

RYLEE SOMMERS-FLANAGAN

Upper Seven Law

P.O. Box 31

Helena, MT 59624

Phone: (406) 396-3373

Email: rylee@uppersevenlaw.com

RYAN AIKIN

Aikin Law Office, PLLC

P.O. Box 7277

Missoula, MT 59807

Phone: (406) 840-4080

Email: ryan@aikinlawoffice.com

Attorneys for Plaintiffs

**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,

vs.

CHRISTI JACOBSEN, in her official
capacity as Montana Secretary of State,

Defendant.

Cause No. DV 21-0451

Hon. Michael Moses

**YOUTH PLAINTIFFS'
BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
BRIEF IN SUPPORT
OF YOUTH PLAINTIFFS'
CROSS MOTION
FOR SUMMARY JUDGMENT**

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INTRODUCTION

House Bill 506 (“HB506”) unconstitutionally burdens the rights of eligible voters who turn 18 in the month before election day by limiting their access to early voting and to absentee ballots. As a result, HB506 violates the Montana Constitution in three ways. First, HB506 limits the terms on which certain persons can vote and, in so doing, directly interferes with young Montanans’ free exercise of their fundamental right of suffrage. Second, HB506 creates a class of individuals who turn 18 in the month before election day and prevents them from accessing their ballots at the same time as otherwise indistinguishable older adults, thus violating their fundamental right to equal protection. Third, HB506 directly contravenes the Montana Constitution’s guarantee that persons under 18 enjoy the same rights and privileges as adults by making voting more difficult for persons who are *not yet* 18—but will be on election day—than it is for everyone who is already 18.

An individual’s age on election day—and no other day—determines whether a Montanan is eligible to vote. HB506 impermissibly saddles newly 18-year-olds with different rules than older but otherwise indistinguishable voters and runs counter to fundamental values of civic engagement, popular sovereignty, and self-government encompassed in the Montana Constitution.

Because no material fact as to HB506 is in dispute, Plaintiffs Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group (“Youth Plaintiffs”), hereby submit this Brief in Support of their Motion for Summary Judgment on Counts Three, Four, and Five of their Complaint, each of which

separately sets forth how HB506 violates the Montana Constitution. Said otherwise, Youth Plaintiffs move for summary judgment because, on its face, HB506 unconstitutionally burdens new voters and specifically discriminates against them because of their age and their status as minors. Youth Plaintiffs also join the Montana Democratic Party (“MDP”) and Western Native Voice (“WNV”) plaintiffs’ brief in opposition to Defendant Secretary of State Jacobsen’s motion for summary judgment filed jointly and concurrently with this Motion.

BACKGROUND

I. Constitutional Framework

The first two fundamental rights identified by the Montana Constitution are popular sovereignty and self-government. Mont. Const., art. II, §§ 1, 2. These rights are secured and realized through the right to vote—an independent protection in the Montana Constitution provided in Article II, § 13. The right to vote is unequivocal, affirmative, and deeply hostile to legislative interference: “All 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.” *Id.*, § 13.

The right to vote appears elsewhere in the Montana Constitution, too. Article IV of the Montana Constitution is dedicated to “Suffrage and Elections,” and announces certain requirements and definitions. Article IV, section 2 defines “Qualified Elector” as follows:

Any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector unless he is serving a sentence for a felony in a penal institution or is of unsound mind, as determined by a court.

References to the age 18 appear three times in the Montana Constitution. In the first instance, it is used to define “Adult Rights,” in Article II, § 14. Next, it appears in the Montana Constitution’s guarantee of the “Rights of Persons Not Adults,” which requires, “The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.” Mont. Const., art. II, § 15. When it appears a third time in the definition of “Qualified Elector,” it unequivocally attaches the right of suffrage to the age 18.

While this last provision is consistent with the Twenty-Sixth Amendment (which was ratified in 1971—one year before Montanans voted to adopt the Montana Constitution), Montana’s commitment to the voting rights of younger persons predated federal changes. Montana voters ratified a measure to lower the voting age to 19 in 1969, and Montana became one of only nine states to reduce the voting age below 21 before ratification of the Twenty-Sixth Amendment.¹ Bromberg Report at 5 (Jan. 14, 2022). Montana’s 1972 Constitutional Convention similarly “articulated broad, consistent, and unopposed support for youth enfranchisement and youth voting rights.” *Id.* at 17.

Article IV of the Montana Constitution also requires that the legislature “provide by law the requirements for residence, registration, absentee voting, and

¹ Montana’s own Senator Mike Mansfield was “one of the leading congressional advocates of constitutional reform in the area of voting age.” Bromberg Report at 6 (quoting *Lowering the Voting Age to 18: Hearing on S.J. Res 8, S.J. Res. 14, and S.J. Res. 78 Before the Subcomm. on Constitutional Amends. of the S. Comm. on the Judiciary*, 90th Cong. 4 (1968) (Sen. Bayh’s remarks introducing Sen. Mansfield)); *see generally* Bromberg Report at 6–11.

administration of elections,” and “insure the purity of elections and guard against abuses of the electoral process.” Mont. Const., art. IV, § 3. The framers specifically considered whether absentee voting should be available to all Montanans, and concluded that it should, unanimously rejecting an amendment that would have limited absentee voting to “service-men and students.” Mont. Const. Conv., III Verbatim Trans., at 431–433 (Feb. 17, 1972) (discussing and voting on Delegate Kelleher’s proposed amendment); *see also* Bromberg Report at 18.

