IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

Montana Democratic Party, Mitch Bohn,

Plaintiffs,

Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe,

Plaintiffs,

Montana Youth Action; Forward Montana Foundation; and Montana Public Interest Research Group

Plaintiffs,

v.

Christi Jacobsen, in her official capacity as Montana Secretary of State,

Defendant.

Consolidated Case No. DV 21-0451

MONTANA DEMOCRATIC PARTY AND MITCH BOHN'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs Montana Democratic Party ("MDP") and Mitch Bohn (together, "MDP and Bohn") submit this reply in support of their Motion for Preliminary Injunction ("Motion") to enjoin enforcement of House Bill 176 ("HB 176" or "Election Day Registration Ban"), Senate Bill 169 ("SB 169" or "Voter ID Restriction"), and House Bill 530 ("HB 530" or "Renewed Ballot Assistance Ban") (collectively, "Challenged Restrictions").

INTRODUCTION

The Secretary ignores overwhelming evidence submitted by MDP and Bohn (as well as other Plaintiffs in these consolidated cases) establishing that the Challenged Restrictions impose severe burdens on the right to vote, without compelling—or even legitimate—state interests to justify them. Under long-established Montana precedent, laws that infringe on this most fundamental right are subject to strict scrutiny review. But although the Secretary attempts to justify the Challenged Provisions as necessary to address concerns about election integrity, she proffers *no* evidence of any voter fraud or other election misdeeds that the Challenged Regulations would actually address.

The truth is that—as the Secretary and her predecessor previously demonstrated, including in litigation surrounding the 2020 election—Montana's elections have been and remain safe, secure, and reliable. At best, the Challenged Restrictions do nothing more than respond to hypothetical threats that have never actually materialized. While this "better safe than sorry" approach to legislating may seem harmless on its face, it cannot justify restrictions on the right to vote, much less under the demanding standard applied by Montana courts. And, as the evidence before this Court broadly demonstrates, the Challenged Restrictions have serious, real-world consequences for multiple segments of Montana's electorate, including, for example, the Native Americans who must rely on ballot return assistance because they lack transportation and reliable mail service; the single parents who rely on election day registration ("EDR") because they are unable to make multiple trips to an election office; and the students who live in dormitories and do not have utility bills or other identifying documents that homeowners may have.

Nowhere in her Response does the Secretary adequately address the burdens that these and other Montana voters now face because of the Challenged Restrictions. She hardly pays even lip service to the many Montanans who are *actually* at serious risk of being disenfranchised. Instead, the Secretary rests much of her argument on the *theoretical* notion that Montana's elections are infected by a "crisis of confidence," and points to that "crisis" to justify the Challenged Restrictions. But that assertion is undermined by a fact the Secretary never acknowledges—Montana has had record-breaking turnout in its recent elections, including in the 2020 election. This turnout, coupled with the

paltry evidence of *any* type of fraud or other election improprieties, much less any that could be addressed by the Challenged Provisions, suggests the exact opposite conclusion: Montanans have a high level of faith in the security and integrity of elections, as they should. That is no doubt why the Secretary herself, less than two years ago, submitted evidence trumpeting the reliability of Montana's electoral system and why her predecessor similarly issued broad proclamations about the security of the 2020 elections. Ex. 36 at 3.[1] But even if there were the crisis of confidence that the Secretary now claims, she has not produced any evidence that third party ballot assistance, the use of student IDs as a primary form of voter ID, or EDR have contributed in any way to the supposed crisis.

In response to the Secretary's abrupt about-face about the reliability and security of Montana's elections, one must ask what has changed in less than two years. The answer lies in the fact that in Montana, as in many other states, legislators and others are attempting to leverage destructive, unfounded claims of voting fraud—the "Big Lie"—about the 2020 elections to roll back voting rights and to make it harder for certain segments of the population to participate in our democracy. Indeed, the Secretary makes no bones about it: she transparently seeks to exploit perceptions about election security resulting from the democracy-threatening, evidence-free falsehoods peddled by former President Trump and his surrogates to limit the right to suffrage. If there is a crisis of confidence in Montana's elections, these cynical falsehoods are its source. But a "crisis" manufactured by politically motivated untruths is hardly a legitimate state interest for curtailing voting rights.

There is, in fact, no legitimate—much less compelling—state interest that justifies the burdens on the right to vote imposed by the Challenged Restrictions. The Secretary does not argue otherwise. Instead, she asserts that the Challenged Restrictions are subject to mere "rational basis" review, but that argument is contradicted by decades of Montana precedent requiring strict scrutiny when fundamental rights are at issue. Nor can the Secretary escape the consequences of this most demanding level of review by asserting, as she does in the Response, that MDP lacks standing. The Court has already fully considered and rejected that argument.

Based on both the governing law and the evidence that is before the Court, Plaintiffs are entitled to a preliminary injunction. The Challenged Restrictions burden the fundamental right to vote

[1] Citations to Exhibits 36 and 37 refer to the exhibits attached to the Declaration of Matthew Gordon submitted with this brief. Citations to Exhibits 1 through 35 refer to the exhibits attached to the Declaration of Matthew Gordon submitted in support of MDP and Bohn's Memorandum in Support of Motion for Preliminary Injunction.

without furthering any compelling state interest, let alone doing so in the least restrictive manner. Plaintiffs' Motion should be granted, and the Court should enjoin the Challenged Restrictions.

ARGUMENT

I. MDP and Bohn do not seek a mandatory injunction.

The starting point of the Secretary's argument—that Plaintiffs are seeking a mandatory injunction, Resp. at 3-5—mischaracterizes the relief MDP and Bohn are seeking. They are not requesting a mandatory injunction. They simply request a return to the status quo as it existed before the enactment of the Challenged Restrictions. A preliminary injunction is a remedy designed "to restrain the doing of injurious acts or, in its mandatory form, to require the undoing of injurious acts and restoration of the status quo . . ." *Newman v. Wittmer*, 277 Mont. 1, 11, 917 P.2d 926 (1996) (cleaned up). The "status quo" is defined as "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Sweet Grass Farms, Ltd. v. Bd. of Cty. Comm'rs of Sweet Grass Cnty.*, 2000 MT 147, ¶ 28, 300 Mont. 66, 2 P.3d 825.

