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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT  
 COUNTY OF YELLOWSTONE

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Montana Democratic Party and Mitch Bohn,	)	
	)	
Plaintiffs,	)	Cause No. DV 21-0451
vs.	)	
	)	Hon. Michael Moses
CHRISTI JACOBSEN, in her official	)	
capacity as Montana Secretary of State,	)	<b>CAUSE NO. DV 21-0560</b>
	)	<b>PLAINTIFFS' BRIEF IN SUPPORT</b>
Defendant.	)	<b>OF MOTION FOR</b>
	)	<b>CONSOLIDATION</b>
	)	
	)	
	)	
	)	

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COME NOW, the Plaintiffs in Cause No. DV-21-0560, by and through counsel of record, and hereby file and serve their brief in support of Motion for Consolidation. Plaintiffs in the instant action seek consolidation with the pending case of *Montana Democratic Party et al. v. Jacobsen*, Cause No. DV 21-0451 (Thirteenth Judicial District Court, Hon. Michael Moses) (hereinafter “MDP”). Pursuant to Rule 1(h) of the Thirteenth Judicial District local rules, this motion is being filed concurrently in Cause No. DV 21-0451 and Cause No. DV 21-0560.<sup>1</sup> Counsel for Plaintiffs in *MDP* have been contacted and do not object to this Motion. Counsel for Defendant in *MDP* have been contacted and object to this Motion as premature.

### **FACTUAL BACKGROUND**

There are currently two pending cases in the Thirteenth Judicial District Court challenging recently passed voter suppression laws. *MDP* challenges HB 176 (close late voter registration on Friday before the election), SB 169 (generally revise voter identification laws), and HB 530 (require Secretary of State to adopt rules governing election security). An amended complaint in *MDP* was filed on May 14, 2021. *Western Native Voice et al. v. Jacobsen*, Cause No. DV 21-0560 (Thirteenth Judicial District Court, Hon. Ashley Harada) (hereinafter “WNV”) challenges HB 176 and HB 530. *WNV* was filed on May 17, 2021.

The two cases share issues of law and fact, but are not identical. Both cases name Secretary of State Christi Jacobsen in her official capacity as Defendant. Both cases allege that HB 176 and HB 530 violate multiple provisions of the Montana Constitution, including art. II, §§ 4, 7, 13, and 17. And both

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<sup>1</sup> The motion “will be heard before the judge presiding in the lowest cause number and, if the cases are consolidated, the trial will also be conducted in that department. The judges may consult with each other regarding any decision on a motion to consolidate.” Rule 1(h), Thirteenth Judicial District Local Rules.

cases seek a declaration that the two laws are unconstitutional and a permanent injunction against their application. However, *WNV* does not include a challenge to SB 169.

In the interest of judicial economy, and for the reasons set forth below, Plaintiffs respectfully request that this Court consolidate this matter for consideration before the first assigned case (*MDP*).

### ARGUMENT

*WNV* and *MDP* should be consolidated because they involve the same common questions of law and fact. Mont. R. Civ. P. 42. Consolidation is proper where multiple cases in the same judicial district concern the same issues of law and fact and do not present any other factors weighing against consolidation. *Tucker v. Tucker*, 2014 MT 115, 375 Mont. 24, 326 P.3d 413.

It is within the Court's discretion to consolidate similar actions in the interests of judicial economy. In considering consolidation, the Court may choose to join the cases for a hearing or trial for any or all matters, consolidate the actions entirely, or "issue any other orders to avoid unnecessary cost or delay" Mont. R. Civ. P. 42(a)(1)-(3). The main purpose of consolidation is to permit trial convenience and economy in administration by avoiding unnecessary costs or delay. *Park County Stockgrowers Ass'n v. Mont. Dep't of Livestock*, 2014 MT 64, ¶ 11, 374 Mont. 199, 320 P.3d 467; *Means v. Mont. Power Co.*, 191 Mont. 395, at 401, 625 P.2d 32, at 36 (1981).