II. Factual & Procedural Background

Representative Paul Fielder sponsored HB506 in response to the Secretary’s request that the legislature resolve apparent conflict in how election administrators managed distribution of ballots to individuals turning 18 in the month before election day. *See* Compl. ¶ 76; Def’s Br. in Resp. to Ps’ Prelim. Injunction Mots. & in Supp. of Def’s Mot. for Summ. J. at 35 (hereinafter Def’s SJ Br.); Def’s SUF ¶ 87. HB506 amended § 13-2-205(2), MCA, to include the following requirement: “Until the individual meets residence and age requirements, a ballot may not be issued to the individual and the individual may not cast a ballot.” *See* Def’s SJ Br. at 35.

When the bill was presented to the House State Administration Committee for discussion and public comment, testimony from many groups and individuals pointed out withholding ballots from individuals who would be eligible to vote by election day would impose barriers and sow confusion. *See* Bromberg Report at 33 (describing testimony from six witnesses who opposed HB506) (citing House State Admin. Hrg.

Video on HB506, at 10:32:08 (Feb. 24, 2021)).² Informational witness Regina Plettenberg—who serves as President of the Montana Association of Clerks & Recorders and as the Ravalli County election administrator—testified that in Ravalli County, she would normally mail ballots to all registered voters who will be eligible to vote by election day. But, she explained, under HB506 the situation would change:

[Right now, i]f we receive the ballot back before they turn 18, we hold it, we don't process it, we just hold it, until . . . they turn 18, and then we'll process it. . . . So like let's say they turn 18 on Tuesday, we would not be able to start counting that until the Tuesday, the election day. So if this bill passes, I don't believe we'd be able to mail that ballot to the voter, so if they can't come vote in person, I think that is the concern of the opponents.

House State Admin. Hrg. Video on HB506, at 10:46:03. At the close of discussion, Representative Fielder acknowledged Plettenberg's testimony and opponents' concerns. He encouraged the Committee to amend the bill to reflect the practice in Ravalli County, noting that it would still accomplish the purpose of providing consistency across all of Montana's 56 counties. *Id.* at 10:59:46.

Two days later, Representative Kelly Kortum proposed an amendment to HB506, changing the language that prohibited the issuance and casting of ballots to instead read: "Until the individual meets residence and age requirements, a ballot submitted by the individual may not be processed and counted by the election administrator." Ex. A, HB506, Version 2, § 1(2).³ The House State Administration Committee passed the amendment unanimously. House State Admin. Hrg. Video on

² Available at http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/42591?agendaId=201039#info_.

³ Available at https://leg.mt.gov/bills/2021/HB0599/HB0506_2.pdf.

Kortum amendment to HB506, at 8:38:43 (Feb. 26, 2021).⁴ It then passed a floor vote in the House by a count of 90 to 10. Ex. B, HB506 Legislative History.

When Representative Fielder presented the bill to the Senate State Administration Committee, incorporating the Kortum amendment, the Secretary's Elections Director Dana Corson testified in support, explaining that "it helps clarify how 18-years-olds can get a ballot and vote." Senate State Admin. Hrg. Video on HB506, at 15:10:41 (March 19, 2021).⁵ No additional testimony was offered in support or opposition to the bill. *Id.* at 15:11:58.

Following this public hearing on March 19, the legislative history reflects that another amendment was introduced and passed in a 5 to 3 vote during an unrecorded "Committee Executive Action" meeting on April 9. Ex. B. The amendment proved to be, in essence, a reversion to the bill's original language that modified the bill to prevent election administrators from sending absentee ballots to Montanans who would be 18 on election day but were not 18 at the time of mailing. Ex. C, HB506, Version 3, § 1(2). The Senate passed the reverted version of HB506, resulting in a conflict with the House version and forcing the bill into a free conference committee for reconciliation. Ex. B. The free conference committee adopted the Senate version. No reason justifying or even articulating the reversal exists in the legislative record.

⁴ Available at http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20210226/-1/40977#agenda_.

⁵ Available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/41488?agendaId=208475>.

LEGAL STANDARD

“Summary judgment is appropriate when there are no genuine issues of material fact.” *Brishka v. Dep’t of Transp.*, 2021 MT 129, ¶ 9. “Disputes concerning only factual interpretations are properly handled on summary judgment.” *Buckley v. W. Mont. Cmty. Mental Health Ctr.*, 2021 MT 82, ¶ 12. If no genuine issue of fact exists, the Court determines “whether the moving party is entitled to judgment as a matter of law.” *Id.*

This Cross Motion for Summary Judgment on Counts Three, Four, and Five of Youth Plaintiffs’ Complaint presents only legal issues related to HB506. There are no genuine issues of material fact. Summary judgment is therefore appropriate.

ARGUMENT

HB506 violates the Montana Constitution in three ways. HB506 burdens young adults *because* of the timing of their 18th birthdays. To interfere with the free exercise of the right of suffrage is to violate that right. Treating a group differently based on age to condition the exercise of another fundamental right—with no other meaningful distinction—violates the right to equal protection. And subjecting minors to higher burdens precisely because they are minors plainly violates the Montana Constitution’s guarantee that persons under 18 are not to be treated differently unless the differential treatment enhances—rather than burdens—their rights.

I. Strict scrutiny applies to HB506.

When, as here, a suspect class or a fundamental right is affected, strict scrutiny applies. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17. This is well established.