Here, "the last actual, peaceable, noncontested condition" was the law before the Legislature enacted the Challenged Restrictions. *See Driscoll v. Stapleton*, 2020 MT 247, ¶ 14, 401 Mont. 405, 473 P.3d 386 ("*Driscoll II*"). Plaintiffs' Motion attempts to ensure that there is no material change to that status quo until it is finally determined at trial that the challenged laws are indeed unconstitutional. *See Cole v. St. James Healthcare*, 2008 MT 453 ¶ 25, 348 Mont. 68, 199 P. 3d 810 ("The purpose of preliminary injunctive relief is to maintain the status quo pending the final outcome of the litigation."). Accordingly, the higher burden that applies to requests for mandatory injunctions does not apply here.[2]

II. The Court should reject the Secretary's request to reconsider prior rulings and overturn established precedent.

The Secretary next impermissibly asks this Court to revisit its prior holdings issued in response to the Secretary's Motion to Dismiss, Resp. at 6-7, 17, 27-30, but those rulings are law of the case and the Secretary identifies no compelling basis to revisit them. The law of the case doctrine "expresses the practice of courts generally to refuse to reopen what has been decided." *Federated Mut. Ins. Co. v. Anderson*, 1999 MT 288, ¶ 60, 297 Mont. 33, 991 P.2d 915. That limitation applies even to this Court's prior rulings. *See State v. Carden*, 170 Mont. 437, 439, 555 P.2d 738 (1976)

[2] In any event, the Secretary's argument is largely academic. "The principles upon which mandatory and prohibitory injunctions are granted do not materially differ." *City of Whitefish v. Troy Town Pump, Inc.*, 2001 MT 58, ¶ 21, 304 Mont. 346, 21 P.3d 1026 (quoting *Grosfield v. Johnson*, 98 Mont. 412, 421, 39 P.2d 660 (1935)).

(noting law of the case doctrine applies "to prior rulings of a trial court in the same case as well"); *see also Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 29, 351 Mont. 464, 215 P.3d 649 (noting it has "also held this principal [sic] applicable to the prior rulings of a trial court in the same case"). The Secretary's attempts to change what has already been decided must fail, as discussed below.

A. MDP's inability to vote does not undermine its standing to challenge suppressive election legislation.

The Secretary asserts once again that MDP lacks standing, without providing new arguments or evidence. Resp. at 6-7. In its Order denying the Secretary's Motion to Dismiss, the Court thoroughly addressed the same arguments, finding that MDP has both organizational and associational standing. Order at 4-10 (holding MDP has organizational standing); 7-10 (holding MDP has associational standing). The Secretary provides no basis for reconsidering or altering these rulings.[3]

B. The Legislature's authority to regulate elections does not shield the election laws it enacts from judicial review.

The Secretary then doubles down on her erroneous argument that the Legislature has unfettered authority to enact legislation affecting elections. Resp. at 17, 27-30. The Secretary not only restates her argument that, because the Legislature may enact laws related to voter registration, it may amend those laws with impunity, Resp. at 27-30, but also stretches that argument by adding that the Court must defer to the Legislature's general duty to regulate elections in determining what level of scrutiny applies to *any* election regulation. Resp. at 17. The Court has already rejected this argument. Order at 16-17 ("[O]nce the Legislature has acted, or 'executed,' a provision that implicates individual constitutional rights, courts can determine whether that enactment fulfills the Legislature's constitutional responsibility."). The Secretary provides no reason why the Court should reconsider its prior holding.

[3] The Secretary briefly suggests that Bohn does not have standing because he has successfully cast his ballot in the past. But a plaintiff need not be prohibited from voting to have standing to challenge a voting restriction; it is enough that they are subject to the restriction, and that it may make it harder for them to vote. *See Comm. for an Effective Judiciary v. State*, 209 Mont. 105, 108, 679 P.2d 1223 (1984) (holding, in response to the State's argument that a registered voter's standing to challenge election law was too speculative, "[w]here the public and the electorate were so clearly intended to benefit by a constitutional provision, . . . a registered voter has standing to assert that public interest by contending that the constitutional provision has been the victim of legislative strangulation"); *see also Ohio NAACP v. Husted*, 768 F.3d 524, 541 (6th Cir. 2014); *Obama for Am. v. Husted*, 697 F. 3d 423, 433 (6th Cir. 2012); *Guare v. State*, 167 N.H. 658, 665 (2015) (holding that confusing language on voter registration form imposed at least an unreasonable burden because it "*could* cause an otherwise qualified voter not to register to vote") (emphasis added).

This Court, like other courts, has also rejected the Secretary's similar argument that the Legislature has free reign to take away any voting right it earlier enacted. *See* Resp. at 28 (regarding EDR), 45 (regarding absentee ballot assistance); Order at 17 ("[J]ust because the Legislature chose to enact election day registration and expand voting rights does not mean the Legislature can water down those rights without a review of the constitutionality of that action."); *see also Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018); *Doe v. Walker*, 746 F. Supp. 2d 667, 681 (D. Md. 2010); *Obama for Am.*, 697 F.3d at 430-31. The Secretary's second attempt at this argument must fail for the same reasons her first try did.

II. The Challenged Restrictions violate the right to vote.

A preliminary injunction is merited when the movant is "entitled to the relief demanded" and "the relief consists in restraining the commission or continuance of the act complained of." § 27-19-201(1), MCA. That requires showing "only a prima facie violation of [the movant's] rights." *Driscoll II*, ¶ 16 (cleaned up). MDP and Bohn have made the required prima facie showing that the Challenged Restrictions violate the constitutional rights of Montanan voters.

A. The Montana Constitution requires that restrictions on the right to vote must satisfy strict scrutiny, and the Secretary tacitly admits that none of the Challenged Restrictions do.