A. *WNV* and *MDP* are sufficiently factually similar to warrant consolidation.

Even where adjoining cases do not have identical issues of law, but rather stem from the same issues of fact, consolidation is appropriate. *State ex rel. Great Falls Tribune Co. v Montana Eighth Judicial District*, 238 Mont. 310, 777 P.2d 345 (1989). Both *WNV* and *MDP* challenge two recently-enacted laws, HB 176 and HB 530. Both cases allege, as a factual matter, that the two laws restrict or suppress the voting rights of certain subsets of the Montana population. The primary thrust of *WNV* is that HB 176 and HB 530 harm Native Americans in rural tribal communities across the seven Indian

reservations located in Montana, by impairing access to the voter registration process and to voting by absentee ballot. *WNV* Complaint, ¶ 3. *MDP* likewise alleges that “the Montana Legislature introduced several laws aimed at restricting the rights of Montanans to engage in their democracy. While these new laws will burden all Montana voters, they specifically target the youngest members of the electorate just months after they turned out to vote at record rates.” *MDP* Amended Complaint, ¶ 1.

As a factual matter, both cases will require proof that HB 176 and HB 530 burden the right to vote by making it more difficult for Native Americans and young voters to cast a ballot. The discovery process in both cases will involve similar written discovery requests, and will likely require depositions of identical agents of the Montana State Government.<sup>2</sup> In the 2020 Ballot Interference Prevention Act cases, for example, the same agents of the Secretary of State’s office sat for depositions at the request of two separate sets of Plaintiffs and had testimony presented at trial.

*MDP*’s challenge to SB 169 does not render that case sufficiently factually dissimilar to warrant denial of consolidation. As a practical matter, *MDP* will be able to engage in discovery practice around SB 169 (including written discovery and depositions) as a supplement to the duplicative discovery at issue in HB 176 and HB 530. And in any event, consolidation does not merge the suits into a single cause, or change the rights of the parties. *Park County Ass’n v. Mont Dep’t of Livestock*, 2014 MT 64, ¶ 11 (quoting *John v. Manhattan R. Co.*, 289 U.S. 479, at 496-97 (1933)). Additionally, consolidation does not make the parties in one suit parties in another. *Id.* Thus, while each party would be able to

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<sup>2</sup> It bears noting that a similar voter suppression law (the “Ballot Interference Prevention Act”) was successfully challenged by two cases filed in the Thirteenth Judicial District in 2020. *Western Native Voice et al. v. Stapleton et al.*, Cause No. DV 20-0377 (Thirteenth Judicial District Court, Hon. Jessica Fehr); *Driscoll et al. v. Stapleton*, Cause No. DV 20-0408 (Thirteenth Judicial District Court, Hon. Donald Harris). Both cases resulted in duplicative discovery, expert testimony and, ultimately, bench trials on successive weeks. And in both cases different judges enjoined the Ballot Interference Prevention Act and declared that it violated the Montana Constitution.

assert its own claims and defenses, there are significant opportunities to eliminate duplication, streamline issues and improve judicial economy.

B. *WNV* and *MDP* involve virtually identical legal issues.

Both cases advance constitutional challenges to HB 176 and HB 530. *WNV* alleges that the two laws violate the right to vote, right to equal protection of law, freedom of speech and due process. *MDP* alleges that the two laws violate the right to vote, right to equal protection, freedom of speech and expression, and due process. Of course, the legal test, including the applicable level of scrutiny for each of these enumerated constitutional rights, is the same across both cases. Accordingly, the similarity between the legal issues at play warrants consolidation to promote judicial economy and avoid unnecessary costs and delay.

C. No prejudice would accrue to Defendant if *WNV* and *MDP* are consolidated.

Both *WNV* and *MDP* involve an identical defendant – the Montana Secretary of State. The Secretary of State would benefit from consolidation as it would be required to defend only one action. In contrast to the Ballot Interference Prevention Act challenges that accrued in 2020, where the State of Montana engaged in two separate bench trials (on successive weeks) and handled multiple appeals to the Montana Supreme Court, here the Secretary of State would be able to defend against all claims in one action. The benefits to the Defendant could not be more clear. *Contra, Association of Unit Owners of Deer Lodge Condominium v. Big Sky*, 245 Mont. 64, 798 P.2d 1018 (1990) (denying consolidation where a defendant in one case was dismissed as the defendant of the other case).

## CONCLUSION

Both *WNV* and *MDP* allege similar sets of facts and rely on virtually identical legal principles. In the interests of judicial economy, and in order to avoid unnecessary delay and costs, Plaintiffs

respectfully request that the Court GRANT their Motion to consolidate and conduct a trial in the department having the lowest cause number. Rule 1(h), Thirteenth Judicial District Local Rules.

DATED THIS 24<sup>th</sup> day of June, 2021.



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**CERTIFICATE OF SERVICE**

I, Alex Rate, hereby certify on this date I emailed a true and accurate copy of the foregoing document to:

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DATED: June 24, 2021

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