See Driscoll v. Stapleton, 2020 MT 247, ¶ 18 (“[S]trict scrutiny[is] used when a statute implicates a fundamental right found in the Montana Constitution’s declaration of rights.”); *Mont. Cannabis Indus. Ass’n v. State*, 2012 MT 201, ¶ 16 (“Legislation that implicates a fundamental constitutional right is evaluated under a strict scrutiny standard, whereby the government must show that the law is narrowly tailored to serve a compelling government interest.”) (hereinafter *Mont. Cannabis I*); *Mont. Envtl. Info. Ctr v. Dep’t of Envtl. Quality*, 1999 MT 248, ¶ 60 (strict scrutiny—the most stringent standard—applies when a law interferes with exercise of a fundamental right or discriminates against a suspect class) (quoting *Wadsworth v. State*, 275 Mont. 287, 302 (1996)).

A fundamental right under the Montana Constitution is “either found in the Declaration of Rights or is a right ‘without which other constitutionally guaranteed rights would have little meaning.’” *Wadsworth*, 275 Mont. at 299 (citations omitted).

HB506 violates the right of suffrage, the right of equal protection, and the rights of persons not adults—three rights that appear in the Montana Constitution’s Declaration of Rights. Art. II, §§ 4, 13, 15. Each is fundamental, and thus strict scrutiny applies. *See, e.g., Driscoll*, ¶ 18; *Mont. Cannabis I*, ¶ 16; *Mont. Envtl. Info. Ctr*, ¶ 60. Because the Secretary cannot justify HB506 with any compelling government purpose nor show that HB506 is narrowly tailored to advance such an interest, it must be struck down.

II. HB506 interferes with the right of suffrage in violation of the express requirements of Article II, Section 13.

HB506 interferes with certain young voters' access to the franchise. The right of suffrage protects Montana elections, requiring that they be "free and open," and absolutely prohibits interference that prevents free exercise of the right to vote. By imposing a limit on the time period during which newly 18-year-olds may vote, HB506 plainly contravenes the text of Article II, Section 13—it literally "interfere[s] to prevent the free exercise of the right of suffrage."

In arguing that federal courts "hold that the right to vote does not include the right to vote absentee," Def's SJ Br. at 36, the Secretary commits two fundamental errors. First, this case is not in federal court and does not rely on federal law.⁶ *Cf. State ex rel. Bartmess v. Bd. of Trs. of Sch. Dist. No. 1*, 223 Mont. 261, 272 (1986) ("[W]e conclude that participation in extracurricular activities is not a fundamental right under the U.S. Constitution. However, that does not preclude a finding that the right is fundamental under Montana's Constitution."). Second, the Secretary

⁶ Most of the federal cases the Secretary cites for the proposition that the U.S. Constitution does not guarantee the right to vote absentee, Def's SJ Br. at 36, are a variation on a theme related to generally applicable deadlines: in *Mays v. LaRose*, plaintiffs challenged a generally applicable deadline for requesting an absentee ballot, 951 F.3d 775, 791–92 (6th Cir. 2020); in *Common Cause Indiana v. Lawson*, the challenged law required that absentee ballots be received by election day, 977 F.3d 663, 664 (7th Cir. 2020); in *Organization for Black Struggle v. Ashcroft*, plaintiffs challenged distinctions between absentee and mail-in ballots, also involving deadlines for the latter, 978 F.3d 603, 607–08 (8th Cir. 2020).

In the other two cases, the takeaway is that the U.S. Constitution does not require the availability of absentee voting. See *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809–10 (1969) (finding rational the Illinois legislature's different treatment of "pretrial detainees" and "the physically handicapped"); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 188 (5th Cir. 2020) (ruling that the Twenty-Sixth Amendment does not preclude a law that allows absentee ballots to issue exclusively to voters over age 65 and individuals who prove absence or disability).

assumes that only absentee voting is relevant and that the Montana Constitution does not protect absentee voting. But HB506 limits young voters' access to both early in-person voting and absentee voting. The Montana Constitution expressly requires the legislature to set requirements for absentee voting—presupposing its availability in Montana. Mont. Const., art. IV, § 3. And indeed, Montana law allows any elector to vote absentee. Section 13-13-212(3), MCA (“An elector may at any time request to be mailed an absentee ballot for each subsequent election in which the elector is eligible to vote as long as the elector remains qualified to vote and resides at the address provided in the initial application.”). This no-excuse absentee voting means that Montanans need not provide any reason to justify voting absentee. *See id.* § 13-13-212(1)(a).

Moreover, since 2014, more than 60% of Montanans have voted by mail—and that proportion has grown steadily to more than 70% in the 2018 election cycle. Herron Report ¶ 28, Table 1. HB506 thus restricts newly 18-year-olds' access to a tool that most Montana voters use routinely and which is expressly contemplated in the Montana Constitution.

The Secretary claims that HB506 is motivated by a desire for uniformity in the administration of elections across counties. Def's SJ Br. at 38. But Youth Plaintiffs have no objection to uniformity. Specifically, Youth Plaintiffs have no objection to the version of HB506 that the House passed and the Secretary supported. *See infra*. pp. 15–17. In its final form, however, HB506 restricts the terms on which certain persons can vote and, in so doing, interferes with young Montanans' fundamental

right of suffrage, flouting the guarantee that “no power . . . shall at any time interfere to prevent the free exercise of the right of suffrage.” Mont. Const., art. II, § 13.

III. HB506 violates the Montana Constitution’s right to equal protection.

HB506 creates a class of individuals who turn 18 in the month before election day and prevents those individuals from accessing their ballots at the same time as similarly situated—otherwise indistinguishable—older adults. The Secretary argues that the distinction is constitutional because age determines access to the franchise. But age for purposes of establishing voter eligibility matters only on election day.