The Secretary again asks this Court to depart from longstanding precedent establishing that restrictions on the right to vote are to be closely scrutinized by Montana courts, arguing that this Court instead should apply a highly deferential rational basis standard. Resp. at 14, 29, 47. But the Montana Supreme Court has been clear: laws that implicate fundamental rights, including the right to vote, are subject to strict scrutiny. *See State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 113 P.3d 281 ("A right is 'fundamental' under Montana's Constitution if the right . . . is found in the Declaration of Rights"); *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236 (statutes that implicate fundamental rights "must be strictly scrutinized"); *see also Driscoll v. Stapleton*, No. DV 20 408, 2020 WL 5441604, at *6 (Mont. Dist. Ct. May 22, 2020) ("*Driscoll I*") (applying strict scrutiny to claims alleging violation of the right to vote).

The very fabric of the Montana Constitution reflects the drafters' views of voting rights as particularly sacrosanct. Unlike the federal constitution, the Montana Constitution contains an explicit and affirmative grant of the right to vote. Mont. Const. art. II, § 13; art. IV, § 2; *see also* Mont. Const art. II, § 4. The Secretary's assertion that the Montana Constitution and the U.S. Constitution "are equivalent" in their recognition of that right, Resp. at 19 n.5, is simply not true. In fact, Montana is one of only seven states whose constitution contains *two different affirmative grants* of the right to

vote, as well as a negative prohibition on infringements of that right. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101-07, 107 n.91 (2014).

Without citing a single supporting case, the Secretary argues that "the Montana Supreme Court directs district courts" to apply a balancing test for laws implicating the fundamental right to vote. Resp. at 17. The Secretary is wrong. Montanans' right to vote, like the rights of free speech, association, and due process, is protected in the Declaration of Rights in the Montana Constitution and is, consequently, a fundamental right. *See Riggs*, ¶ 47; *accord Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, 325 P.3d 1204; *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 43, 744 P.2d 895 (1987). Laws that implicate these rights "can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *Mont. Env't Info. Ctr.*, ¶ 63; *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 23, 314 Mont. 314, 65 P.3d 576 (applying strict scrutiny to voting restriction); *Driscoll I*, 2020 WL 5441604, at *6 (same).[4]

The Secretary's argument that the Montana Supreme Court has applied less onerous standards of review even when fundamental rights are implicated, *see* Resp. at 17-18, relies on inapposite cases. For instance, in *Montana Cannabis*, the Court premised its application of rational basis review on the finding that no fundamental right was implicated by the challenged law. *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶¶ 21, 23, 32, 366 Mont. 224, 286 P.3d 1161. Likewise, in *Nelson*, after noting that "right[s] expressly enumerated in the Montana Constitution" are "subject to the highest degree of protection," the Court held that the challenged conduct did not implicate a fundamental right. *Nelson v. City of Billings*, 2018 MT 36, ¶¶ 13, 30, 390 Mont. 290, 412 P.3d 1058. So, too, in *Montana Shooting Sports Ass'n v. State*, 2010 MT 8, ¶ 20, 355 Mont. 49, 224 P.3d 1240 (holding the collection of social security numbers did not implicate the fundamental right of privacy), and *Wiser v. State, Dep't of Com.*, 2006 MT 20, ¶ 20, 331 Mont. 28, 129 P.3d 133 (holding the fundamental right to privacy does not include a right to obtain medical from unlicensed persons). The Secretary similarly mischaracterizes the Supreme Court's holding in *Willems*, which did not apply a balancing test, but

[4] The Secretary argues that applying strict scrutiny would render unconstitutional even laws that make voting *easier*. Resp. at 15. But that argument has been repeatedly rejected. *See, e.g.*, *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 836-37 (D. Mont. 2020) (dismissing plaintiff's equal protection claim because a system "designed to ensure that all eligible Montanans can vote in the upcoming election" did not "condone or facilitate any disparate treatment of Montana voters"); *Short v. Brown*, 893 F.3d 671, 677-78 (9th Cir. 2018) (holding a law that "makes it easier for some voters to cast their ballots by mail" does not burden the right to vote).

rather held that the plaintiffs' requested remedy would not cure the purported violation of the right to suffrage. *Willems*, ¶ 34.[5]

By focusing her efforts on arguing for a lower standard of review not supported by Montana authority and presenting no reasoned argument that the Challenged Restrictions can survive strict scrutiny, the Secretary tacitly admits that they cannot. For the reasons described in MDP and Bohn's Brief in Support of Motion for Preliminary Injunction, that is precisely the case.

B. Even if the Court applies a balancing test, the Challenged Restrictions still must satisfy a demanding standard, and they do not.

The Court should decline the Secretary's request to depart from Montana Supreme Court precedent and weaken the protections that the Montana Constitution has long afforded the right to vote—a right that is preservative of all other rights. But even if the Court applies a balancing test, it should reject the Secretary's request to apply an unduly deferential form of rational basis review, which is inconsistent with even the *Anderson-Burdick* framework the Secretary suggests. Resp. at 19. Under *Anderson-Burdick*, courts apply a two-step process. First, the court considers whether and to what extent the challenged law burdens the right to vote. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Laws that impose severe burdens are subject to strict scrutiny. *See Norman v. Reed*, 502 U.S. 279, 280 (1992); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019). But even state regulations that impose less than "severe" burdens on the right to vote are subject to more exacting forms of scrutiny than rational basis review. Regardless of the extent of the burden, the state 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." *Ohio NAACP*, 768 F.3d at 545-46; *see also Anderson*, 460 U.S. at 789. Even a "minimal" burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Ohio NAACP*, 768 F.3d at 538 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.)). Moreover, "[t]he existence of a state interest . . . is a matter of proof." *Duke v. Cleland*, 5 F.3d 1399, 1405 n.6 (11th Cir. 1993). The Secretary fails to demonstrate that the Challenged Restrictions can satisfy the *Anderson-Burdick* standard.

