absentee Ballot Assistance Ban that permit some individuals to assist voters in returning their absentee ballots are likely to result in arbitrary and unfair treatment. The complete ban on absentee ballot assistance does not apply to an "acquaintance" of the voter. But acquaintance is merely defined as "an individual known by the voter." One voter could sincerely believe a person she met several minutes earlier is an "individual known" by her. Another voter might not.

87. The restrictions also treat different forms of absentee ballot assistance differently: if a person assists five of his family members by depositing their absentee ballots in United States Postal Service mailbox, that person is not required to register with an election official. Nothing in the law prevents someone from putting a stamp on someone else's ballot and dropping it off at a post office. But a person who assists a single family member by returning her ballot to a polling location is required to provide his signature, name, address, and telephone number, as well as the voter's name and address, and must describe his relationship to the voter to a poll worker.

88. Finally, the State has no interest in continuing to enforce the Absentee Ballot Assistance Ban and Registration Requirement. Substituting procedural safeguards, including adopting the practices already voluntarily implemented by groups providing organized ballot

return assistance, would effectuate the state's interest in regulating absentee ballots. Conversely, the public interest in ensuring that all voters have access to fair absentee voting is clear. Montana recognized the same twenty years ago, when it became the fifteenth state to permit no-excuse absentee voting.

COUNT V
Montana Constitution, Article II, § 17
Election Day Cutoff - Denial of Procedural Due Process

89. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

90. The Election Day Cutoff also fails to provide adequate process to ensure that voters' ballots are fairly considered and counted. Montana's procedures for counting absentee ballots too often deprive voters of having their ballot counted because (1) some voters do not learn of the Election Day Cutoff at all; (2) postal mail delivery timeframes are not guaranteed and vary between different communities, with rural communities often experiencing longer delivery timeframes than voters living in larger cities, resulting in otherwise similarly situated voters facing different effective mailing deadlines; and (3) even voters who are aware of the Election Day Cutoff and return their absentee ballots by postal mail will not have their ballots counted even if, through no fault of their own, the ballot does not arrive at the county recorder's office by 8 p.m. on Election Day. Montana's Election Day Cutoff further deprives all voters who vote by mail of the ability to cast a meaningful and informed vote by requiring voters to cast their ballots a full week (or more) before Election Day if they wish to ensure that their ballots will actually be counted.

91. Montana's Election Day Cutoff is neither a reliable nor fair way to administer voting by mail. Absentee voters who return their ballot by mail do not reliably know that their ballot will be counted. Montana elections officials can only offer voters their best guess of when

voters must place their ballots in the mail for it to be counted. The Election Day Cutoff is unfair because it effectively requires some voters to cast their ballots before the rest of the electorate if they wish to be afforded the same process as other voters in the State and to have their votes counted. The Election Day Cutoff is also unfair to all Montana voters who vote absentee by mail because it requires them to cast their ballot without complete information.

92. The value of additional or substitute procedural safeguards to ensure that the votes of Montana's absentee voters are both meaningfully cast and actually counted is readily apparent. A substitute procedure—requiring mail ballots to be postmarked on or before Election Day and received by the county within, at a minimum, five business days after Election Day to be counted—solves the inequities inherent in Montana's Election Day Receipt Deadline. A postmark date not only offers a reliable date to Montana voters by which they must cast their ballots, but it also ensures that rural voters and minority voters are not more likely to have their ballot rejected simply because they live in a town with slower mail service. A postmark date additionally ensures that all of Montana's voters can consider any information that may arise and influence voters' choices in the last week of the election.

93. Because Montana is not required to finalize its election results within a certain time period after the election, accepting ballots that are postmarked on or before Election Day and which arrive, at a minimum, within five business days of Election Day would put a minimal administrative burden on the state, if any. And as the United States Supreme Court has explained, "administrative convenience" cannot justify the deprivation of a constitutional right. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975).

94. Having induced its citizens to vote by mail over the past two decades, Montana must establish adequate procedures to ensure that voters have a reliable, fair, and effective method

to cast their ballots. Because Montana's Election Day Cutoff is markedly inadequate in all of those respects, and Montana is readily capable of instituting a substitute procedure which would protect those voters' rights with minimal burden to the state, Montana's Election Day Cutoff violates Montana voters' procedural due process rights.

COUNT V

Montana Constitution, Article II, § 17

Absentee Ballot Assistance Ban - Void for Vagueness

95. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

96. Article II, § 17 of the Montana Constitution requires that Montana statutes provide "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *State v. Stanko*, 1998 MT 321, ¶ 22, 292 Mont. 192, 974 P.2d 1132, 1136 (citations omitted). That is because "[n]o person should be required to speculate" whether her contemplated course of action may be subject to penalties. *Id.* A statute can be unconstitutionally vague in two ways: (1) the statute can be so vague that it is void on its face, or (2) the statute can be vague as applied in a particular situation. *Id.* at ¶ 17. The Absentee Ballot Assistance Ban is vague in both ways.

97. The Absentee Ballot Assistance Ban is unconstitutionally vague because it fails to define "acquaintance" sufficiently. Acquaintance is merely defined as "an individual known by the voter." Mont. Code § 13-35-702(1). One voter could sincerely believe a person she met several minutes earlier is an "individual known" by her. Another voter might not. The Absentee Assistance Ban does not provide a person of ordinary intelligence sufficient notice of who is allowed to assist whom with their absentee ballot and who is not.

98. Additionally, the Absentee Ballot Assistance Ban is unconstitutionally vague as applied in particular circumstances. For instance, the Ban defines "family member" as means "an

individual who is related to the voter by blood, marriage, adoption, or legal guardianship.” Mont. Code § 13-35-702(4). But that definition does not provide adequate guidance to voters in many Native American communities, for whom the term “family member” encompasses persons who may not clearly fall within the scope of “relat[ion] . . . by blood [or] marriage.”

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

- A. Declaring that Montana’s Absentee Ballot Assistance Ban and Election Day Cutoff violate the Montana Constitution;
- B. Preliminarily and permanently enjoining the Secretary of State and his agents, officers, employees, successors, and all persons acting in concert with each or any of them, from enforcing the Absentee Ballot Assistance Ban and Election Day Cutoff; and
- C. Granting Plaintiffs such other and further relief and the Court deems necessary and proper.

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Dated: March 13, 2020

Respectfully submitted,

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