Montana’s Equal Protection guarantee requires that “persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment.” *Gazelka v. St. Peter’s Hosp.*, 2018 MT 152, ¶ 15 (citations omitted). In so doing, it “ensures that ‘Montana’s citizens are not subject to arbitrary and discriminatory state action.’” *Wilks v. Mont. State Fund*, 2008 MT 29, ¶ 21 (quoting *Bustell v. AIG Claims Serv., Inc.*, 2004 MT 362, ¶ 19). To assess an equal protection challenge, Montana courts “first identify the classes involved, and determine if they are similarly situated.” *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 10. The two classes that HB506 creates are 1) individuals who turn 18 in the month before or on election day, and 2) individuals who turn 18 at any time before the month before election day.

In *Jaksha v. Butte-Silver Bow County*, the Montana Supreme Court invalidated a law that imposed a maximum hiring age on firefighters, concluding that although the defendant had identified a “legitimate governmental objective”—

protecting both firefighter safety and public safety—the age limitation was “not rationally related to achieving that objective.” 2009 MT 263, ¶ 23; *see also Reesor*, ¶ 19 (likewise invalidating a law that limited disability benefits for persons over a certain age). As here, the statute in *Jaksha* openly turned on age, but the underlying right the plaintiff sought to vindicate was the right to pursue a firefighter position despite being older than 34, not the fundamental right to vote. *Id.* ¶ 19. Just as individuals older and younger than 34 are similarly situated with respect to firefighting capacity, individuals who turn 18 at any time on or before election day are identically situated with respect to voter eligibility.

Unlike *Jaksha*, the equal protection violation here implicates the fundamental right to vote, and strict scrutiny applies. *Wadsworth v. State*, 275 Mont. 287, 302 (1996); *see Driscoll*, ¶ 11 n.3 (“It is undisputed here that the right of suffrage is a fundamental Montana Constitutional right.”). Limiting access to the ballot based on individuals’ specific birthdate serves no legitimate purpose, let alone the compelling government objective that strict scrutiny requires. And reduced access to absentee ballots and early in-person voting is enough to violate Youth Plaintiffs’ constitutional rights because “[t]he 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.” *See Big Spring v. Jore*, 2005 MT 64, ¶ 18 (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)). All Montanans who are eligible to vote on a given election day are indistinguishable with respect to their constitutional right to vote in that election—they all possess it, fully and unequivocally. *See Mont. Cannabis Indus. Ass’n v. State*,

2016 MT 44, ¶ 19 (hereinafter *Mont. Cannabis II*) (“Equal protection emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.” (quotation marks omitted)). Requiring certain voters to wait to access their ballots—whether in person or by mail—violates equal protection.

The Secretary urges that the age classification created by HB506 is “based on a fundamental difference between the two classes—the individual’s qualifications as an elector under Mont. Const. art. IV, § 2.” Def’s SJ Br. At 39. But a person’s qualifications as an elector prior to election day are irrelevant. HB506 itself creates an artificial distinction amongst electors who are all equally qualified on the only day that matters—election day. That is, HB506 limits access to the ballot based not on an individual’s age on election day (relevant), but on the proximity of an individual’s 18th birthday to election day (irrelevant).

In creating this distinction, HB506 limits newly 18-year-olds’ ability to access absentee ballots, a vital voting tool available to all other Montanans. *See supra* pp. 7–8; *see also, e.g.*, Roche Decl. ¶¶ 6, 13 (“I rely on the absentee ballot system.”); Dozier Decl. ¶¶ 4 (same); Lockner Aff. ¶¶ 11–12 (same); Hosefros Decl. ¶¶ 11 (same); Lockwood Decl. ¶¶ 13–16 (“Mail-in ballots have also been hugely important to me since the start of the COVID-19 pandemic.”). It also constrains certain individuals from early in-person voting. Declarant Isaac Nehring will turn 18 just four days before the June 7, 2022 primary election. Nehring Decl. ¶¶ 7–8. June 3 is a Friday and the day before his high school graduation. *Id.* ¶¶ 15–19. Under HB506, Nehring’s only options for voting in person are on Friday, June 3, which is his last

day of high school, Monday, June 6, or Tuesday, June 7. *Id.* If Nehring were unaware that he could pre-register to vote and attempted to register and vote in person after noon on Monday, June 6, he would be prevented from voting entirely due to the interaction between HB506 and House Bill 176, which eliminates election day registration and rolls the deadline for registering to vote back to noon the day before. HB506 imposes extreme limits on Nehring's options for voting. *Id.* ¶¶ 6–7, 15–21. He is not alone. *See* Herron Report ¶¶ 39–42 (describing the limitations for individuals with 18th birthdays that fall in the week before election day); *id.* ¶¶ 53, 61, 64 (providing a breakdown of the number of registered voters who turned 18 in the 30 days before election day for primary and general elections in 2014, 2016, 2018, and 2020). Dozens and sometimes hundreds of registered voters turn 18 in the *week* before each election day. *See, e.g., id.* ¶ 64. HB506 violates these voters' right to equal protection by limiting their access to the ballot relative to their similarly situated peers.

IV. HB506 violates the Montana Constitution's guarantee of equal access to fundamental rights for persons under 18 years of age.

The Montana Constitution is special in promising that persons under 18 enjoy the same rights and privileges of those over 18—unless an age-based restriction enhances (rather than interfering with) the exercise of a minor's fundamental rights. HB506 directly contravenes this requirement by making it harder for persons who are *not yet* 18—but will be on election day—to vote than it is for everyone else who is already 18. It is exactly this type of law that Article II, Section 15 prohibits.

The Secretary appears to misapprehend the import of this requirement. Youth Plaintiffs do not contend, as the Secretary would have it, that individuals should be allowed to vote in elections for which they are ineligible to vote. Rather, eligibility to vote is determined by citizenship, residency status, and age *on election day*.