[5] The Secretary attempts to dilute the level of scrutiny applied to fundamental rights by noting that fundamental rights are not absolute. Resp. at 18 n.4. But that is not inconsistent with strict scrutiny. *See Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977) (noting that even rights that are not absolute may trigger strict scrutiny).

1. Even under the *Anderson-Burdick* framework, the Secretary cannot evade scrutiny of the Challenged Restrictions by attempting to downplay the burdens imposed upon voters.

In arguing that the Challenged Restrictions pass constitutional muster, the Secretary downplays—or, in the case of EDR, entirely ignores—the burdens each imposes on Montana voters.[6] The Secretary would also have the Court ignore the burdens the Challenged Restrictions place on specific groups of Montana voters, but even under the Secretary's preferred *Anderson-Burdick* standard, courts are directed to specifically consider the effects of the challenged voting legislation on the voters who are actually affected, not the entire population of voters as a whole. *See, e.g.*, *Driscoll I*, 2020 WL 5441604, at *6; *see also Anderson*, 460 U.S. at 792-94 (holding "it is especially difficult for the State to justify a restriction that" imposes disparate burdens on identifiable groups of voters, including those who share an economic status); *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (holding 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"); *Vote Forward v. DeJoy*, 490 F. Supp. 3d 110, 116-18, 121-28 (D.D.C. 2020) (finding postal policy did not survive *Anderson-Burdick* because changes "place an especially severe burden on voters who have no other reasonable choice than to vote by mail"); *League of Women Voters of Florida, Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216-1217 (N.D. Fla. 2018) ("Disparate impact matters under *Anderson-Burdick*."). And the severity of the burden of a challenged restriction is greater when it disproportionately falls upon populations who already face greater hurdles to participation and are less likely to overcome the increased costs of participation. *See Ohio NAACP*, 768 F.3d at 545 (finding significant burden that fell disproportionately on African American, lower-income, and homeless voters likely to use the voting opportunities eliminated by challenged law).

MDP and Bohn have shown that each of the Challenged Restrictions burden the right to vote of young, elderly, low-income, disabled, and Native voters. Ending EDR prevents those voters from relying on election day-specific amenities, like time off from work, organized transportation,

[6] The Secretary asserts that the Voter ID Restrictions impose only a small burden on voters characterizing them as they merely elevating government over non-government IDs, Resp. at 20, and that the Renewed Ballot Assistance Ban imposes no more than the usual burden of voting by forcing voters to return their own ballots. *Id.* at 46. As discussed below, this ignores the actual burdens these laws impose on the Montana voters who will be subject to them. And the Secretary does not even acknowledge the burden imposed on voters by eliminating EDR, instead portraying it as a mere minor change to Montana's voting laws. *Id.* at 35.

extended hours, and the one-stop option afforded by registering on election day. Mot. at 16-17. It also prevents voters who discover previously unknown errors in their voter registration information from updating that information and casting their ballots on election day. *Id.* The Voter ID Restriction burdens young voters, who are far more likely to vote using IDs issued by Montana colleges and universities, from casting their ballots without showing additional documentation, which they are far less likely to possess. *Id.* at 17. And the Renewed Ballot Assistance Ban disproportionately burdens populations of voters who—because of jobs, school-related obligations, distance from election offices, unreliable postal service, and physical limitations—need additional assistance requesting, casting, or returning their absentee ballots. *Id.* at 17-18.

The Secretary ignores MDP and Bohn's evidence of the burdens placed on voters and instead brandishes *Brnovich v. Democratic National Committee*. *See* Resp. at 47-48. But *Brnovich* does not support the Secretary's position. *Brnovich* held that two Arizona election rules did not violate a federal statute that is not at issue in this case: Section 2 of the Voting Right Act's discriminatory results prohibition. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021). That said, even *Brnovich* emphasizes that courts must consider the totality of circumstances in assessing whether certain groups of voters have an equal opportunity to participate in the political process. *Id.* at 2338. As a result, the Court weighed evidence related to the burden on minority voters, as well as the disparities in the burden on those voters as compared to other voters. *Id.* at 2344-48. By offering those non-exhaustive guideposts to assist courts in this factual inquiry, the *Brnovich* Court clarified that "any circumstance that has a logical bearing on whether voting is 'equally open' and affords 'equal opportunity' may be considered." *Id.* at 2338. And the *Brnovich* Court was highly deferential to the facts found by the trial court, which, in that case, found that the evidence before it did not establish a Section 2 violation. *Id.* at 2330. In other words, nothing in *Brnovich* provides a shield for the Secretary; in this case, as in all cases challenging a restriction on the right to vote, this Court must carefully consider the evidence before it. And in this case, which is brought under the Montana Constitution, it must do so within the legal framework established by the Montana Supreme Court for evaluating such challenges.

The Secretary's interaction with the actual evidence presented in this case is highly dismissive and cannot possibly carry the burden that she must meet for the Challenged Restrictions to survive. Relying on purely anecdotal and unsupported assertions, the Secretary dismisses the burdens imposed by the Challenged Restrictions as impacting just a "few qualified voters." Resp. at 24. But the Secretary ignores that courts often find that laws that threaten disenfranchisement can impose a severe

burden on the franchise even when a relatively small number of voters are affected. *See, e.g.*, *Driscoll I*, 2020 WL 5441604, at *6; *see also Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (disqualifying provisional ballots that constituted less than 0.3 percent of total votes inflicted "substantial" burden on voters); *Ga. Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1264 (N.D. Ga. 2018) (finding severe burden where 3,141 individuals were ineligible to register).

The Secretary's attempts to minimize the burdens imposed by the Voter ID Restrictions are similarly baseless. Although the Secretary claims that "[p]articipation in American life routinely requires personal identification," Resp. at 23, those routine activities permit forms of ID, such as out of state drivers' licenses, that the Voter ID Restrictions do not. Ignoring the extensive evidence put forward by MDP and Bohn, the Secretary baldly asserts—without citing any supporting evidence—that young voters are not burdened by the Student ID Restriction because "most" young voters have other, acceptable forms of identification. Resp. at 13. But Plaintiffs' evidence directly contradicts that assertion. *See* Mot. at 8-9. In a fruitless attempt to downplay the burdens imposed by the Voter ID Restrictions, the Secretary points to additional hoops voters lacking required IDs may jump through. Resp. at 11-12 (describing provisional balloting and affidavit options). But those options impose their own burdens. *Cf. Priorities USA v. State*, 591 S.W.3d 448, 454 (Mo. 2020) (holding Missouri's affidavit exception to the state's voter ID law, which permitted voters to execute an affidavit and present a form of non-photo identification, unconstitutionally burdened the right to vote).

Also baseless are the Secretary's attempts to minimize the burdens imposed by the elimination of EDR and the Renewed Ballot Assistance Ban. The Secretary does not meaningfully respond to the evidence MDP and Bohn presented about the burdens that would imposed by the elimination of EDR, including the undisputed evidence that over 70,000 Montanans have relied on EDR since its inception. Mot. at 3. Instead, she simply argues that the law makes a minor change to the current scheme. Resp. at 35. The evidence tells a markedly different story. And regarding the Renewed Ballot Assistance Ban, the Secretary claims that Montana's election system "generally makes it very easy to vote." Resp. at 46 (listing ways voters may return their ballots). But the Montana Supreme Court has already held that the availability of other means of returning ballots does not eliminate the burdens imposed by ballot assistance bans. *See Driscoll II*, ¶ 25.[7]

[7] The Secretary's narrow focus on the Renewed Ballot Assistance Ban's effect on the *return* of ballot collection ignores the additional burdens that law imposes on *requesting* and *obtaining* absentee

The Secretary further attempts to minimize the burdens imposed by the Challenged Restrictions by trying to limit the right to vote to only the final step in the process. *See* Resp. at 45-46. The Secretary is again wrong. *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219 ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.") (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)).

2. The Secretary's vague and overly broad purported state interests do not satisfy either strict scrutiny or the *Anderson-Burdick* balancing test.

The Secretary attempts to justify the burdens imposed by the Challenged Restrictions by pointing to the State's interests in ensuring confidence in elections, preventing voter fraud, and ameliorating administrative burden. But none of these justifications pass constitutional muster. Further, vague, abstract, or hypothesized state interests, or overbroad generalizations or justifications invented post-hoc in response to litigation, of course, cannot satisfy strict scrutiny. Nor do they satisfy the *Anderson-Burdick* test.

Anderson-Burdick requires that the Challenged Restrictions are "actually necessary" to serve specific state interests, and that they actually and effectively address the specific problem. *See Obama for Am.*, 697 F.3d at 434 (finding state failed to offer evidence that local election officials actually struggled to cope with the period of early voting that the state eliminated, fatally undermining its "vague interest" in smooth election administration); *Ohio NAACP*, 768 F.3d at 547 (finding state failed to show that the particular type of voter fraud about which it expressed concern was "logically linked" to the restriction on early voting and registration at issue, and further failed to explain how the restriction would prevent the fraud). In *Anderson* itself, in fact, even after the Court determined that a proffered state interest was legitimate, it went on to ask (1) whether there was anything in the record before it that undermined that interest (the Court found there was), (2) whether the law actually promoted that interest (the Court found it did not), and (3) whether the law was necessary to achieve that interest (the Court found it was not). *See Anderson*, 460 U.S. at 7; *see also id.* at 799, 802-05 (similar analysis of other proffered interests). As a result, the restriction did not survive.

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ballots. *See* Mot. at 15. HB 530 imposes a civil penalty of $100 each time a person receiving a "pecuniary benefit" "distribute[s], order[s], request[s], collect[s], or deliver[s]" ballots. In other words, the Renewed Ban sweeps far broader than merely prohibiting organizations from assisting a voter in returning their completed ballot—it also applies to assisting a voter in requesting and receiving their ballot in the first place. The Secretary does not even address this aspect of the ban.

The Secretary offers no substantive evidence that the Challenged Restrictions are "actually necessary," or that the Challenged Restrictions would actually address any of the interests the Secretary claims they serve. The Secretary instead appeals to *Brnovich*'s discussion of a state's interest in preventing voter fraud. But, as discussed, *Brnovich* considered a claim under the Voting Rights Act that Arizona's voting laws diluted minority voting power. *See Brnovich*, 141 S. Ct. at 2334. Plaintiffs' claims here are constitutional, and the Secretary's reliance is misplaced. *Cf. Fair Fight Action, Inc. v. Raffensperger*, Order on Motion for Summary Judgment, No. 18-cv-5391 at *29 n.26 (N.D. Ga. Nov. 15, 2021) (describing differences in the Section 2 analysis under *Brnovich* and the *Anderson-Burdick* analysis). Further, the Challenged Restrictions were not only passed in the absence of voter fraud in Montana, but also in the wake of an indisputably secure election. Ex. 36 at 3. Nevertheless, sidestepping the voluminous evidence Plaintiffs have produced demonstrating that Montana's elections are secure, the Secretary cites two recent charges of non-citizen residents attempting to register to vote and another Montanan's attempt to register under the Spanish translation of the name "Mikey Mouse." Resp. at 22. But those incidents are isolated, and in any event, are unrelated to third party ballot assistance, use of student IDs as a primary form of ID, or EDR—the practices eliminated by the Challenged Restrictions.

Attempting to justify the burdens imposed by the Challenged Restrictions, the Secretary cries wolf about a "crisis" of confidence in American elections. Resp. at 1-3. However, just months before the 2020 general election, the Secretary's office relied on an expert report touting Montanans' high levels of confidence in their elections, which were found to be "higher than any other mostly or all [vote-by-mail] states." Ex. 37 at 27-30. And even if Montanans' confidence has since decreased, it does not save the Challenged Restrictions. The Secretary provides no evidence suggesting that third party ballot assistance, use of student IDs as a primary form of ID, or EDR have contributed in any way to decreased confidence in elections. And the Secretary's failure to connect the Challenged Restrictions to confidence in elections is hardly surprising—to the extent there is a crisis of confidence, it is one manufactured by those who have contested in bad faith the results of the 2020 election and cannot justify the burdens of the Challenged Restrictions.