The Secretary's argument is essentially that minors are minors—and minors can't vote. *See* Def's SJ Br. at 39–40 (quoting *Mont. Cannabis II*, ¶ 18). But HB506 only affects individuals who will be eligible to vote by election day. Their age on every day before election day is unrelated to their ability to meaningfully engage with voting in that election. *See Caldwell v. MACo Worker's Comp. Trust*, 2011 MT 162, ¶ 19 (holding “age was ‘unrelated to a person’s ability to engage in meaningful employment.’”). The Montana Constitution specifically guarantees that when minors are distinguished from adults, it must be for the purpose of enhancing—not undermining—their rights. *Matter of S.L.M.*, 287 Mont. 23, 35 (Mont. 1997) (“[I]f the legislature seeks to carve exceptions to this guarantee, it must not only show a compelling state interest but must show that the exception is designed to enhance the rights of minors.”). Yet instead of supporting young people in exercising their right to vote for the first time, the State elected to make voting more difficult.

Beyond being a fundamental right, voting is likely the most effective form of civic engagement, making youth access to it extremely valuable. *See* Bromberg Report at 15 (voting is by its nature habit forming and “[d]eliberately making it more difficult for *new* voters to build that habit of political participation quite literally threatens the future of participatory democracy” (quoting Jenny Diamond Cheng,

Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment, 67 Syracuse L. Rev. 653, 676 (2017)); cf. *Mont. Auto. Ass'n v. Greely*, 193 Mont. 378, 387 (1981) (“The only real influence that most voters can exert upon elected officials is to give or withhold their vote.”). Depriving young people on the precipice of adulthood access to the same tools and resources available to their older counterparts *because* they are on the precipice of adulthood is discriminatory and irreconcilable with the values embraced in Article II, Sections 4, 13, and 15 of the Montana Constitution. Moreover, it is exactly the sort of worse treatment for young people that Article II, § 15 of the Montana Constitution meant to guard against. Youth Plaintiffs seek only to prevent a derogation of their right to fully participate in elections in which they are eligible to vote.

V. HB506 is not closely tailored to advance a compelling government interest.

Because HB506 violates fundamental rights—the right of suffrage, the guarantee of equal protection, and the rights of persons not adults—it must satisfy strict scrutiny to survive. The Secretary’s proffered rationale may at first appear reasonable, but the relationship between HB506 and that rationale is in no way closely tailored.

The Secretary claims that HB506 is motivated by a desire “to ensure the integrity, reliability, and fairness of its election processes.” Def’s SJ Br. at 40–41. To this end, the Secretary argues that HB506 provides for uniform treatment and clarity consistent with this purpose. *Id.* at 41. Even assuming that the Secretary has identified a compelling interest here, she provides no explanation for rejecting a

version of the bill that would have advanced exactly the described interest while enhancing access to the vote, rather than restricting access. This failure to closely tailor HB506 to advance only that purpose through the least onerous means renders the law unconstitutional. *Mont. Env'tl. Info. Ctr.*, ¶ 63 (any statute that implicates a fundamental right “must be strictly scrutinized and 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”).

The House passed and the Secretary supported a nondiscriminatory version of HB506 that would have allowed voting officials to hold ballots submitted by young voters until they reached the age of 18—only to have the Senate revert to the original version when the time for public comment had elapsed. See Ex. A; Ex. B; *cf. Veasey v. Abbott*, 830 F.3d 216, 262 (5th Cir. 2016) (passing discriminatory ID law despite testimony about likely disparate impact “supports a conclusion of lack of responsiveness”). The Secretary was also aware before the 2021 legislative session that election administrators across Montana were handling distribution of ballots to new 18-year-olds in different ways—and had been since at least 2014. Def’s SJ Br. at 35 (citing McLarnon Decl. ¶ 6); *see also Malcomson v. Northwest*, 2014 MT 242, ¶ 31 (where the state had long administered workers’ compensation cases “without exposing injured workers to a potential violation of their constitutional right of privacy,” the new statute that allowed *ex parte* communications was overbroad and could not stand). Rather than rely on a genuinely nondiscriminatory, proven, and

accessible method for handling ballots, *see generally* House State Admin. Hrg. Video on HB506, at 10:46:03 (Feb. 24, 2021) (Plettenberg testimony); McLarnon Decl. ¶¶ 6(f), (g), the Secretary chose the option that most burdens first-time voters—and for no apparent gain to election administrators, who must now hold back ballots until an individual’s actual birthday, regardless of proximity to election day or the possibility that doing so will disenfranchise certain new voters. *Cf. Burns v. Cty. of Musselshell*, 2019 MT 291, ¶ 19 (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

The legislature routinely sets requirements for voting that do not offend constitutional guarantees—and sometimes the legislature passes election related laws that run afoul of the Montana Constitution. *Compare Willems v. State*, 2014 MT 82, ¶¶ 33–34 (agreeing that “the shuffling of legislators is a necessary byproduct of the redistricting process” and upholding a redistricting plan) *with Finke v. State ex rel. McGrath*, 2003 MT 48, ¶¶ 21–23 (invalidating a law that limited the franchise to owners of real property); *see also Driscoll*, ¶ 29 (vacating the district court’s preliminary injunction of the ballot receipt deadline and affirming the preliminary injunction of the Ballot Interference Prevention Act).