Nor has the Secretary shown that the Challenged Restrictions will actually increase confidence in elections. In fact, the research relied on by the Secretary regarding strict voter ID laws says otherwise. *See* Enrico Cantoni and Vincent Pons, *STRICT ID LAWS DON'T STOP VOTERS: EVIDENCE FROM A U.S. NATIONWIDE PANEL, 2008-2018*, at 25-26, National Bureau of Economic Research (Revised May 2021),

https://www.nber.org/system/files/working_papers/w25522/w25522.pdf (analyzing "effects of strict ID laws on . . . beliefs on election integrity" and finding "no significant impact on . . . public confidence in election integrity[,]" which "weakens the case for adopting such laws in the first place"). If, as Cantoni and Pons conclude, strict voter ID laws do not increase confidence in elections, it is no wonder the Secretary is unable to muster any evidence that eliminating a form of acceptable primary ID will do so.

The remaining interests the Secretary claims are similarly unavailing. In defense of the Voter ID Restrictions, the Secretary claims an interest in imposing a voter ID requirement. Resp. at 21. But the state's interest in requiring an ID is not at issue here. What is in question is the State's interest in limiting the use of IDs issued by state colleges and universities. The Secretary also points to the interest in ensuring compliance with residency requirements. Resp. at 21. But eligibility to vote is addressed during the registration process, when voters must prove their identity and obtain a voter registration confirmation form before they receive a voter registration card, § 13-2-110(3)(a)-(c), (4)(a), MCA, not when somebody votes. And other than a U.S. passport or Tribal ID, none of the primary forms of identification affirm voting eligibility—noncitizens can obtain a Montana driver's license or state ID card, concealed carry permit, and a military ID, and none of those forms of ID prove a voter's residence, Mot. at 10, a fact even the Secretary acknowledges, *see* Resp. at 10 ("Primary IDs are sufficient by themselves to establish voter identification."). Although the Secretary attempts to justify the exclusion of student IDs on the basis of potential fraud, Resp. at 22, she fails to provide any evidence that the use of student IDs has resulted in fraud or rebut MDP and Bohn's evidence to the contrary, Mot. at 9-10.

In defense of the elimination of EDR, the Secretary cherry-picks specific administrative tasks without explaining how EDR actually impacts them. Although the Secretary claims that eliminating EDR gives election officials additional time to process ballots, Resp. at 26, Montana does not limit the number of days the state has to certify election results after election day. §§ 13-15-507, 13-15-401, 13-15-402, MCA. Moreover, the statutory scheme already contemplates that the counting of ballots is not complete until the Monday after the election at the earliest, when federal write in ballots are due to be received and provisional ballots are allowed to be counted. §§ 13-21-206, 13-15-107, MCA. And the Secretary cites no evidence that any county has ever had any difficulty meeting applicable canvassing deadlines, let alone that any difficulty arose because of EDR. Without citing any evidence that EDR causes election officials to make mistakes on election day, the Secretary claims that eliminating EDR alleviates the potential for error. Resp. at 34. And as election officials

and legislatures alike admitted during the legislative hearings on HB 176, there is no evidence of EDR causing errors. Mot. at 7; Mot. Ex. 15, House State Admin. Comm. at 30:17-20; Semerad Decl. ¶ 5; Seaman Decl. ¶ 7.[8] Finally, the Secretary erroneously claims that eliminating EDR reduces long wait times at polling locations. Resp. at 25. Because EDR does not occur at polling locations, that claim is baseless. Resp. Ex. 4, ¶¶ 26; Resp. Ex. 6, ¶¶ 9-10.

Finally, to defend the Renewed Ballot Assistance Ban, the Secretary asserts the statute serves its interests in preventing fraud and coercion and intimidation of voters, as well as in regulating the connection of money and ballot collection. Resp. at 48-50. But the Secretary has not produced, nor has undersigned counsel independently uncovered, any evidence of fraud, intimidation, or coercion linked to ballot collection—paid or unpaid—in Montana. The specter of fraud cannot justify the burdens that HB 530 imposes on Montanans.

III. The Challenged Restrictions violate Equal Protection.

MDP and Bohn demonstrated that the Challenged Restrictions violate Montana's Equal Protection Clause by disproportionately and disparately abridging the right to vote of young Montana voters. Mot. at 18-19. Without seriously grappling with the impact of the Challenged Restrictions on Montana's youngest voters, the Secretary's Response splits hairs to defend them. But none of the Secretary's arguments withstands scrutiny.

The Secretary first makes the unsupported assertion that MDP and Bohn cannot establish unequal treatment of young voters without assigning an age range to that category of voters. Resp. at 13, 31. But the first step of the equal protection analysis merely requires "identify[ing] the classes involved and determine[ing] if they are similarly situated." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, 325 P. 3d 1211. The goal of doing so is to "isolate the factor allegedly subject to impermissible discrimination." *Id.* ¶ 29. Thus, the class need only be defined "in a way which will effectively test the statute without truncating the analysis." *Id.* ¶ 34. Here, because the Challenged Restrictions disproportionately impact young voters, they "create[] two classes out of similarly situated persons, distinguished only by the[ir] age-based" access to the franchise. *Id.* ¶ 31. The Secretary also half-heartedly suggests that evidence regarding the burdens imposed on *student voters* cannot serve as a proxy for *young voters*. Resp. at 12-13, 24. Courts, however, regularly do just that. *See, e.g.*, *League of Women Voters of Florida*, 314 F. Supp. 3d at 1216, 1221, 1223 (finding Secretary

[8] Citations to declarations refer to declarations filed in support of MDP and Bohn's Memorandum in Support of Motion for Preliminary Injunction.

of State's prohibition on early voting on college campuses "lopsidedly impacts Florida's youngest voters" and ultimately concluding that the prohibition failed *Anderson-Burdick* and also separately violated the 26th Amendment to the U.S. Constitution because it restricted access to the franchise on "account of age"); *see also United States v. State of Tex.*, 445 F. Supp. 1245, 1245 (S.D. Tex. 1978), *aff'd sub nom. Symm v. United States*, 439 U.S. 1105 (1979) (holding requirement that students complete an additional questionnaire when registering to vote violated the Twenty Sixth Amendment); *Worden v. Mercer Cnty. Bd. of Elections*, 294 A.2d 233, 237 (N.J. 1972) (holding law targeting student voters "forc[ed] young voters to undertake special burdens").