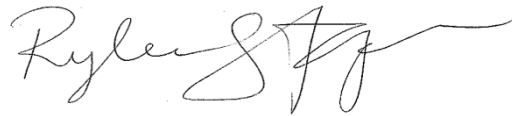
Imposing an arbitrary and unnecessary constriction of the time available for voting on individuals who turn 18 in the month before election day is an unconstitutional restriction on these rights. The Secretary’s professed reason for doing so is far from compelling in this context, and the tailoring is anything but

narrow. Even if the federal *Anderson-Burdick* standard applied, which it does not, HB506 could not survive because it is not a “reasonable, nondiscriminatory restriction[]’ upon the First and Fourteenth Amendment rights of voters.” *Mays v. LaRose*, 951 F.3d 775, 791–92 (6th Cir. 2020) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

CONCLUSION

For the reasons set forth above, Youth Plaintiffs respectfully request that this Court grant Youth Plaintiffs’ Cross Motion for Summary Judgment on Counts Three, Four, and Five of their Complaint and deny the Secretary’s Motion for Summary Judgment in full.

Respectfully submitted this 5th day of April, 2022.



Rylee Sommers-Flanagan
Upper Seven Law

Ryan Aikin
Aikin Law Office, PLLC

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 5th day of April, 2022, by email.

David M.S. Dewhirst
Office of the Attorney General
Justice Building, Third Floor
215 North Sanders Street
P.O. Box 201401
Helena, MT 59620-1401
david.Dewhirst@mt.gov

Austin Marcus James
Office of the Secretary of State
Montana Capitol Building, Room 260
P.O. Box 202801
Helena, MT 59620-2801
austin.james@mt.gov

Dale Schowengerdt
Ian McIntosh
Crowley Fleck, PLLP
900 North Last Chance Gulch, Suite 200
Helena, MT 59601
P.O. Box 797
Helena, MT 59624-0797
DSchowengerdt@crowleyfleck.com
imcintosh@crowleyfleck.com

/s/ Rylee Sommers-Flanagan
Upper Seven Law

Exhibit A

HB 506 Version 2

RETRIEVED FROM DEMOCRACYDOCKET.COM

1 HOUSE BILL NO. 506

2 INTRODUCED BY P. FIELDER

3 BY REQUEST OF THE SECRETARY OF STATE

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING ELECTION LAWS; REVISING
6 PROCEDURES FOR PROSPECTIVE ELECTORS TO REGISTER AND VOTE; CLARIFYING
7 REQUIREMENTS FOR A BOARD OF COUNTY CANVASSERS; ELIMINATING THE EXPERIMENTAL USE
8 OF VOTE SYSTEMS; AMENDING SECTIONS 13-2-205 AND 13-15-401, MCA; AND REPEALING SECTION
9 13-17-105, MCA."

10
11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12
13 **Section 1.** Section 13-2-205, MCA, is amended to read:

14 **"13-2-205. Procedure when prospective elector not qualified at time of registration.** ~~(1) An~~
15 Subject to subsection (2), an individual who is not eligible to register because of residence or age requirements
16 but who will be eligible on or before election day may apply for voter registration pursuant to 13-2-110 and be
17 registered subject to verification procedures established pursuant to 13-2-109.

18 (2) Until the individual meets residence and age requirements, a ballot SUBMITTED BY THE INDIVIDUAL
19 may not be issued to the individual and the individual may not cast a ballot PROCESSED AND COUNTED BY THE
20 ELECTION ADMINISTRATOR."

21
22 **Section 2.** Section 13-15-401, MCA, is amended to read:

23 **"13-15-401. Governing body as board of county canvassers.** (1) The governing body of a county
24 or consolidated local government is ex officio a board of county canvassers and shall meet as the board of
25 county canvassers at the usual meeting place of the governing body ~~within 14 days after each election,~~ at a
26 time determined by the board, ~~to and within 14 days after each election to complete the canvass the of returns.~~

27 (2) If one or more of the members of the governing body cannot attend the meeting, the member's
28 place must be filled by one or more county officers chosen by the remaining members of the governing body so

1 that the board of county canvassers' membership equals the membership of the governing body.

2 (3) The governing body of any political subdivision in the county that participated in the election may
3 join with the governing body of the county or consolidated local government in canvassing the votes cast at the
4 election.

5 (4) The election administrator is secretary of the board of county canvassers and shall keep minutes
6 of the meeting of the board and file them in the official records of the administrator's office."

7

8 NEW SECTION. **Section 3. Repealer.** The following section of the Montana Code Annotated is
9 repealed:

10 13-17-105. Experimental use of voting systems.

11 - END -

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Exhibit B

HB 506 Legislative History

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Montana Legislature

Detailed Bill Information

2021 January
Regular Session

The 67th Regular Session of the Montana Legislature adjourned Sine Die on April 29th, 2021; Legislative day 80.

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Bill Draft Number: LC0317 **Current Bill Text:** [Previous Version\(s\)](#)

Bill Type - Number: HB 506

[Associated Amendments](#) Disclaimer: All amendments are drafts only for consideration by a committee and are subject to change. An amendment formally adopted by the committee will be incorporated into the standing committee report to the respective body and, if adopted, will be engrossed into the next version of the bill.

Short Title: Generally revise election laws

Primary Sponsor: [Paul Fielder](#) (R) HD 13














Chapter Number: 531

Bill Actions - Current Bill Progress: Became Law

Bill Action Count: 62

Print Friendly

Action - Most Recent First	Date	Votes Yes	Votes No	Committee / Audio
Chapter Number Assigned	05/14/2021			
(H) Signed by Governor	05/14/2021			
(H) Transmitted to Governor	05/04/2021			
(S) Signed by President	05/04/2021			
(H) Signed by Speaker	05/04/2021			
(C) Printed - Enrolled Version Available	04/28/2021			
(H) Returned from Enrolling	04/28/2021			
(H) Sent to Enrolling	04/28/2021			
(S) 3rd Reading Free Conference Committee Report Adopted	04/27/2021	<u>30</u>	<u>20</u>	
(H) 3rd Reading Free Conference Committee Report Adopted	04/27/2021	<u>64</u>	<u>34</u>	
(S) 2nd Reading Free Conference Committee Report Adopted	04/27/2021	<u>30</u>	<u>20</u>	
(H) Scheduled for 3rd Reading	04/27/2021			
(S) Scheduled for 2nd Reading	04/27/2021			
(H) 2nd Reading Free Conference Committee Report Adopted	04/27/2021	<u>65</u>	<u>35</u>	
(H) Scheduled for 2nd Reading	04/27/2021			
(S) Free Conference Committee Report Received	04/27/2021			(S) Free Conference
(H) Free Conference Committee Report Received	04/27/2021	4	2	(S) Free Conference
(S) Hearing	04/27/2021			(S) Free Conference
(S) Free Conference Committee Appointed	04/23/2021			(S) Free Conference
(H) Free Conference Committee Appointed	04/23/2021			(S) Free Conference
(H) 2nd Reading Senate Amendments Not Concurred	04/23/2021	<u>94</u>	<u>6</u>	

				 
(H) Scheduled for 2nd Reading	04/23/2021			
(S) Returned to House with Amendments	04/15/2021			
(S) 3rd Reading Concurred	04/15/2021	<u>29</u>	<u>21</u>	
(S) Scheduled for 3rd Reading	04/15/2021			
(S) 2nd Reading Concurred	04/14/2021	<u>31</u>	<u>19</u>	 
(S) Scheduled for 2nd Reading	04/14/2021			
(C) Printed - New Version Available 	04/13/2021			
<u>(S) Committee Report--Bill Concurred as Amended</u>	04/12/2021			(S) State Administration
(S) Committee Executive Action--Bill Concurred as Amended	04/09/2021	<u>5</u>	<u>3</u>	(S) State Administration
<u>(S) Hearing</u>	03/19/2021			<u>(S) State Administration</u>  
(S) Referred to Committee	03/08/2021			(S) State Administration
(S) First Reading	03/08/2021			
(H) Transmitted to Senate	03/02/2021			
(H) 3rd Reading Passed	03/02/2021	<u>87</u>	<u>12</u>	
(H) Scheduled for 3rd Reading	03/02/2021			
(H) 2nd Reading Passed	03/01/2021	<u>90</u>	<u>10</u>	 
(H) Scheduled for 2nd Reading	03/01/2021			
(C) Printed - New Version Available 	02/26/2021			
(H) Committee Report--Bill Passed as Amended	02/26/2021			(H) State Administration
(H) Committee Executive Action--Bill Passed as Amended	02/26/2021	<u>19</u>	<u>0</u>	(H) State Administration
(C) Amendments Available	02/25/2021			
<u>(H) Hearing</u>	02/24/2021			<u>(H) State Administration</u>  
(H) First Reading	02/19/2021			
(H) Referred to Committee	02/19/2021			(H) State Administration
(C) Introduced Bill Text Available Electronically 	02/19/2021			
(H) Introduced	02/19/2021			
(C) Draft Delivered to Requester	02/18/2021			
(C) Draft Ready for Delivery	02/18/2021			
(C) Executive Director Final Review	02/17/2021			
(C) Draft Ready for Delivery	02/17/2021			
(C) Draft in Assembly	02/17/2021			
(C) Executive Director Review	02/16/2021			
(C) Bill Draft Text Available Electronically	02/16/2021			
(C) Draft in Final Drafter Review	02/16/2021			
(C) Draft in Input/Proofing	02/16/2021			
(C) Draft to Drafter - Edit Review [CMD]	02/12/2021			
(C) Draft in Edit	02/11/2021			
(C) Draft in Legal Review	02/10/2021			
(C) Draft to Requester for Review	02/10/2021			
(C) Draft to Requester for Review	02/10/2021			
(C) Draft Request Received	08/27/2020			

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Sponsor, etc.

Sponsor, etc.	Last Name/Organization	First Name	Mi
Requester	Fitzpatrick	Steve	
Drafter	Nowakowski	Sonja	
Primary Sponsor	Fielder	Paul	

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Subjects

Description	Revenue/Approp.	Vote Majority Req.	Subject Code
Elections (see also: Ballot Issues)		Simple	ELEC

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Additional Bill Information

Fiscal Note Probable: No

Preintroduction Required: N

Session Law Ch. Number: 531

DEADLINE

Category: General Bills

Transmittal Date: 03/02/2021

Return (with 2nd house amendments) Date: 04/20/2021

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Section Effective Dates

Section(s)	Effective Date	Date Qualified
Sections 1, 5, and 6	14-MAY-21	
Sections 2-4	01-OCT-21	

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04/05/2022 06:41 PM Mountain Time

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Exhibit C

HB 506 Version 3

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HOUSE BILL NO. 506

INTRODUCED BY P. FIELDER

BY REQUEST OF THE SECRETARY OF STATE

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING ELECTION LAWS; REVISING PROCEDURES FOR PROSPECTIVE ELECTORS TO REGISTER AND VOTE; CLARIFYING REQUIREMENTS FOR A BOARD OF COUNTY CANVASSERS; ELIMINATING THE EXPERIMENTAL USE OF VOTE SYSTEMS; AMENDING SECTIONS 13-2-205 AND 13-15-401, MCA; AND REPEALING SECTION 13-17-105, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 13-2-205, MCA, is amended to read:

"13-2-205. Procedure when prospective elector not qualified at time of registration. ~~(1) An~~
Subject to subsection (2), an individual who is not eligible to register because of residence or age requirements
but who will be eligible on or before election day may apply for voter registration pursuant to 13-2-110 and be
registered subject to verification procedures established pursuant to 13-2-109.