Ignoring caselaw to the contrary, the Secretary further argues that the Challenged Restrictions present no equal protection issue because they do not facially classify voters by age. Resp. at 31-32. But an apparently neutral law may nonetheless violate equal protection if "in reality [it] constitute[es] a device designed to impose different burdens on different classes of persons." *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421. And MDP and Bohn have shown just that: young Montanans are unduly affected because the Restrictions constrict identification and voting methods disproportionately used by them. *See* Mot. at 18-19.

Despite the Secretary's refusal to acknowledge such evidence, the Legislature knew that the Challenged Provisions would have disproportionate impacts on young voters. *See* Mot. Ex. 15 at 21:9-15 (EDR), Mot. Ex. 20, Senate State Admin. Comm. at 13:6-15, House State Admin. Comm. at 19: 6-8 (student IDs), Mot. Ex. 29, House Judiciary Comm. at 15:7-11; 16:11-19; 22:16-20, Senate State Admin. Comm. at 12:14-13:13 (ballot collection). Perhaps most tellingly, Speaker of the House Wylie Galt made the intent of the Voter ID Restrictions explicit: during a legislative hearing on SB 169, Galt wondered "if you're a college student in Montana and you don't have a registration, a bank statement, or a W-2, it makes me kind of wonder why you're voting in this election anyway." Mot. at 10-11. He concluded that young voters have "little stake in the game." *Id.* While intentional discrimination is not necessary to prove Plaintiffs' claims, this evidence, too, strongly supports granting Plaintiffs' Motion. Indeed, the Supreme Court rejected a virtually indistinguishable rationale offered by Texas in *Carrington v. Rash*, 380 U.S. 89 (1965), when it attempted to justify restrictions that made it harder for "transient" members of the military to vote in that state.

IV. The Renewed Ballot Assistance Ban violates the freedom of speech and association.

The Secretary again attempts to rely on *Brnovich* to discount Plaintiffs' free speech and association claims. Resp. at 51-52. But the question before this Court is whether Plaintiffs have

shown, on first appearance, that the *laws at issue* constitute burdens on their freedoms of speech and association and do not "*bear[] a substantial relationship* to a sufficiently important governmental interest," *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 818 (E.D. Mich. 2020) (emphasis added), or are not "narrowly tailored" toward those ends, *Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021); *see also Driscoll II*, ¶ 16 (describing the preliminary injunction standard). *Brnovich* does not alter that standard.

V. Plaintiffs' challenges of the Renewed Assistance Ban are ripe for review.

The Secretary claims that, because she has not yet promulgated regulations to implement the Renewed Ballot Assistance Ban, Plaintiffs cannot challenge the law's ban on organized ballot collection. *See* Resp. at 42-43. But foot-dragging on the Secretary's part cannot stand as an impediment to constitutional review. The purpose of Montana's ripeness requirement is merely to "prevent the courts . . . from entangling themselves in abstract disagreements." *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 54, 365 Mont. 92, 278 P.3d 455 (cleaned up). Cases are unripe only when "the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Id.* By its terms, the Renewed Ballot Assistance Ban imposes a civil penalty of $100 each time a person receiving a "pecuniary benefit" "distribute[s], order[s], request[s], collect[s], or deliver[s]" ballots. Plaintiffs challenge that explicit statutory requirement.

The Secretary's ripeness argument rests on an assumption that the statute leaves much for the Secretary to implement. But if that were true, the Renewed Ballot Assistance Ban would constitute an unlaw delegation of legislative power. Article V, Section 1, of the Montana Constitution provides that "[t]he legislative power is vested in a legislature consisting of a senate and a house of representatives." That law-making power "may not be granted to an administrative body to be exercised under the guise of administrative discretion." *Bacus v. Lake Cnty*, 138 Mont. 69, 78, 354 P.2d 1056 (1960). Accordingly, in delegating powers related to the administration of statutes, the legislature must prescribe "a policy, standard, or rule" for the administrative body's guidance. *Id.* That policy, standard, or rule must be "sufficiently clear, definite, and certain to enable the agency to know its rights and obligations." *White v. State*, 233 Mont. 81, 88, 759 P.2d 971, 975 (1988). The law must leave "nothing with respect to a determination of what is the law" in order to be a proper delegation. *Id.* If the legislature fails to do so, "its attempt to delegate is a nullity." *Bacus*, 138 Mont. at 79.

If the Secretary is right that the Renewed Ballot Assistance Ban is not ripe for review until she promulgates regulations—or, in other words, that the statute imposing a criminal prohibition is

so inchoate that there is no real threat of enforcement to give rise to a dispute until she promulgates regulations—then HB 530 must not prescribe a "sufficiently clear, definite, and certain" policy, standard, or rule, and the legislature's delegation of authority violates Article V, Section 1. *Bacus*, 138 Mont. at 78 (1960).