(2) Until the individual meets residence and age requirements, a ballot SUBMITTED BY THE INDIVIDUAL
may not be issued to the individual and the individual may not cast a ballot PROCESSED AND COUNTED BY THE
ELECTION ADMINISTRATOR MAY NOT BE ISSUED TO THE INDIVIDUAL AND THE INDIVIDUAL MAY NOT CAST A BALLOT."

Section 2. Section 13-15-401, MCA, is amended to read:

"13-15-401. Governing body as board of county canvassers. (1) The governing body of a county
or consolidated local government is ex officio a board of county canvassers and shall meet as the board of
county canvassers at the usual meeting place of the governing body ~~within 14 days after each election,~~ at a
time determined by the board, to and within 14 days after each election to complete the canvass the of returns.

(2) If one or more of the members of the governing body cannot attend the meeting, the member's
place must be filled by one or more county officers chosen by the remaining members of the governing body so

1 that the board of county canvassers' membership equals the membership of the governing body.

2 (3) The governing body of any political subdivision in the county that participated in the election may
3 join with the governing body of the county or consolidated local government in canvassing the votes cast at the
4 election.

5 (4) The election administrator is secretary of the board of county canvassers and shall keep minutes
6 of the meeting of the board and file them in the official records of the administrator's office."

7

8 NEW SECTION. **Section 3. Repealer.** The following section of the Montana Code Annotated is
9 repealed:

10 13-17-105. Experimental use of voting systems.

11 - END -

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CERTIFICATE OF SERVICE

I, Rylee Sommers-Flanagan, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 04-05-2022:

John C. Heenan (Attorney)
1631 Zimmerman Trail, Suite 1
Billings MT 59102
Representing: Mitch Bohn, Montana Democratic Party
Service Method: eService

Jonathan Patrick Hawley (Attorney)
1700 Seventh Avenue
Suite 2100
Seattle WA 98101
Representing: Mitch Bohn, Montana Democratic Party
Service Method: eService

Matthew Prairie Gordon (Attorney)
1201 Third Ave
Seattle WA 98101
Representing: Mitch Bohn, Montana Democratic Party
Service Method: eService

Peter M. Meloy (Attorney)
2601 E. Broadway
2601 E. Broadway, P.O. Box 1241
Helena MT 59624
Representing: Mitch Bohn, Montana Democratic Party
Service Method: eService

Ryan Ward Aikin (Attorney)
1018 Hawthorne St.
Missoula MT 59802
Representing: Montana Youth Action, Forward Montana Foundation
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: Western Native Voice

Service Method: eService

John Mark Semmens (Attorney)

900 N. Last Chance Gulch

Suite 200

Helena MT 59601

Representing: Jacobsen, Christi As Secretary Of State Of Mt

Service Method: eService

E. Lars Phillips (Attorney)

1915 S. 19th Ave

Bozeman MT 59718

Representing: Jacobsen, Christi As Secretary Of State Of Mt

Service Method: eService

Leonard Hudson Smith (Attorney)

P.O. Box 2529

Billings MT 59103

Representing: Jacobsen, Christi As Secretary Of State Of Mt

Service Method: eService

Ian McIntosh (Attorney)

1915 S. 19th Ave

P.O. Box 10969

Bozeman MT 59719

Representing: Jacobsen, Christi As Secretary Of State Of Mt

Service Method: eService

Dale Schowengerdt (Attorney)

900 N. Last Chance Gulch

Suite 200

Helena MT 59624

Representing: Jacobsen, Christi As Secretary Of State Of Mt

Service Method: eService

David M.S. Dewhirst (Govt Attorney)

215 N Sanders

Helena MT 59601

Representing: Jacobsen, Christi As Secretary Of State Of Mt

Service Method: eService

William McIntosh Morris (Attorney)

1915 S. 19th Ave.

P.O. Box 10969

Bozeman MT 59719

Representing: Jacobsen, Christi As Secretary Of State Of Mt

Service Method: eService

Clayton H. Gregersen (Attorney)

P.O. Box 2529
Billings MT 59101
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

David Francis Knobel (Attorney)
490 N. 31st St., Ste 500
Billings MT 59101
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

Austin Markus James (Attorney)
1301 E 6th Ave
Helena MT 59601
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: eService

Confederated Salish And Kootenai Tribes (Plaintiff)
Service Method: Email

Blackfeet Nation (Plaintiff)
Service Method: Email

Fort Belknap Indian Community (Plaintiff)
Service Method: Email

Northern Cheyenne Tribe (Plaintiff)
P.O. Box 128
Lame Deer 59043
Service Method: Email

Henry James Brewster (Attorney)
10 G Street NE, Ste 600
Washington 20002
Representing: Mitch Bohn, Montana Democratic Party
Service Method: Email

Jonathan Topa (Attorney)
125 Broad Street 18th Floor
New York 10004
Representing: Western Native Voice
Service Method: Email

Kathleen Lynn Smithgall (Attorney)
P.O. Box 201401
Helena 59620
Representing: Jacobsen, Christi As Secretary Of State Of Mt
Service Method: Email

Electronically Signed By: Rylee Sommers-Flanagan
Dated: 04-05-2022

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