VI. MDP and Bohn did not unreasonably delay in seeking a preliminary injunction.

The Secretary's complaint about delay is unfounded and insincere in light of her own efforts to delay this litigation and her agreement to the preliminary injunction briefing schedule. The parties agreed to a January 12, 2022 deadline for all Plaintiffs to file their motions for preliminary injunctions, and the Secretary cannot seriously complain that a motion is untimely or unduly delayed when it was filed on a deadline to which she previously agreed. *See, e.g.*, *Markson v. CRST Int'l, Inc.*, No. ED CV 17-1261, 2020 WL 8994104, at *2 (C.D. Cal. Apr. 14, 2020) (holding plaintiffs did not unduly delay filing a motion for leave to amend where motion was filed before the parties' stipulated deadline). The Secretary's unfounded assertions about delay are especially surprising because the Secretary herself significantly delayed progression of this case by seeking to stay discovery pending adjudication of her meritless motion to dismiss and refusing to respond to Plaintiffs' discovery requests for months while that motion was pending.

Even setting that aside, MDP and Bohn did not inexcusably delay seeking relief in this case. They filed their complaint and amended complaint on the same days the Challenged Restrictions were signed into law and went into effect. MDP Pls.' Compl. at 26; Act of Apr. 19, 2021, Mont. Laws ch. 244 (HB 176); Act of Apr. 19, 2021, Mont. Laws ch. 254 (SB 169); MDP Pls.' First Am. Compl. at 48; Act of May 14, 2021, Mont. Laws ch. 534 (HB 530). They then filed their motion for a preliminary injunction on January 12, 2022, in accordance with the parties' agreed-upon schedule and the Court-approved deadline—and well before the upcoming primary, the first state-wide election since enactment of the Challenged Restrictions. MDP Pls.' Mot. for Prelim. Inj.; 1/14/22 Order at 2. That timing is not cause for denying preliminary relief. *See Native Ecosys. Council v. Marten*, 334 F. Supp. 3d 1124, 1133 (D. Mont. 2018) (rejecting argument that ten-month delay in filing motion for preliminary injunction warranted denial of motion). Even in the context of election-related litigation, courts have rejected arguments that purported months—or even years—long delays in seeking preliminary injunctions barred issuance of those injunctions. *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016) (thirty-month delay); *Dem. Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1326 (11th Cir. 2019) (year-long delay); *Pavek v. Simon*, 467 F. Supp. 3d 718, 753 (D. Minn. 2020) (year-long delay).

The cases cited by the Secretary are inapposite, some because they involved years-long delays. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018); *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976); *see also Brown*, v. Jacobsen, No. CV 21-92, 2022 WL 122777, at *3 (D. Mont. Jan. 13, 2022). Others involved circumstances in which a party was aware of the consequences of a law well before seeking an injunction and "fostered the exigency with which [they we]re later confronted" by failing to seek an injunction sooner—circumstances not present in this case. *Flint v. Dennison*, 336 F. Supp. 2d 1065, 1066-67, 1070 (D. Mont. 2004) (denying motion for preliminary injunction requiring Associated Students of the University of Montana to allow plaintiff to take his seat in the senate where plaintiff was aware of campaign finance rule and chose to violate it and seek to avoid consequences through injunction rather than seek injunction against rule prior to election); *Fishman*, 429 U.S. at 1330.[9]

In other cases cited by the Secretary, the plaintiffs' delays undercut their argument that they faced imminent harm, either because plaintiffs waited to file a motion for a preliminary injunction even though the delay meant that the court had little time to rule before the threatened irreparable harm would be inflicted, *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1221 (D. Utah 2004), or because the plaintiff sought to delay preliminary injunction proceedings after filing a motion arguing it was suffering irreparable harm, *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90 (D.C. Cir. 2014).[10] MDP and Bohn, conversely, have not waited until the eleventh hour to seek a preliminary injunction, nor did they delay filing a motion for preliminary

[9] The Secretary cites a single case from Montana courts to imply that a preliminary injunction must be issued at the very beginning of a case or not at all. *See* Resp. at 8. But that case involved a challenge to an *extension* of an existing preliminary injunction years after it was initially entered and a party's argument that the existing preliminary injunction "expired after a reasonable time without notice and a hearing," and had nothing to do with when a motion for a preliminary injunction must be filed. *See Boyer v. Karagacin*, 178 Mont. 26, 34, 582 P.2d 1173 (1978), *overruled on other grounds by Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶ 12 & n.2, 319 Mont. 132, 82 P.3d 912.

[10] The Secretary represents that the *Open Top Sightseeing* court found that a 36-day delay between filing suit and seeking a preliminary injunction caused the court to deny the motion. Resp. at 9 (citing *Open Top Sightseeing* for the proposition that a "delay of 'thirty-six days' [was] not permitted . . . ."). The Secretary is, again, wrong. In *Open Top Sightseeing*, plaintiffs' requested postponement of preliminary injunction proceedings undercut the claim of irreparable injury, and it was the postponement, not the thirty-six days between filing suit and seeking an injunction, that undercut the claim. *Open Top Sightseeing USA*, 48 F. Supp. 3d at 91 ("The plaintiffs, *by their actions in seeking to prolong the briefing and hearing on their motion for a preliminary injunction*, have demonstrated that any alleged harm lacks the urgency and immediacy required to grant the extraordinary relief the plaintiffs[] request.") (emphasis added).

relief while already suffering from the threatened injury. Instead, Plaintiffs have sought a preliminary injunction well before the first statewide election after the Challenged Restrictions went into effect, leaving the Court enough time to fashion appropriate preliminary relief.

Finally, even if MDP and Bohn had delayed filing their motion for a preliminary injunctions—and they did not—that would not be sufficient reason to deny that motion. "[D]elay is but a single factor to consider in evaluating irreparable injury; courts are 'loath to withhold relief solely on that ground.'" *Arc of Calif. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (quoting *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984)). Because the Plaintiffs have otherwise demonstrated that they are entitled to a preliminary injunction under § 27-19-201, MCA, any purported delay does not defeat their motion.

CONCLUSION

For the reasons discussed above and in their brief in support of their motion for preliminary injunction, MDP and Bohn respectfully request that this Court enter a preliminary injunction enjoining the Challenged Restrictions before the June 7, 2022 primary.

Dated: March 2, 2021

Respectfully submitted,

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